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THE

INDIAN DECISIONS

NEW SERIES.

MADRAS—VOL. VIII.

I.L.R., 22 MADRAS.

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22 M. 1=2 Weir 778.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

1898 Sep. 1. — Appellate Criminal. — 22 M. 1= 2 Weir 778.

QUEEN-EMPRESS *v.* DONAGHUE AND ANOTHER.*
[29th July, 31st August and 1st September, 1898.]

Evidence Act—Act 1 of 1872, *Section* 122—*Privileged communication—Letter from husband to wife—Letter taken on search of wife's house.*

On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the Police :

Held, that the letter was admissible in evidence against the accused.

APPEALS against the judgment of conviction and sentence pronounced by A. Thompson, Sessions Judge of North Malabar, in sessions case No. 6 of 1898.

" First accused " said the District Judge " is an Assistant Engineer " employed by the District Local Fund Board, Malabar, and, as such, he is " entrusted with the power to issue cheques on any Government treasury " for the amount placed to his credit in that treasury. Among the " works under his charge was the completion of the approaches to the new " Kuttupoya Bridge. The new bridge was in a slightly different position " from that of the old bridge, so that as the hill on both sides of the bridge " runs down to the river and as the old approach had been cut out of the " side of the hill, the approach to the new had to be formed by making a " further cutting out of the hill at the side of the old cutting. The cut- " ting done for the old [2] approach and the further cutting done for the " new approach are referred to by the witnesses as the old cutting and " the new cutting, respectively.

" Second accused was the contractor, or as he is called technically " the 'piece-worker,' who actually carried out the new approach work.

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* Criminal Appeals Nos. 185 and 186 of 1898.

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"The charge against the first accused is in substance that he dis-"honestly paid to the second accused sums of money belonging to the "District Board very greatly in excess of the amount which he knew to "be due to the second accused for the work actually done by the second "accused; and the charge against the second accused is, in substance, that "by dishonestly receiving large sums of money, to which he knew that he "was not entitled, he abetted the breach of trust committed by first "accused."

It appeared that the first witness for the prosecution, who was a Police officer of Pondicherry, searched the house of the wife of the first accused at Pondicherry on the 4th of December 1897 and there found, *inter alia*, a letter from the first accused to his wife, dated 6th November 1897, which was tendered in evidence by the prosecution and marked in the Magistrate's Court as Exhibit V. Objection was taken in the Sessions Court to the admissibility of this document under Evidence Act, Section 122, and the Sessions Judge upheld the objection on the ground that the taking of a husband's letter written to his wife from the possession of the latter by searching her house amounts to compelling the wife to disclose a communication made to her husband. On the other evidence in the case the Sessions Judge found the accused was guilty and sentenced the accused to rigorous imprisonment for three years and two years respectively.

The accused preferred these appeals.

Mr. *E. Norton* and Mr. *J. G. Smith*, for the appellants.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

JUDGMENT.

BODDAM, J.—We are of opinion that the conviction of both the prisoners in this case is right.

We are satisfied from the evidence of Mr. Paul that the defence raised to the effect that the prosecution had not taken into consideration a large quantity of earth, &c., which had been removed from the Iritty side of the new bridge between the old road and the new is absolutely false. Mr. Paul has proved that the allegation of the prosecution that there was a hollow there and not [3] a large quantity of earth to be removed is true. This of itself is sufficient to show that the first defendant had grossly exaggerated the work done by the second defendant and has thereby been instrumental in defrauding the Local Fund Board of large sums of money which were paid to the second defendant on the false returns made by the first defendant. In these circumstances we see no reason to think that the rest of the evidence of the District Engineer and others called to corroborate him is not true.

Whether, in fact, the first defendant made the measurements which he has vouched as being made by him or not is immaterial, for he says he made them; and even if he did not make them he vouched them and in either case he must have known that the measurements were wrong, and is equally guilty of the offences charged.

As regards the second defendant he was paid for work which he must have known perfectly well that he had never done, and we have no doubt that this was the result of arrangement between the first and the second defendants and that each shared to some extent in the proceeds.

We think the Sessions Judge was wrong in declining to receive in evidence the letter, Exhibit V—a letter from the first defendant to his wife which had been found by the police when searching her house under a

1898 SEP. 1. — APPELLATE CRIMINAL. — 22 M. 1= 2 Weir 778.

search warrant. Section 122 of the Evidence Act does not apply to such a case. A document, even though it contains a communication from a husband to a wife or *vice versa*, in the hands of third persons, is admissible in evidence ; for, in producing it, there is no compulsion on or permission to the wife or husband to disclose any communication. The section protects the individuals, and not the communication if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made. For these reasons we think that Exhibit V was rightly received in evidence. We think the sentence is inappropriate and excessive and should be modified. The first accused is sentenced to two years' rigorous imprisonment and a fine of Rs. 2,500, in default nine months' further rigorous imprisonment.

The second accused is sentenced to two years' rigorous imprisonment and a fine of Rs. 5,000, in default nine months' further rigorous imprisonment. If the fine is collected, two-thirds of it should be paid to the Local Fund Board.

[4] SUBRAMANIA AYYAR, J.—I concur and would only add a few words as to the question of the admissibility of the letters addressed by the appellant to his wife. Now as to the letters which passed into the hands of the police in Pondicherry, all that appears in the evidence with reference to the circumstances in which the police took them is that they were found in the premises occupied by the wife and were taken in execution of a search warrant issued by a Magistrate. Section 122 of the Evidence Act, relied on on behalf of the appellant in support of the contention that such letters were not admissible, does not support it. The words of the section material to our present purpose are "compelled to disclose" and "permitted to disclose." These clearly imply that the party concerned is made or allowed to say or do something by way of disclosing a communication made during marriage. But, in the instance before us, the appellant's wife had not to act and, if that were a matter of any significance, did not, in fact, act in any such way. If at the time the police took charge of the letters the wife was present, she was but a spectator of what was going on. That cannot possibly be held to come within the purview of the section quoted. Further, Sections 94 and 96 of the Code of Criminal Procedure, which should be read together, are also against the appellant's counsel's contention inasmuch as the former section excepts only documents falling under Sections 123 and 124 of the Evidence Act, thus implying that documents referred to in Section 122 of that enactment are not exempt from being searched for, seized, and produced in evidence in a case such as this. *Reg.* v. *Pamenter* (1), to which we were referred, is distinguishable even if it were law which is however doubted in Taylor on Evidence (9th edition, volume I, page 569, note). The American cases (*Commonwealth* v. *Griffin* (2) and *State* v. *Center* (3)), cited in page 590 of the same work, to which our attention was called, are also scarcely in point. According to Greenleaf on Evidence, these cases are unfavourable to the contention urged on behalf of the appellant, since the ruling there appears to be that a third person, who has overheard a conversation between husband and wife while it was going on, may testify to it (15th edition, volume I, page 347, note). See also *Rex* v. *Simons* (4). Be this as it may, it is perfectly clear from the

(1) 12 Cox. C. C. 177.
(2) 110 Mass. 181.
(3) 35 Vern. 378.
(4) 6 C. & P. 540.

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[5] passage in Greenleaf which refers to the said American cases that in the United States it has been held that a communication between husband and wife, if it is in writing, is not privileged if the writing gets into the hands of third parties. As to the letters taken by the police from the Post office, these having been seized before they reached the addressee, the wife, it is a question whether they can be treated as communications "made" to the wife within the meaning of Section 122 relied on. But assuming that they could be so treated they must also, for reasons already given with reference to the letters taken in Pondicherry, be held to be admissible.

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22 M. 5=8 M.L.J. 224.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

SECRETARY OF STATE FOR INDIA (*Defendant No.* 1), *Appellant* v. RAJAH GOUNDAR (*Plaintiff*), *Respondent.**
[19th August and 2nd and 6th September, 1898.]

Revenue Recovery Act (Madras)—Act II of 1864, *Section* 37—*Tender of full amount of arrears of revenue—Sale for arrears accrued since attachment.*

When a defaulter, whose land has been attached and is being brought to sale for arrears of revenue, tenders the full amount of the arrears of revenue on account of which the land was attached together with interest and charges under Revenue Recovery Act, 1864, Section 37, the Collector is bound to stay the sale.

When, therefore, a collector notwithstanding such tender proceeded to sell on the ground that arrears had accrued between the date of attachment and the date of tender:

Held, that the sale was invalid.

APPEAL against the decree of W. J. Tate, District Judge of Salem, in original suit No. 18 of 1894.

The plaintiff was the holder of a mitta on which the revenue fell into arrears and a part of the mitta was attached under Revenue Recovery Act. The plaintiff subsequently tendered together with interest and charges the amount of the arrears accrued up to the date of the attachment, but further arrears having accrued in the interval the Revenue officer brought the property to sale in respect of such arrears and the property was purchased by Government. The plaintiff now sued to set aside the sale and [6] to recover the land on the ground that the sale was illegal. The District Judge passed a decree for the plaintiff.

This appeal was preferred on behalf of the Secretary of State.

The Government Pleader (Mr. *E. B. Powell*), for the appellant.

Sivasami Ayyar, for the respondent.

JUDGMENT.

The facts which it is necessary to notice in this case are as follow:—The revenue due on the plaintiff's mitta for Fasli 1302 fell into arrear, and a portion of it was attached and advertised for sale with the usual formalities. Some days before the date fixed for the sale the full amount (Rs. 2,766-4-0) of the arrear for Fasli 1302 with interest and other charges

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* Appeal No. 126 of 1897.

was paid by the defaulter to the Tahsildar. Meantime, however, the revenue payable for Fasli 1303 had become due, but had not been fully paid by the defaulter. The Collector, therefore, refused to stay the sale already advertised and sold the land in order to recover the arrears due for Fasli 1303. The District Judge found that the sale was invalid and void, and against this decree the Secretary of State for India in Council appeals mainly, as we are informed by the learned Government Pleader, for the purpose of ascertaining the meaning of Section 37 of the Revenue Recovery Act (No. II of 1864, Madras). The section runs as follows :—

"It shall be competent to the defaulter . . . . to tender the "full amount of the arrears of revenue with the interest thereon, and "all charges which have been incurred in demanding the arrears or in "attaching and managing the estate, or in taking the steps necessary for "sale, and thereupon the sale shall be stayed."

The question for our decision is whether the words "the full amount of the arrears of revenue" mean the arrears of revenue on account of which the land was attached and the notice of sale issued, or include also arrears which accrued after the attachment and sale notice, but prior to the day of tender; in other words, whether, in the present case, the Collector was bound to stay the sale on payment of the arrears of Fasli 1302 specified in the attachment and sale notices, together with interest and other charges thereon, or was justified in bringing the land to sale for the arrears of Fasli 1303, without making any demand or attachment or issuing any sale notice in respect thereof.

We have no doubt but that the sale of the land was, in the circumstances stated, invalid, and voidable at the option of the defaulter.

[7] There is nothing in Section 37 or in any other section of the Act or even in the notices issued under the Act to justify the conclusion that the land when attached and advertised for sale for a specified arrear, can, after that arrear has been paid up, be legally sold for subsequent arrears. The Act gives the Collector power to recover arrears in various ways, one of which is by attachment and sale of so much of the land as may be necessary, but the exercise of this power must be in accordance with the provisions of the Act. First, he must issue a demand in writing under Section 25. If that is of no avail he may attach the land under Section 27, and may either keep it under management (Section 28), in order to recover the arrears out of the rents and profits, or may sell the land after due notice (Section 36). In all these sections the wording of the Act is such as to show that the procedure laid down refers to "the arrears" for which the demand was made, the amount of which is specified in the notices of demand, attachment and sale. Then follows Section 37 which gives the defaulter the right to pay up "the arrears" and charges at any time up to sunset of the day preceding the sale "and thereupon the sale "shall be stayed." If it was intended that the sale should not be stayed unless all arrears subsequent, as well as prior, to the attachment had been paid, we should certainly have expected an explicit statement to that effect, especially as the section states in detail the various sums which have to be paid in addition to "the arrears." The simple addition of some such words as "up to date of tender" after the words "arrears of revenue" would have made the intention, if such there was, quite plain. We do not think that there is anything to justify the importation of such words. It is argued for the appellant that it is reasonable that the terms should be made more stringent the longer the

1898 Sep. 6. — Appellate Civil. — 22 M. 5 = 8 M.L.J. 224.

default continues; and that though the defaulter might, under Section 35, obtain the release of the land from attachment by paying merely the arrears for which the attachment was made, he ought to be required to pay subsequent arrears also if he fails to take advantage of Section 35 and allows the sale notice to issue. It is contended that the Legislature intended to indicate this further liability by the change in the language of Section 37, that in the sections prior to Section 37 and especially in Section 35 reference is made simply to "the arrears," whereas in Section 37 the words are "the full amount of the arrears" and that this change of phrase is intended to include [8] subsequent arrears. We do not think that this is so. The words "the full amount" appear to be used merely to show clearly that a part payment would be of no avail. The words "the full amount" are used in Section 33 without any such special import being attached to them. If so considerable a further liability were to be imposed under Section 37, we think that it ought to have been, and would have been, clearly expressed.

Again, it is argued that the security of the revenue is endangered unless we except the appellant's interpretation of Section 37, inasmuch as Section 42 provides that the land shall be sold free of incumbrances, and that after liquidating the arrears the balance shall be paid to the defaulter who may also (Section 43) collect the rents due up to the day of sale.

In reply to this it would seem to be enough to say that possible risk to the revenue from defective legislation is no sufficient reason for putting a strained construction on the Act; but we may also add that the risk appears to be unreal, for Section 42 must be read with Section 2 which lays down the fundamental rule that the land is the security for the public revenue, and there seems to be little doubt but that, in accordance with the doctrine of conversion, the sale-proceeds of land sold at a sale properly held under the Act would be liable for any arrears of revenue due on the land at the date of sale. That, however, is not the question before us. The question is whether the sale was a valid sale notwithstanding that the arrears for which the land was attached had all been paid off prior to the sale. As already stated, we think that it was not valid. We observe that in Section 13, Clause 5 of Regulation XXVII of 1802 (superseded and repealed by Act II of 1864) provision was made in perfectly explicit language for the recovery of arrears falling due while land was under management of the Collector, and in Section 43 of Act II of 1864 provision is made for the defaulter to recover rents due up to the date of sale of his land. The Legislature, therefore, when passing the Act had that date prominently in view for certain purposes, and it seems to us unlikely that if they intended that land attached for one arrear should be sold after its payment, for the satisfaction of other arrears falling due up to the date of the sale, they would not have expressed the intention in plain language.

We, therefore, confirm the decree of the Court below and dismiss this appeal with costs.

22 M. 9.

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22 M. 9.

[9] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

ACHUTAN NAYAR AND OTHERS (*Counter-petitioners, Nos.* 2, 5, 6, 9 *and* 10), *Appellants v.* CHERIOTTI NAYAR AND OTHERS (*Petitioners*), *Respondents.** [9th July, 1897, and 25th March, 1898.]

Marumakkatayam Law—Self-acquired property—Power of disposition by will—Succession certificate—Probate.

A member of a Marumakkatayam tarwad died leaving self-acquired property. The karnavan of the tarwad applied for a succession certificate, but the application was opposed by legatees under a will of the deceased which had not been admitted to probate but was undisputed :

Held, that the will was valid, and that the succession certificate should not be granted to the karnavan but to one of the legatees.

[R., 32 M. 351 (F.B.)=6 M.L.T. 106 (109) ; 17 Ind. Cas. 769 (778)=24 M.L.J. 240 (255)=13 M.L.T. 166.]

APPEAL under Succession Certificate Act, Section 19, against the order of B. Macleod, Acting District Judge of North Malabar, in miscellaneous petition No. 268 of 1895.

This was an application for a succession certificate, and it appeared that the deceased was a member of a Marumakkatayam tarwad of which the applicant was the karnavan, and that he left self-acquired property which he bequeathed by will to two persons who opposed the application. The property bequeathed comprised, *inter alia*, thirteen debts payable to the deceased. The will had not been admitted to probate, but it was undisputed.

The District Judge said :—"The deceased was not the last surviving "member of his tarwad, and he cannot override the right of survivorship "held by petitioner. *Fatma* v. *Shaik Essa* (1) shews the necessity "of probate. Petitioner also relies on *Kuttyassan* v. *Mayan* (2), and "there is here no question of limitation. Counter-petitioner relies on "*Krishna Kinkur Roy* v. *Panchuram Mundul* (3) as to probate being un-"necessary. He also relies on *Sivamma* v. *Subbamma* (4) as to the will "giving a *prima facie* title. The self-acquired property was not disposed "of during the [10] lifetime of deceased, and, at his death passes to his "family, of which the petitioner, as karnavan, is the representative, "and he will be given certificate accordingly."

The legatees preferred this appeal.

Ryru Nambiar, for appellants.

Sundara Ayyar, for respondents.

JUDGMENT.

In the case of tarwad property, no doubt it is only the last surviving member of the tarwad who can validly dispose of it by will. The reason is that, in that case, there is no co-parcener in existence who can succeed by survivorship, so as to exclude the operation of the will.

* Appeal against Order No. 117 of 1896.

(1) 7 B. 266. (2) 14 M. 495. (3) 17 C. 272. (4) 17 M. 477.

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But, in the case of self-acquisition, this rule does not hold good, for the reason on which it rests does not exist. The case of *Ryrappan Nambiar* v. *Kelu Kurup* (1) is an authority for holding that the property, in this case, does not pass by survivorship but by inheritance, and the recent decision in *The Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Rao* (2) in effect rules that the powers of gift *inter vivos* and of will are co-extensive among Hindus under the Mitakshara Law. We think that the same rule may be held to apply to persons governed by the Marumakkatayam Law, and the Bill now before the Legislative Council recognizes the right as one that exists. In the present case the will is admitted, and it is admitted that the property is self-acquisition. No probate of the will is required, as the case does not fall under Section 1, Clause 4, of the Succession Certificate Act (*Kalidas Fakirchand* v. *Bai Mahali* (3)). This being so, effect must be given to the disposition of the will.

We set aside the order of the District Judge with costs throughout, and direct that the certificate be issued to the second appellant.

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22 M. 11.

[11] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

GAJAPATI RAJAH AND ANOTHER (*Plaintiff and his Representative*), *Appellants* v. SURYANARAYANA (*Defendant*), *Respondent.**
[29th March, 1898.]

Kattubadi—Rent—Charge.

Kattubadi is rent and does not constitute a charge on the land.

[F., 10 M.L.J. 256 (257).]

SECOND appeal against the decree of H. R. Farmer, District Judge of Vizagapatam, in appeal suit No. 440 of 1884, confirming the decree of G. Jagannadha Rau, District Munsif of Rajam, in original suit No. 343 of 1894.

The plaintiff sued to recover with interest arrears of kattubadi accrued due to him by the defendant on account of his mirasi and inam land from 1889 to 1893. The District Munsif passed a decree for three years' arrears of rent, holding the balance to be barred by limitation. The District Judge, in the first instance, passed a decree for the plaintiff for the full amount claimed, but subsequently on the petition of the defendant, he reviewed his judgment and held with reference to *Vizianagaram Maharajah* v. *Sitaramarazu* (4) that only three years' arrears were recoverable.

The plaintiff preferred this second appeal.

Rangachariar, for appellants.

The respondent was not represented.

JUDGMENT.

No doubt the decisions of this Court have not been altogether uniform in the view they have taken as to whether payments due on account of

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* Second Appeal No. 1430 of 1896.

(1) 4 M. 150. (2) 20 M. 167. (3) 16 B. 712. (4) 19 M. 100.

kattubadi are or are not a charge on the land, but the most recent reported decision of a Division Bench (*Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau* (1)) distinctly lays it down that, in the absence of any contract or usage to the contrary, kattubadi is not chargeable on the land. In the recent Full Bench decision in *Lakshminarayana Pantulu* v. *Venkatarayanam* (2), it was expressly assumed that kattubadi was [12] rent, and it is difficult to see why it should be regarded as chargeable on the land when ordinary rent is not so chargeable.

Again in *Venkatadri Appa Rau* v. *Hassan Begam* (3) this Bench recently held that a suit for kattubadi was cognizable by a Small Cause Court, thereby assuming that it was in the nature of rent and was not chargeable on the land.

In these circumstances, we agree with the latest reported ruling to which we have referred. The decision of the District Judge is therefore right and we dismiss this second appeal.

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22 M. 12=8 M.L.J. 183.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SITARAMA SASTRULU AND OTHERS (*Defendants Nos.* 1, 2 *and* 10, *and Representatives of Defendant No.* 1), *Appellants v.* SURYANARAYANA SASTRULU (*Plaintiff*), *Respondent.** [1st April, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 574—*Contents of appellate judgment.*

The judgment of an Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them.

[F., 31 M. 469 (470) = 18 M.L.J. 34 (35) = 3 M.L.T. 71 (72); 15 M.C.C.R. 61; R. U.B.R. (1905) 3rd Qr. C.P.C., 574 (35).]

SECOND appeal against the decree of the District Judge of Godavari, in appeal suit No. 110 of 1895, affirming the decree of the District Munsif of Narsapur, in original suit No. 370 of 1893.

The plaintiff sued for partition of certain family property and questions were raised as to who were the individuals constituting the joint family and as to their respective rights to the property in question and the extent of the family property. Sixteen issues were framed on the pleadings. The District Munsif passed a decree against which defendants Nos. 1, 2 and 10 preferred [13] an appeal to the District Court and calling in question the decision of the District Munsif on most of the issues. The District Judge affirmed this decree delivering judgment as follows:—

"This is an appeal against the decision of the District Munsif of "Narsapur in suit No. 370 of 1893 on his file.

"Plaintiff sued for partition of family property and obtained a decree. "Against this decision the first, second and tenth defendants appeal.

"This appeal is merely a reiteration of the defence that was put "forward before the District Munsif. To deal with the grounds of appeal "would be simply to repeat the judgment of the District Munsif. I concur

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* Second Appeal No. 167 of 1897.

(1) 19 M. 329. (2) 21 M. 116. (3) Referred Case No. 37 of 1896 (unreported).

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"in the decision which the District Munsif has given on each point. The "judgment of the Lower Court is confirmed, for the reasons therein set "forth and this appeal is dismissed with costs."

Defendants Nos. 1, 2 and 10 preferred this second appeal.

K. Narayana Rau, for appellants.

The respondent was not represented.

JUDGMENT.

We are unable to accept the judgment of the Lower Appellate Court, as one made in conformity with the law as laid down in Section 574, Code of Civil Procedure. There is no express statement of the points for determination or of the decision on such point or the reasons for the decision. All we find is a general reference to the Munsif's judgment as containing the views of the Judge. Such a general and wholesale adoption of the judgment of the Court of First Instance cannot be considered as a sufficient compliance with the law. The judgment of the Appellate Court should show on the face of it that the points is dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them. There is no indication that such was the case here. We must, therefore, reverse the Lower Appellate Court's decree, and direct that the appeal be restored to the file and disposed of according to law.

Costs will abide and follow the result.

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22 M. 14=8 M.L.J. 151.

[14] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

VAIRAVAN ASARI (*Plaintiff No.* 2), *Appellant v.* PONNAYYA AND OTHERS (*Defendants*), *Respondents.** [6th April, 1898.]

Limitation Act—Act XV of 1877, *Schedule II, Articles* 106, 116—*Suit for an account of a dissolved partnership—Registered partnership deed.*

A suit for an account of a partnership dissolved more than three years before the filing of the plaint is barred by limitation even if the instrument of partnership was registered.

[D., 25 M. 587 (597).]

SECOND appeal against the decree of A. F. Pinhey, Acting District Judge of Madura, in appeal suit No. 90 of 1896, affirming the decree of K. Krishnama Chariar, District Munsif of Madura, in original suit No. 582 of 1894.

The plaintiff instituted this suit on 3rd September 1894 and in the plaint prayed for an account to be taken of a partnership which had been dissolved on the 15th of June 1891 by the death of one of the partners, and for a decree for payment to him of his share of the capital and profits of the firm. In bar of limitation the plaintiff relied on the fact that the deed of partnership was a registered instrument. The District Munsif, however, held that the suit was barred by limitation and dismissed the

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* Second Appeal No. 230 of 1897.

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suit. On appeal the District Judge took the same view and affirmed the decree.

Plaintiff No. 2 preferred this second appeal.

Seshachariar, for appellant.

Ranga Ramanujachariar, for respondent No. 1.

JUDGMENT.

A wide meaning has no doubt been given to the words of Article 116 of the schedule to the Limitation Act. But the present case—a suit for an account by one partner against another after dissolution of the partnership—is in our opinion altogether beyond the scope of the article. The only case approaching this one (namely, that of *Ranga Reddi* v. *Chinna Reddi* (1)) is plainly distinguishable. We are not prepared to say that the article can [15] be stretched to cover every case in which the plaintiff's claim may in its origin be referred to a contractual relation which is expressed in a registered agreement.

The second appeal is dismissed with costs.

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22 M. 15 = 1 Weir 446 = 2 Weir 333 & 705.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* ANGA VALAYAN AND OTHERS.*
[31st March and 14th April, 1898.]

Penal Code—Act XLV of 1860, *Sections* 395, 396, 412—*Criminal Procedure Code—Act X of* 1882, *Sections* 269, 307, 533—*Verdict of jury and their opinion as assessors—Confessional statement.*

Ten persons were committed to a Sessions Court charged with offences under Indian Penal Code, Sections 395 and 396, and some of them were also charged with offences under Section 412. One of the accused had made a confessional statement before the Magistrate who recorded it, but did not make on it a memorandum to the effect stated in Criminal Procedure Code, Section 164, and did not admit it in evidence for the reasons that the accused was produced from the custody of the police in which he had been detained for five days, and there was a proposal on the part of the police to treat him as an approver. It appeared that a perusal of the preliminary register would have shown that the accused were either guilty under Section 396 or not guilty under Section 395 at all. The accused were tried by the Sessions Judge with a jury. The confessional statement was not admitted in evidence. The jury found the accused not guilty of dacoity but the Judge disagreeing with the verdict referred the case to the High Court under Criminal Procedure Code, Section 307.

Held, (1) that the procedure adopted by the Judge was wrong and that he should have tried the accused with the aid of assessors under Indian Penal Code, Section 396;

(2) that the Judge should have enquired under Criminal Procedure Code, Section 533, whether the confessional statement had been duly made; and

(3) that under the circumstances, the High Court should determine on the evidence on record, after giving due weight to the opinions of the Judge and the jury whether the accused were guilty under Section 395.

[R., 12 Cr.L.J. 488 = 12 Ind. Cas. 96 = (1911) 2 M.W.N. 197 (198); 13 Cr.L.J. 739 (741) = 17 Ind. Cas. 51.]

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* Criminal Appeal No. 123 of 1898.

(1) 14 M. 465.

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CASE referred for the orders of the High Court under Criminal Procedure Code, Section 307, by G. T. Mackenzie, Sessions Judge of Coimbatore, in sessions case No. 14 of 1898.

[16] The accused were ten persons, who were charged in the Sessions Court with the offences of (i) dacoity and (ii) dacoity with murder, and some of them were charged also with the offence of dishonestly receiving property stolen in the commission of dacoity, under Indian Penal Code, Sections 395, 396 and 412, and in respect of all of them, the jury returned a verdict of not guilty. The Sessions Judge disagreed with the verdict, and he referred the case as above. In his letter of reference he made, *inter alia*, the following observations :—

"7. When the case came on, the prosecution was astonished to see "that the confession of second accused was not on record and that no "mention of it was made in the Magistrate's judgment. At the request "of the Public Prosecutor, I wrote a note to the Magistrate, asking him "to come over to the Sessions Court with the confession. He came and "the Public Prosecutor called him as a witness to prove the confession. "It is a lengthy confession, but at the end instead of the prescribed "certificate is a remark by the Magistrate that this confession ought not "to have been taken, because the prisoner came from police custody and "there was some idea of making him a witness. The Public Prosecutor "pressed the confession, but, in the circumstances, I could not place it "before the jury.

"10. It has been suggested to me that, as Section 396 is not a jury "section, I ought to have tried this case with assessors. The charge which "the Magistrate framed was one charge under Sections 395 and 396, and it "seemed to me that the accused had to be convicted of dacoity by a jury "before Section 396 came into operation. I, therefore, tried the case with "a jury. If the High Court decides that my procedure was erroneous, and "that I ought to have tried this case with assessors, I differ from these five "assessors, as I consider that the accused are guilty under Sections 395 "and 396, and I am ready to proceed with the case. Some of the accused "are said to be old offenders and the next stage would be to call on these "accused to plead to the charge under Section 75."

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

Kasturiranga Ayyangar, for accused No. 2.

JUDGMENT.

In this case the ten accused persons were charged with having committed dacoity and murder in committing dacoity—offences punishable under Sections 395 and 396, Indian Penal Code—[17] and some of them were also charged with having received some of the stolen property under Section 412, Indian Penal Code.

Offences under Sections 395 and 412, Indian Penal Code, are triable by a jury: an offence under Section 396 is triable by a Judge with assessors. The Sessions Judge under the impression that "the accused had to "be convicted of dacoity by a jury before Section 396 came into opera-"tion," empanelled a jury, and left it to them to say whether a dacoity had been committed or not. The jury found a verdict of not guilty, and the Sessions Judge, considering the verdict corrupt, referred the case to the High Court under Section 307, Criminal Procedure Code. In doing so, he suggested that if his procedure was erroneous and if he ought to have tried the case himself as an offence under Section 396, Indian Penal Code, he was

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of opinion that all the accused were guilty under that section, and he was prepared to proceed with the case, the next step being to ascertain whether any of the accused were liable to enhanced punishment under Section 75, Indian Penal Code, as old offenders. We are of opinion that the procedure of the Sessions Judge was erroneous.

The offence of committing murder in the course of a dacoity (Section 396) was the offence charged against all the accused, and it is an offence triable not by a jury but by a Judge with assessors. In the present case there could be no sort of doubt but that an offence under Section 396 had been committed, and the only question to be tried was whether the accused were among the offenders. In other words, a perusal of the preliminary register would have shown the Sessions Judge that the accused were either guilty under Section 396 or they were not guilty of dacoity at all. That being so, the Sessions Judge should have simply tried the accused with the aid of assessors under Section 396. The fact that the Magistrate had framed the charge in the inconvenient way he did, including all three offences in one count, ought not to have prevented the Sessions Judge from recasting the charge correctly. In the present case the minor charge under Section 412, Indian Penal Code, might well have been reserved for a separate trial, if necessary, after the result of the trial under Section 396 was known.

Had the circumstances been different, so as to give ground for supposing that the accused might be guilty of dacoity without being guilty also under Section 396, then the Sessions Judge might properly have empanelled a jury, and, on the conclusion of the [18] trial, he might under Section 269, Criminal Procedure Code, have asked their opinion as assessors as to the guilt of the accused under Section 396, Indian Penal Code, and the Judge should then have found the accused guilty or not guilty under that section. If he found them guilty, he should have proceeded to conclude the case by passing sentence. If, however, he found them not guilty, he should have then charged the jury with respect to the dacoity under Section 395, Indian Penal Code, and should have taken their verdict thereon as a jury.

Such would have been the correct procedure, but it was not followed; and we have now to consider how we should deal with the case under the circumstances in which it comes before us. It has been suggested that we ought to tell the Judge to do now what he ought to have done in the first instance, *viz.*, to try the offence under Section 396 and to treat the jury as assessors and their verdict as the opinion of assessors, and then proceed with the trial as an assessors' case. We do not, however, think that we can properly do this. The Judge has left it to the jury to say as a jury, whether the accused were guilty of dacoity or not, and the jury has found them not guilty. That verdict is binding, unless it is set aside according to law, and if the accused are not guilty of dacoity they obviously cannot be guilty of the major offence under Section 396. We must, therefore, proceed to deal with the case under the powers given to us by Section 307, Criminal Procedure Code, as amended by Section 3 of Act XIII of 1896, and determine whether the accused are guilty of dacoity or not "after considering the entire evidence and after giving due weight to the "opinions of the Sessions Judge and the jury." We cannot, we think, under the terms of Section 307, Criminal Procedure Code, try the accused for an offence under Section 396, Indian Penal Code, since that is not an "offence of which the jury could have convicted them on the charge

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"framed and placed before it." We might, no doubt, order a new trial by the Sessions Judge for the offence under Section 396, but that would be attended with obvious inconveniences, and is not necessary for the ends of justice, as we can, in the event of a conviction under Section 395, impose a sentence adequate to the requirements of the case.

Turning now to the merits of the case, we are urged by the Public Prosecutor to admit as evidence the confession of the second accused taken down in writing by the Magistrate under Section [19] 164, Criminal Procedure Code, but not filed by him as part of the record, because, as the Magistrate explained, he found, after it was written, that under the rules framed by Government he ought not to have recorded the confession, inasmuch as "(1) the accused had been in the police lock-up for "five days and is now produced by the police from their custody; and (2) "there is a proposal on the part of the police to treat the accused as an "approver."

In regard to this we observe that the first reason is not one laid down by law or by the executive orders of Government, dated 17th December 1887, No 2883 J., to which the Magistrate refers. All that Section 164, Criminal Procedure Code, requires is that the Magistrate shall not record any confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, and that the Magistrate, when he records a confession, shall make a memorandum at the foot thereof to the effect stated in the section. This memorandum the Magistrate failed to make in the present case and for this reason the Sessions Judge considered that he could not allow the confession to be treated as evidence. In this the Sessions Judge was in error. He should have proceeded under Section 533, Criminal Procedure Code, "to take "evidence that the accused duly made the statement recorded," and he should then have admitted the statement "if the error of the "Magistrate had not injured the accused as to his defence on the "merits." The Sessions Judge did, indeed, send for the Magistrate, and he was examined with regard to the confession, but in a singularly vague and inconclusive manner. The Sessions Judge did not ascertain whether the Magistrate believed that the accused made the statement voluntarily or not. The Magistrate said that "the usual warning" was given, but we are left in ignorance as to what the Magistrate meant by "the usual warning." The Magistrate said that no police officer was present when the confession was made, but that "there was some talk" of making accused an approver. The Magistrate did not say, nor did the Sessions Judge ascertain, between whom this "talk" took place, or whether it was communicated to the accused. Obviously any such proposal not communicated to the accused could be no reason for not recording his confession.

In this vague state of the evidence as to the circumstances under which the confession was made we are unable to say whether it is admissible or not, and we do not think it necessary to call for [20] further evidence on the point, inasmuch as we find the other evidence against the second accused untrustworthy and the confession, even if admissible, would not, under the circumstances, be regarded by us as a true confession on the strength of which we could convict him.

[After a discussion of the evidence the judgment proceeded as follows :—]

The accused except the second adduced no evidence to disprove the prosecution case, and raised no plea save the general one of not guilty.

On the whole, we find that the first, third, eighth, ninth and tenth accused are guilty of the dacoity with which they were charged. It was a deliberate and daring offence, and one of their associates who has not yet been arrested committed murder in commiting the dacoity. We sentence each of these first, third, eighth, ninth and tenth accused, *viz.*, Anga Valyan, Rangan (son of Dasan), Parai Rangan, Katti Valayan and Rama Valayan, to seven years' regorous imprisonment.

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The other accused we find not guilty and direct that they be at once set at liberty.

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22 M. 20 = 8 M.L.J. 167.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

NETTAKARUPPA GOUNDAN (*Defendant No.* 2), *Appellant v.* KUMARASAMI GOUNDAN AND OTHERS (*Plaintiffs and Defendant No.* 1), *Respondents.** [12th November, 1897 and 15th April, 1898].

Limitation Act—Act XV *of* 1877, *Schedule* II, *Article* 132—*On demand—Accrual of cause of action.*

In a suit brought in 1895 on a hypothecation bond, dated 9th October 1880, it appeared that the loan secured thereby was repayable on 9th October 1883, but it was stipulated that if interest was not paid at 10 per cent. per annum as therein provided then that the loan should be repaid with interest at 15 per cent. when the obligee should require it. Default had been made in the payment of interest in 1881, but the obligee had not called for the money :

Held, that the suit was not barred by limitation.

[R. 10 M.L.T. 258 (259).]

APPEAL against the order of K. Ramachandra Ayyar, Subordinate Judge of Bellary, in appeal suit No. 113 of 1896, reversing the decree of V. K. Desika Chariar, District Munsif of Namakal, in original suit No. 413 of 1895.

[21] The plaintiff sued to recover principal and interest due on an instrument, dated 9th October 1880, therein described as hypothecation debt bond, and he asked for a decree for sale of the property comprised therein. The instrument omitting names and parcels was translated as follows :—"I have hypothecated to you . . . . and received Rs. 800; "the particulars of the receipt of which are as follow: On 19th September "1879 last, I hypothecated to you this land and the land bearing Survey "No. 50, and received Rs. 775, the interest of which due up to date is "Rs. 80-12-0, and deducting out of this, the payments made to you, the "balance due by me is Rs. 25. As I have thus received the entire sum of "Rs. 800, it shall bear interest at Rs. 10 per cent. per annum, and I shall "not only pay the principal and interest and receive back this bond on "the 25th Purattasi of Subhanu (9th October 1883) which is the next "third year, but shall pay you the interest due in each year and take "receipt from you. In default of paying on the above dates, I shall pay "the said sum with interest at Rs. 15 per cent. per annum, from the date "of the bond, irrespective of the above due date, whenever you make "the demand. Thus is the hypothecation bond executed with consent."

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* Appeal against Order No. 84 of 1897.

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The District Munsif dismissed the suit as being barred by limitation. His decision was reversed on appeal by the Subordinate Judge. He said :—

"The suit bond, dated 9th October 1880, provides for repayment of "the principal and interest on the 25th Purattasi Subhanu (9th October "1883). Besides, as each year's interest accumulates I shall pay the same "to you and take receipt. If failure to pay accordingly on the dates is "committed, I shall pay with (including) interest at 15 per cent. per an-"num from the date of the writing without regard to the term aforesaid "when you require."

"It is a bond contracting for payment on a date specified with further "or additional stipulation to pay earlier, in case of non-payment of inter-"est yearly, if the obligee so requires or demands. It is thus the privilege "of the obligee to exercise the option or not to demand payment before "the specified date. It is not a forbearance to sue, when cause of action "had arisen as in instalment bonds.

"By Article 132, Limitation Act, time on a bond to enforce payment "of money charged on immoveable property begins to [22] run when the "money sued for becomes due. Here the money becomes due ordinarily "after 9th October 1883; and extraordinarily after 9th October 1881, "if so required by the creditor. When no requisition from the creditor "is shewn the ordinary calculation should be accepted.

"As observed in *Hanmantram Sadhuram Pity* v. *Bowlus* (1), the "liability of the defendant being by the bond made dependent on a "preceding demand, the defendant could not, till such demand was made, "have considered the action as accruing against him since the default "made in October 1881.

Defendant No. 2 preferred this appeal.

Hon. *V. Bashyam Ayyangar* and *Tiruvenkatachariar*, for appellant.

Pattabhirama Ayyar and *Seshagiri Ayyar*, for respondents.

JUDGMENT.

We think that in this case the words construed by the Subordinate Judge as "when you require" imply a condition as was also decided in a case where the words actually used were "on demand" (*Vythilinga Nadan* v. *Narayanasami Ayyan* (2)). There the words were not considered as merely technical words as they were interpreted to be in *Perumal Ayyan* v. *Alagirisami Bhagavathar* (3). The Subordinate Judge was therefore right in holding the suit was not barred, and this appeal is dismissed with costs.

(1) 8 B. 561 (568).
(2) Second Appeal No. 200 of 1897 (unreported).
(3) 20 M. 245.

22 M. 22.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

ARUMUGAM CHETTI (*Plaintiff*), *Appellant v.* ARUNACHALM CHETTI AND ANOTHER (*Defendants*), *Respondents.**
[22nd April, 1898.]

Civil Procedure Code—Act XIV of 1882, *Sections,* 508, 521—*Delivery of an award.*

A suit was, at the instance of the plaintiff and defendants, referred to an arbitrator. The arbitrator made his award within the period fixed by the order of reference, but did not submit it to the Court until two days later:

Held, that the award was valid under Civil Procedure Code, Section 508.

[F., 27 A. 459 (461) = 2 A.L.J. 201 (202) = A.W.N. (1905) 47 (48); 89 P.R. 1907; Rel., 8 C.W.N. 916 (918); R., 26 A. 105 (107).]

[23] SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in appeal suit No. 375 of 1896, affirming the decree of N. Sambasiva Ayyar, District Munsif of Sivaganga, in original suit No. 426 of 1895.

The facts of the case were stated as follows by the Subordinate Judge:—

"Plaintiff sued for the recovery of Rs. 800, being damages sustained "by him in consequence of the misrepresentations made by the first "defendant, his paternal uncle, at a division of the family property in "respect of the outstandings due to the family.

"The first defendant denied his liability to pay the damages and "the second defendant, another uncle of the plaintiff, supported the "claim.

"At the instance of both parties the suit was referred to the arbitra-"tion of one Subbusámi Ayyar, who made an award dismissing the suit, "and submitted the same to the Court. The Lower Court, in accordance "with the award, dismissed the claim.

"The time allowed by the District Munsif for passing the award was "7th April 1895, and the arbitrator passed the award before that date, that is, on 3rd April 1896, and submitted it to the Court on the 9th April. The appellant contends that inasmuch as the award did not reach the Court before the 7th April, the same is invalid."

The order of reference to the arbitrator was as follows:—

"Whereas the abovenamed plaintiff and defendant have agreed to "refer the matters in difference between them in the above suit to your "arbitration and award, you are hereby appointed arbitrator accordingly "to determine all the said matters in difference between the parties, and "with power by consent of the parties, to determine which party shall "pay the costs of this reference.

"You are required to deliver your award in writing to this Court on "or before the 30th March 1896 or such other day as this Court may "further fix."

* Second Appeal No. 479 of 1897.

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The time for the delivery of the award was subsequently altered to 7th April 1896. The Subordinate Judge passed a decree for the defendant affirming that of the District Munsif.

The plaintiff preferred this second appeal.

Desikachariar, for appellant.

[24] *V. Krishnasawmy Ayyar* and *Ranga Ramanujachariar*, for respondent No. 1.

JUDGMENT.

The award in this case was made and completed within the time fixed, but it was not filed in the Court until two days after the time specified in the order for that purpose. Both the Courts below have held the award was valid, although it was not filed in Court within the time directed, and we concur in this view, as we consider the word "delivery" in Section 508 of the Code of Civil Procedure is used in the sense of making the award and not in that of filing it in Court. Under Section 521 of the Code of Civil Procedure, it is not the filing of an award beyond the time fixed that invalidates it, but the omission to make the award within the period allowed. In a considered judgment in *Umersey Premji* v. *Shamji Kanji* (1) Mr. Justice Jardine has arrived at the same conclusion as ours, and has declined to follow certain observations of the Judges in *Behari Das* v. *Kalian Das* (2) tending to a contrary view. The decision of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (3) is not inconsistent with our view.

Their Lordships evidently treat the delivery of an award and the making of it as the same thing in a question like the present.

We accordingly dismiss the second appeal with costs.

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22 M. 24=8 M.L J. 147.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

NARAYANA KAVIRAYAN (*Defendant*), *Appellant v.* KANDASAMI GOUNDAN (*Plaintiff*), *Respondent.**
[2nd May, 1898.]

Civil Procedure Code—Act XIV of 1882, Section 43—Decree for specific performance of a contract for sale of land—Subsequent suit for possession.

The defendant having agreed to sell land to the plaintiff but failed to execute a conveyance, the plaintiff sued for specific performance and obtained a decree and the Court executed a conveyance of the land to him. He now sued for possession :

Held, that the right to possession having arisen at the same time of the right to the execution of a conveyance, the suit was not maintainable.

[Diss., 6 Ind. Cas. 926=6 N L R. 81; 4 N L.R. 14 (16); R., 37 C 57=14 C.W.N. 527 =5 Ind. Cas. 205 (206); 14 C.L.J. 159=11 Ind. Cas. 228 (230); 12 M.L.J. 71 (72); U.B.R. (1903) 1st. Qr., Buddhist Law, Divorce, pp. 12 (14)]

[25] SECOND appeal against the decree of G. T. Mackenzie, Acting District Judge of Coimbatore, in appeal suit No. 5 of 1896, reversing the

* Second Appeal No. 779 of 1897.

(1) 13 B. 119. (2) 8 A. 543. (3) 13 A. 300.

decree of P. S. Gurumurti Ayyar, District Munsif of Erode, in original suit No. 632 of 1894.

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The District Munsif said:—

"Plaintiff obtained a decree in original suit No. 142 of 1893 directing "the defendant to execute a sale-deed for Rs. 200 in respect of his lands "in favour of plaintiff. Defendant having failed to give a sale-deed "accordingly, plaintiff got one executed by this Court on behalf of the "defendant and even after its execution, defendant failed to deliver the "lands to plaintiff though demanded. Hence the suit to recover the "lands with mesne profits.

"Defendant contended that the suit is barred by Section 43, Civil "Procedure Code, and stated that plaintiff is not entitled to any mesne "profits, and that the suit is bad for misjoinder of causes of action as "mesne profits are claimed before cause of action therefor accrued.

"Plaintiff was in a position to sue for possession of the lands when "he filed suit No. 142 of 1893. Instead of asking for possession also, he "confined himself there to a prayer for the execution of a sale-deed for "the lands agreed to be sold by defendant. Having thus omitted to sue "for possession there, I do not think he has the right to ask for it in a "separate suit now as Section 43, Code of Civil Procedure, is against law. "I do not think the form of the sale-deed, Exhibit A, given to plaintiff by "this Court can improve matters. The suit consequently fails and with "it the claim for damages (see *Shib Kristo Dah* v. *Abdool Sobhan Chow-"dhry*(1)). The result is the suit is dismissed with costs."

The District Judge on appeal reversed the decree of the District Munsif saying :—"I am of opinion that this appeal must be allowed. I doubt "if plaintiff could sue for possession upon a contract to sell. I think that "all the relief he could claim was the execution of a conveyance. But "even if plaintiff could have sued for possession, he need not do so. The "Transfer of Property Act regards the transfer of ownership as com-"plete when the document is registered and it is not contemplated "[26] that a man will retain possession after he has executed a convey-"ance. Defendant is now a trespasser upon plaintiff's land."

The defendant preferred this second appeal.

Venkatasubba Ayyar, for appellant.

Mr. *Stephen Andy*, for respondent.

JUDGMENT.

We are of opinion that the right to possession arose coincidently with the right to the execution of a conveyance by the defendant. Both rights are declared under Section 55 of the Transfer of Property Act and in the case cited (*Nathu valad Pandu* v. *Budhu valad Bhika* (2)), it is admitted that the contract of sale created in the purchaser a right of possession. The decision appears to proceed on the peculiar facts of the case. The District Munsif was therefore right in his conclusion. We must reverse the decree of the District Judge and restore that of the District Munsif. Respondent must pay costs in this and in the Lower Appellate Court.

(1) 15 W.R. C.R. 408. (2) 18 B. 537.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

ASAN KUTHU SAHIB MERCOYAR AND OTHERS (*Defendants Nos. 1 and 4 and Representatives of Defendant No. 1*), *Appellants v.* RAMANATHAN CHETTI (*Plaintiff*), *Respondent.**
[26th and 27th April and 3rd August, 1898.]

Bottomry bond—Owner's covenant to pay—Construction of deed of hypothecation—Uncertainty of agreement.

The owners of a vessel for the purpose of repairing it borrowed a sum of Rs 10 000 from the plaintiff and executed an instrument stating the purpose of the loan and hypothecating the vessel to him and promising to repay the principal with interest by the 12th of March 1891. The instrument proceeded as follows:—"You have no connection with the security or sea worthiness (yogyam) "of the said ship up to the above stipulated time. If the money is not paid in "the said stipulated time we shall add vattam at Rs. 20 per cent. per annum on "the amount of principal and interest accruing on that date, adding vattam "once in twelve months until date of payment after the said stipulated time on "the hypothecation security (adamana yogyam) of the said ship. and shall get "back [27] this mortgage bond." The money was not repaid on the stipulated date and the vessel after making several voyages subsequently foundered in port:

Held, that the instrument was not a bottomry bond, and the plaintiff was not entitled under it, regarded as an instrument of hypothecation merely, to recover the enhanced interest referred to in the passage above quoted, because that part of the agreement was void for uncertainty.

[R., 25 M. 561 (565).]

APPEAL against the decree of P. Naravanasami Ayyar, Subordinate Judge of Negapatam, in original suit No. 43 of 1895.

The plaintiff sued to recover from the defendants and from the remains of a wreck of the barque "Lord Harris" the sum of Rs. 36,726. The plaint set out that, on the 11th October 1890, defendant No. 1 and the father of the other defendants being owners of the "Lord Harris" which was then at the port of Coringa in need of repairs, executed an instrument of hypothecation which was filed in the suit as Exhibit A. That instrument omitting the names and description of the parties was (as translated) in the following terms:—

"Now we have received from you the sum of Rs. 10,000, having hypothecated to you our ship 'Lord Harris' of 594¾ tons, which is in Gori in the port of Coringa. As we have received from you, this sum of rupees ten thousand for the repair works of the above ship, we shall pay in cash within the 30th Masi next (12th March 1891) the principal and interest adding interest on the above amount at the rate of 1 rupee per cent. per mensem, and shall get back this bond. You have no connection with the security or sea worthiness (yogyam) of the said ship up to the above stipulated time. If the money is not paid in the said stipulated time, we shall add vattam at Rs. 20 per cent. per annum on the amount of principal and interest accruing on that date, adding vattam once in 12 months until date of payment after the said stipulated time on the hypothecation security (adamana yogyam) of the said ship, and shall get back this mortgage bond."

* Appeal No. 130 of 1897.

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The plaint alleged that the plaintiff paid the sum of Rs. 10,000 for the repairs of the vessel and that subsequently on the 14th October 1890 the executants of the above instrument gave him a power of attorney which was filed in the suit as Exhibit B and contained (as translated) the following passage:—

" With respect to our ship called 'Lord Harris' of 594¾ tons which "is now in the Gori in the port attached to Coringa, you are authori-"zed to carry on the following on our [28] behalf for the above-"mentioned three years:—To carry on the repairs and other works, "&c., to appoint or dismiss paid servants, such as the commander, &c., to "execute charter parties, to let it on hire, to load it with goods bought "by you, to sell the above goods, to get loan of money for vattam on the "security or credit (yogyam) of the said ship and that of the goods loaded "therein; to give it back after that yogyam is over, to set it sail to the "necessary places, to cause it to be anchored wherever necessary."

Various other transactions between the plaintiff and the defendants were set out which resulted according to the plaint in the defendants being indebted to the plaintiff in the above sum. In computing this amount, the plaintiff debited the defendants with interest at 20 per cent. per annum under the last part of Exhibit A. The vessel foundered in port on the 8th December 1895. The suit was brought in December of the same year. The defendants denied the plaintiff's right to the remains of the vessel and objected to, *inter alia*, the claim for interest. The Subordinate Judge passed a decree for Rs. 23,406 disallowing the balance of the plaintiff's claim.

The defendant preferred this appeal.

K. Narayāna Rau, for appellants.

V. Krishnasami Ayyar, for respondent.

JUDGMENT.

SUBRAMANIA AYYAR, J.—It was contended for the appellants that the Subordinate Judge erred in finding that the respondent advanced under Exhibit A Rs. 9,647-3-6 and under the arrangement come to subsequent to that document Rs. 18,198-3-1.* But the Subordinate Judge has not allowed any item of advance claimed by the respondent not supported by duly proved vouchers. The evidence thus accepted by the Subordinate Judge is practically uncontradicted and, in my opinion, quite trustworthy. I have no hesitation, therefore, in holding that the plaintiff has proved that advances to the extent stated above were made by him.

The next question for determination is, whether the respondent is disentitled to recover the whole or any portion of his claim, inasmuch as the barque "Lord Harris," referred to in Exhibit A, became a wreck subsequent to 12th March 1891, † the date fixed in the document, with reference to the payment of the money due thereunder. This depends, in one aspect of the matter, upon whether the transaction is, as contended for the appellants, supportable [29] as a bottomry bond. Now, though not only a master but an owner also may give a bottomry bond (*Duke of Bedford* (1)), yet to the validity of such a bond given by an owner, it is

* In 8 M.L.J. 159 for this figure we find 7551-9-5—ED.

† In 8 M.L.J. 159 it is stated as 21st March 1891—ED.

(1) 2 Hag. Adm., 294.

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necessary to show, as was laid down in several cases, that he had no adequate personal credit or security other than the bond available at the port where it was given. In the early case of the *Nelson* (1) Lord Stowell observed :—"It is certainly the vital principle of this species of bonds "(bottomry) that they shall have been taken where the owner was "known to have no credit, no resources for obtaining necessary supplies." This language was quoted and relied on in the case of the *Hersey* (2) where Sir John Nicholl added "if they" (the necessary supplies) "can be procured "upon the credit either of the master or of the owners or by advances on "the freight or by passage money or upon any other credit than the hypothecation of the ship, the bond of hypothecation" (viewed as a bottomry bond) "is absolutely void." Did the condition thus required by the authorities exist in the present case? Clearly not. For Exhibit A itself shows that in the first instance, the owners undertook a personal liability which was to subsist for a period of about five months from the date of the bond, *i.e.*, up to the 12th March 1891. * This circumstance alone is fatal to the contention that the transaction should be viewed as a valid bottomry bond, and it is unnecessary to consider whether another objection urged on behalf of the respondent against the appellants' said contention is well founded, the objection being that the instrument could not operate as a bottomry bond, inasmuch as it was executed by the owner in a place which was not a foreign port to him. I consequently hold that Exhibit A could not be supported as a bottomry bond.

Next, taking it, as was argued for the respondent, that the transaction is a hypothecation not amounting to a bottomry bond, the question is as to the validity of the portion of the instrument which provides for the contingency of the amount lent not being paid back within the 12th March 1891.† In this connection it is first necessary to consider the meaning and effect of the word "yogyam" used in the instrument to qualify the vernacular term for hypothecation. The meaning of the word does not appear to have been considered in any decided case. And no attempt was [30] made in the present instance to prove what is denoted by the word according to mercantile custom, if such a custom exists with reference to it. According to Rottler's dictionary "yogyam" sometimes in Tamil usage means 'chance,' hazard,' 'danger' and the phrase "yogyathukku kodukkirathu" is explained in the same work (1) 'to advance money, &c., to an honest man trusting to his honesty; (2) 'to risk one's own money, &c., on a ship or otherwise.' That, in Exhibit A, the word was inserted to indicate that the lender, in consideration of his receiving higher interest subsequent to the 12th March 1891,§ consented to his right to recover the money after that date being made to depend on the safety of the barque is not denied, though the parties are not agreed as to the circumstances in which the loss of the vessel should take place to disentitle the lender from claiming his money. The respondent in his evidence stated that he was not to be affected unless the vessel was lost during a voyage. On the other hand, one of the appellants and a relation of his say that it is immaterial whether the loss occurs during voyage or when the vessel is in port, as was the case in the present instance. Neither view could, in my opinion, be accepted, sought to be established as it is by such meagre and interested evidence, taking the evidence to have been rightly admitted.

* In 8 M.L.J. 160 it is found as 21st March, 1891—ED.
† In 8 M.L.J. 161, we find for this 21st March 1891—ED.
§ In 8 M.L.J. 161 it is found as 21st March 1891—ED.

(1) 1 Hag. Adm., 169 at p. 175. (2) 3 Hag. Adm., 404 at p. 408.

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In this state of things could the provisions of the document as to what was to be the result to the lender, if the money remained unpaid within the 12th March 1891,* and the barque was lost subsequently, be held to amount to a valid agreement? I think not, since though the parties might have thought that after the 12th March* the money was risked by the respondent upon the safety of the vessel, yet they have failed to express themselves with the definiteness indispensable to an enforceable agreement, the term yogyam used with reference to the risk believed to be undertaken being very vague in itself, and the contract being entirely silent on several points on which in a case like this the parties thereto were bound to make up their minds and indicate with reasonable clearness what their intentions as to those points were, if effect is to be given to their agreement by a Court of Justice. To explain myself, whether it was the intention that the respondent was to be deprived of his money even if the vessel was destroyed while in port, or whether it was intended that he was to be affected only if the loss of the vessel happened during voyage, and if the latter loss, during what particular voyage or voyages, it [31] being distinctly understood that the barque was to make more than one, was contemplated—these are matters which should have been settled and provided for in the contract. It was equally necessary that the document should have stated loss resulting from what cause or causes, *e.g.*, such and such perils of the sea was to disentitle the lender from claiming repayment. As to these absolutely essential points, the document is completely defective. Therefore, the portion of the instrument dealt with above must be held to be void for uncertainty. And it follows that, on the one hand, the respondent's right to recover his advances is unaffected by the fact that the barque became a wreck subsequent to the 12th March 1891 and, on the other hand, that he is not entitled to the higher interest or vattam at 20 per cent. agreed to be paid in consideration of a risk which was never legally undertaken by him. I would therefore modify the decree of the Subordinate Judge by awarding to the respondent on account of the first item claimed in the plaint Rs. 9,647-3-6 with interest at 12 per cent. per annum and on account of the second item Rs. 18,198-3-1 † with interest at the same rate on Rs. 17,322-3-1 § thereof, minus the sums found by the Subordinate Judge to have been received by the respondent with interest thereon at the above rate. The appellants will pay and receive proportionate costs in this appeal.

As to the memorandum of objections, I think that the Subordinate Judge was justified in declining to act upon the respondent's accounts in the absence of vouchers or other more satisfactory evidence, especially with reference to so large an amount as Rs. 6,781-12-8 included in the second item in the plaint. I would therefore dismiss the memorandum of objections with costs.

DAVIES, J.—I concur.

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* In 8 M.L.J. 161 it is given as 21st March 1891.—ED.
† In 8 M.L.J. 162 it is given as, 8427-10-2—ED.
§ In 8 M.L.J. 162 it is given as 7551-10-2—ED.

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[32] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

VENKATAGIRI RAJAH (*Plaintiff*) *v.* SHEIK BADE SAHEB AND ANOTHER (*Defendants*).* [22nd and 30th August, 1898.]

Limitation Act—Act XV of 1877, *Section* 19—*Acknowledgment—Muchalka under the Rent Recovery Act* (*Madras*), 1865.

A muchalka given by a tenant at the end of a fasli, containing an undertaking to pay instalments of rent at dates then passed, amounts to an acknowledgment of liability for the purpose of Limitation Act, 1877, Section 19.

CASE referred under Civil Procedure Code, Section 617, for the opinion of the High Court by T. Varadarajulu Naidu, District Munsif of Kanigiri.

The case was stated as follows:—

"In small cause suit No. 442 of 1898, the plaintiff, the Rajah of Venkatagiri, claims to recover Rs. 35-12-6, being the balance of rent alleged to be due by the defendants, his tenants, for fasli 1304, which commenced on 1st July 1894 and ended on 30th June 1895. The suit was instituted on 21st February 1898, and it is based upon a muchalka, alleged to have been executed by the first defendant's elder brother in favour of the plaintiff. The muchalka is dated 25th June 1895, and the dates fixed therein for payments of the three instalments in which the rent was payable, *viz.*, 15th August 1894, 30th October 1894 and 30th January 1895, had all expired on that date.

"In the second suit, small cause suit No. 338 of 1898, the Rajah claims to recover Rs. 38-12-1, being the whole rent payable by the defendants, his tenants, for fasli 1304. This suit, which was instituted on 21st February 1898, is also based upon a muchalka similar to the one in the first mentioned suit. The muchalka is dated 18th June 1895, and the dates when the instalments were payable had all expired on that date.

"For the defendant, it is urged that the suits are barred by limitation, that they are governed by Article 110 of the Limitation Act, and limitation commenced to run on the dates fixed in the muchalkas as those when the rents were payable, and that the [33] dates of muchalkas would not afford starting points for limitation, nor would the language thereof justify the view that they could operate as acknowledgments under Section 19 of the Limitation Act. For the plaintiff it is contended that as the obligation of a tenant to pay rent arises on the receipt of the patta and the execution of the muchalka, time began to run under Article 110 only from the dates of the muchalkas and not earlier, and that further the muchalkas afford sufficient acknowledgments in writing to prevent the suits from being barred.

"On the first point, I am clearly of opinion that the starting points for limitation in such cases are the dates of the kistbandi and not the dates when the muchalkas were executed. The case of *Sobhanadri Appa Rau* v. *Chalamanna* (1) was overruled in *Sriramulu* v. *Sobhanadri Appa Rau* (2), wherein it was held by his Lordship Mr. Justice Parker

* Referred Cases Nos. 17 and 18 of 1898.

(1) 17 M. 225. (2) 19 M. 21.

that the period of limitation began to run on the dates on which the rent fell due, though the obligation to pay the rent arose on the tender of the patta; and this view was followed in a recent case of *Venkatagiri Rajah* v. *Ramasami* (1).

"On the other point, namely, as to whether the muchalkas afford sufficient acknowledgments to save the suits from the bar of limitation, I am inclined to find for the defendants, but as the question is not free from doubt, and as about 700 small causes depend upon the decision on that point, I have deemed it proper to obtain an authoritative ruling to avoid the inconvenience and hardship that might be caused, if my view should happen to be incorrect.

"This question appears to have been raised by the District Munsif of Ongole in his reference in *Venkatagiri Rajah* v. *Ramasami* (1); but it was not expressly referred to in the order passed in the case, and the facts of the case then referred did not necessitate an express decision upon it.

"The muchalkas were taken subsequent to the dates of the kistbandi, and in the first case a portion of the rent of the year had been paid before the date of the muchalka, while in the second case the whole rent remained due on the date of the muchalka. The muchalkas appear merely to embody the terms upon which the tenants held the lands, and do not seem to contain any admission of the liabilities of the tenants to pay any sums on the dates on which **[34]** they were executed. The muchalkas may perhaps be deemed to contain admissions of a subsisting relationship of landlord and tenant, but they do not, I think, contain any acknowledgment that any rent of the year was due on the dates on which they were executed. The person making the acknowledgment, it has been held, must consciously admit that there is an existing liability in respect of the identical right which is afterwards claimed by the plaintiff (*Venkataramanayya* v. *Srinivasa* (2), *Dharma Vithal* v. *Govind Sadvalkar* (3) and *Ram Das* v. *Bijnundun Das* (4). In *Venkata* v. *Parthasaradhi* (5), his Lordship Mr. Justice Muttusami Ayyar observed that 'upon a reasonable 'construction of the language used by the debtor in writing the relation of 'debtor and creditor must appear to be distinctly admitted, that it must 'be admitted also to be a subsisting jural relation, and that an intention 'to continue it until it is lawfully determined must also be evident.' This view was followed in *Periavenkan Udaya Tevar* v. *Subramanian Chetti* (6), where it was held that the words used must, to satisfy the requirements of Section 19 of the Limitation Act, be such as to show that there was an existing jural relationship, as debtor and creditor, between the parties at the time when the admission was made or at some time within the period of limitation. In the two cases now in question it does not appear to have been the intention of the executants that they should thereby acknowledge their indebtedness at the time in any sum. In the first case, it cannot certainly be said that, by the execution of the muchalka, he admitted his liability for the whole rent of the year, for admittedly he had paid a portion of the rent before its date.

"In certain cases it was held that it was not necessary that the writing should specify the exact amount of the debt or the exact nature of the property or right in respect of which the acknowledgment was made; but invariably, there must, I think, be a distinct acknowledgment

(1) 21 M. 413. (2) 6 M. 182. (3) 8 B. 99.
(4) 9 C. 616. (5) 16 M. 220 (223). (6) 20 M. 239.

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of a liability subsisting on the date of the admission, which is, I believe, wanting in the muchalka in question.

"In *Rangayya Appa Rau* v. *Ratnam* (1) it was held that a landlord suing for rent after the expiry of the period prescribed is entitled to prove that his right was acknowledged within the period; but [35] what the exact nature of the aknowledgment then in question was, does not appear from the report, and the decision of the case did not finally turn upon that point."

Hon. *Bhashyam Ayyangar* and *Desikachariar*, for the plaintiff.

The defendant was not represented.

JUDGMENT.

SUBRAMANIA AYYAR, J.—This is a reference in a suit by the Rajah of Venkatagiri against a raiyat, holding certain lands in the zamindari, for the rent due for Fasli 1304 ending with 30th June 1895. The rent was payable in instalments and admittedly they became due on 15th August and 30th October 1894 and 30th January 1895, respectively. The present suit was instituted on the 21st February 1898. The suit is clearly barred, unless, as contended for the plaintiff, the muchalka, executed by the defendant to the plaintiff on the 25th June 1895, contains an acknowledgment such as is required by Section 19 of the Limitation Act. The question for determination is whether it contains such an acknowledgment. It is to be observed that the language employed in the muchalka amounts to more than a mere acknowledgment. There is a distinct promise to pay. But the promise as such in the muchalka is obviously void on account of the inconsistency in its terms manifest on the very face of it. For the defendant promised on the 25th June to pay rent on three dates which had already expired, *viz.*, 15th August and 30th October 1894 and 30th January 1895. Some observations, made by Lord Ellenborough, C.J., in *Hall* v. *Cazenove* (2) where a similar point arose, may be referred to here. In that case a charter-party not executed until the 15th March contained a covenant by the owner that the ship should and would proceed from a certain port, where she then lay, on the 12th February preceding on her outward bound voyage. In dealing with this term of the contract the Chief Justice said:—" But here when the deed was " executed or concluded by the delivery, the stipulation, which was not " impossible in its nature when the deed was first framed, had become " impossible as between these parties from the time having passed. The " stipulation, therefore, had then become wholly nugatory and cannot be " understood as having formed any part of the contract between the " parties without imputing to them the most manifest absurdity " (*Hall* v. *Cazenove* (2).

[36] Now in construing written instruments, which admit of more that one interpretation, that interpretation which leads to an absurd result frustrating the general intention of the parties must give way to an interpretation that would carry out that intention. The muchalka, so far as we are here concerned, could be construed so as to avoid any absurd conclusion in one of two ways. The first is that suggested by the view taken by an eminent Judge in *Doe d. Darlington* v. *Ulph*(3). There a lease for years to commence at Michaelmas 1845 which was, by a decree for specific performance at the instance of the lessee, executed on the 12th January 1847, bearing date as of the 29th September 1845, contained a covenant to insure the demised premises, and keep them insured during

(1) 20 M. 392. (2) 4 East, 477 at p. 482. (3) 13 Q.B. 204 at p. 208.

the term, and a power of re-entry on breach. The landlord brought an action in ejectment and proved that the premises were not insured until the 18th February 1847.

Lord Denman, C.J., Coleridge and Wightman, JJ., dealt with the case on the assumption that the covenant might be construed as a covenant to insure within a reasonable time only after the execution of the deed. They did not, however, express any decided opinion on the question whether that assumption was correct. But Patteson, J., went further and said :—"I cannot think that the defendant was bound by "this covenant to keep the premises insured before the lease was actually "executed; for till then there was nothing to oblige him to do so. I "think if he had insured the premises shortly after the execution, he "would have complied with his covenant. In all covenants to do an act "in future, the covenantor must have some time to perform it in. It "is impossible, for instance, for a man to insure the very next "moment after he has entered into a covenant to do so; and if no "time be expressed, he must have a reasonable time in which to do "it." (*Doe d. Darlington* v. *Ulph* (1). These observations would seem to warrant the promise in the present case to pay on the three dates before mentioned being treated as a promise to pay within a reasonable time from the date of the muchalka. This interpretation, if admissible, is less satisfactory than the second and the only other interpretation which the language of the instrument is susceptible of, *viz.*, that it amounts merely to an acknowledgment of liability. For according to the one construction certain material words found [37] in the instrument have to be completely rejected on the ground that, in the circumstances, they are meaningless, while effect is given to those words by accepting the view that they refer to the dates when certain instalments were payable and treating the words of promise as, in effect, an admission of the executant's liability in respect of those instalments. That this construction, suggested for the plaintiff, is the sounder appears also from two other equally important circumstances bearing on the matter. One is that muchalkas, such as the present, differ materially from contracts in the strict sense of the term, that is, engagements entered into by parties who are free to enter into them or not as they choose, inasmuch as, except where by mutual consent an exchange of patta and muchalka is dispensed with, persons, in the possession of the plaintiff and the defendant here, are under a legal duty to interchange such documents periodically—a duty enforcible specifically. The other circumstance is that although occasionally muchalkas like the present may contain terms truly contractual, as when in any respect the old terms of a tenancy are by the instrument altered or modified, yet in the large majority of instances this class of documents contains nothing more than admissions of liability on the part of raiyats to deal with landholders during a specified period, in respect of the lands held by the former, to conform in their dealings to the terms and conditions settled by antecedent contract or established by long prevalent usage. On the whole, therefore, the construction urged for the plaintiff is, in my opinion, the better, if not the only correct construction It remains to add a word with reference to the allegation that prior to the execution of the muchalka, the defendant had made some payments on account of the instalments in question. If that allegation be found to be true that would, of course, *pro tanto*, be a defence on the merits. But such a circumstance could not in

(1) 13 Q.B. 204 at p. 208.

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any way render the muchalka, the less an acknowledgment for purposes of limitation.

BENSON, J.—I agree with the conclusion arrived at by my learned colleague. In order to construe pattas and muchalkas in a case like the present, we must bear in mind the circumstances under which such documents are executed.

Their purpose is to satisfy the requirements of the Rent Recovery Act (Madras Act VIII of 1865). Section 4 of that Act evidently contemplates that they shall be exchanged at the beginning of each Fasli or revenue year, but, as a matter of convenience [38] and of practice, they are entered into at any time during the year, and usually only a short time before its close, by which time both parties know what land has been cultivated by the tenant and what rent is payable by him. The form and language of the documents are the same whether they are executed early or late in the year, and without regard to the fact that at the time of execution some or all of the instalments of rent may have already become due, and may even have been actually paid. The promise, therefore, in the muchalka to pay the rent due for the year by instalments on specified dates must be construed with reference to these admitted facts. If any instalment is already overdue, the promise must be construed as an acknowledgment that the instalment became payable on its due date, and as a promise to pay so much of it as has not, in fact, been already paid. This promise to pay must be understood as a promise to pay, within a reasonable time, the amount then actually due and not already paid. It would be manifestly absurd to regard it as a promise to pay on a date already past, and it would be unreasonable to regard it as a promise to pay over again a sum already paid. In regard to instalments not due prior to the exchange of patta and muchalka, the promise must be regarded as an acknowledgment that the instalment will become payable on its due date, and as a promise to pay the same on such date. With regard then to instalments due before the date of the muchalka, the document must, I think, be construed as if it ran "I admit "that the instalments herein mentioned fell due on the dates herein stated, "and I acknowledge my liability to pay such part of them as I have not "already paid, and I promise to pay the same within a reasonable time." Thus there was neither an acknowledgment of liability nor a promise in regard to instalments already paid, but there was both an acknowledgment and a promise in regard to instalments not already paid. If there was an arrear then due by the tenant, the muchalka was such an acknowledgment of liability in regard thereto as is contemplated by Section 19 of the Indian Limitation Act. There is nothing opposed to this conclusion in the remarks of this Court in the case of *Periavenkan Udaya Tevar* v. *Subramaniam Chetti* (1) to which the District Munsif has referred, for the tenant must be held to have made the acknowledgment with reference to his actual [39] existing indebtedness, the fact of which was known to him at the time. The District Munsif must, therefore, ascertain, in the first instance, whether any, and, if so, what sum was due by the tenant when he signed the muchalka. The acknowledgment in the muchalka will save the time bar in respect of any such sum. The practical result is that the muchalka is an acknowledgment of liability for the purpose of saving the bar by time, but it is not an acknowledgment of liability for the purpose of binding the tenant to pay the sum acknowledged.

(1) 20 M. 239.

22 M. 39=8 M.L.J. 278.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

VENKAYYA (*Plaintiff*) *Appellant v.* RAMASAMI AND ANOTHER (*Defendants Nos. 2 and 4*), *Respondents.** [16th August and 8th September, 1898.]

Landlord and tenant—Argricultural land—Change in the nature of cultivation—Waste.

The defendant held from the plaintiff irrigable land which was cultivated with paddy, raggi, &c.; he had an occupancy right in his holding and paid a fixed money rent. The defendant having planted cocoanut trees on the land, the plaintiff sued to eject him and to have the trees removed.

Held, that the acts of the defendant did not constitute waste or a breach of the terms of his tenancy, and that the suit should be dismissed.

[R., 24 M. 421 (425); 30 M. 155 (157)=17 M.L.J. 64 (65).]

SECOND appeal against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 302 of 1896, affirming the decree of J. M. Nallasami Pillai, District Munsif of Chittor, in original suit No. 439 of 1895.

The plaintiff was the landlord of the defendant who had an occupancy right in his holding. The lands were nanja lands used for cultivation of paddy, raggi, &c., but the defendant had planted thereon cocoanut trees, and the plaintiff's case was that this circumstance gave him a right to eject the defendant, and he accordingly brought this suit for possession of the land and for the removal of the trees. The decree of the District Munsif was in favour of the defendant, and it was affirmed on appeal by the District Judge.

[40] The plaintiff preferred this second appeal.

Sivasami Ayyar, for appellant.

Kumarasami Sastri and *Visvanadha Sastri*, for respondents.

JUDGMENT.

MOORE, J.—The plaintiff (appellant) sued to eject the defendants (respondents) on the ground that they had converted a piece of wet land held by them on patta under him intended for cultivation with paddy, raggi, &c., into a cocoanut garden. He also prayed that he should be awarded Rs. 2 as the cost of removing the cocoanut plants on the holding. Both the Lower Courts have dismissed his case with costs. In the pattas filed (Exhibit A series) the land under cultivation is classed as wet, but nothing is said as to the nature of the crops that should be grown on it. As the District Judge remarks, the plaintiff tried to import into the terms of the tenancy a clause to the effect that the tenant should not use the land for any purpose inconsistent with its general character as paddy land, and finds that the burden of proving that such a condition was one of the terms of the tenancy was on the plaintiff and that he has not discharged it.

It is now urged in appeal that the tenants have, by growing cocoanut trees on paddy land, altered the character of the holding and that the landlord is accordingly entitled, if not to eject them, at all events, to get a

* Second Appeal No. 1045 of 1897.

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decree directing the removal of the cocoanut plants and the reconversion of the land into ordinary wet land. It is urged that if this is not done, the amount of rent to be paid to the landlord may be diminished, that it may hereafter become impossible to identify the land, and that it may also be rendered difficult for him if the land is cultivated with cocoanut trees to realize the arrears due to him by attachment and sale of the crops growing thereon under the provisions of Act VIII of 1865. It does not appear to me that there is much force in these contentions. Whatever crop the tenants may grow they must, it is clear, pay the rent agreed in the patta and no alteration in the nature of the crops can, it is admitted, give them any right to claim any deduction from that sum. There can be no real danger that there will hereafter be any difficulty in identifying the land, and it does not appear to me that there is any evidence on the record to justify the supposition that the tenants who, it is shown, have a permanent right of occupancy, will run the risk of losing that right by neglecting to pay the rent due by them. It is also pleaded that if the land remains as a cocoanut tope, the landlord will, in case the [41] tenants abandon it, be put to considerable expense in having the trees cleared away so as to make it fit for the cultivation of paddy, &c. As the land is valuable, the landlord need not, as it appears to me, be under any apprehension that these tenants with a permanent right of occupancy will abandon it.

It is further urged that when the tenants planted cocoanut trees on the wet land they altered the character of the holding and thereby committed an act of waste and that such being the case the landlord is entitled to a decree as prayed for. The only cases of importance that have been quoted at the hearing are *Ramanadhan* v. *Zamindar of Ramnad* (1) and *Lakshmanna* v. *Appa Rau* (2). What was held in the former of these cases was that a zemindar was entitled to compel a tenant to demolish a dwelling house which he had erected for purposes not connected with agriculture on agricultural land held by him, and in the latter that a zemindar is justified in inserting a clause in a patta preventing a tenant from erecting buildings on his holding which are not compatible with the agricultural character of the holding. These decisions, it is clear, treat of cases of a completely different nature to that at present under consideration. Turning to the latest edition of Woodfall on the Law of Landlord and Tenant (16th edition, page 648), I find that the tenor of the decisions as to waste by changing the nature of the property is briefly as follows:—"If the tenant convert arable land into wood, "or *e converso*, or meadow into arable, it is waste; and this would appear "to be the case, even where the act is done according to the custom of "the country for the purpose of amelioration. If a tenant pull down a "malt-mill and build a corn-mill it is waste, also if he convert a corn-mill "into a fulling-mill, it is waste, though the conversion be to the lessor's "advantage." Applying the principle of these decisions to the present case, it appears to me that the defendants cannot be held to have committed waste. They have not converted the holding into one of a completely different character. They have, it must, in my opinion, be held, merely chosen to grow one description of crop, cocoanuts, in lieu of another, paddy or raggi. They cannot be said to have converted 'arable land into wood,' inasmuch as a cocoanut garden is, it must be admitted, something very different from a wood. In many parts of Malabar one may [42] see in a stretch of wet land fields grown with cocoanut trees intermingled with

(1) 16 M. 407.

(2) 17 M. 73.

plots of paddy land. Both are irrigated in much the same way and both may, it appears to me, be held to be cultivated with wet crops. As I cannot hold that the tenants have committed waste, I would dismiss this second appeal with costs.

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SUBRAMANIA AYYAR, J.—In this case, so far as the present appeal goes, the appellant (plaintiff)—an inamdar—seeks to obtain a decree directing the respondent (defendant)—a raiyat—to remove certain cocoanut trees planted by him a short time before the institution of the suit in one of the parcels of land in his possession. The District Munsif and the District Judge decided against the appellant.

Now beyond putting in the pattas issued to the respondent under the Rent Recovery Act, for Faslis 1299 to 1304, the appellant produced no evidence. These pattas show nothing more than what the respondent himself admits, *viz.*, that the land in question is nanja or irrigated land. On the other side, the respondent called a few witnesses to prove the prevalence of a practice, in the locality wherefrom this case comes, of persons, in the position of the respondent, planting cocoanut or other fruit trees on lands of similar description without reference to the consent of the landholder. The District Judge, however, held that no such practice was made out. The case has to be decided with reference to but three undisputed circumstances:—

1. The land has hitherto been used only for growing paddy or raggi.
2. The right, which the respondent possesses in the land, is of a permanent character though he may, if he likes, relinquish the land in accordance with the proviso to Section 12 of the Rent Recovery Act.

3. The rent payable for the land is a definite money rent which is not liable to be enhanced, save for the exceptional reasons and under the conditions specified in the first proviso to Section 11 of the enactment referred to.

In the absence of special rules, laid down as applicable to questions such as the present arising between persons in the position of the parties to this case, we must in dealing with such questions be guided, as far as practicable, by the principles which govern similar questions when they arise between persons who stand to each other in the relation of landlords and tenants, in the [43] strict sense of the terms, to which relation that subsisting between the present parties bears, in important respects, an analogy.

Now, according to those principles, the appellant will not be entitled to any relief unless the respondent has, by planting the trees, contravened some agreement or understanding between him and the appellant as to the crops to be raised on the land; or unless the land has, by being so planted, been put to an unhusbandlike use, (assuming that the obligation to use in a husbandlike manner implied in certain circumstances is to be taken as an incident of the respondent's holding, a point as to which I shall add a few words later on); or unless the act of the respondent amounts to waste.

First, has the respondent, by the act in question, violated any agreement or understanding between him and the appellant as to the crops to be raised? In support of the contention that he has, the only circumstance, relied on, is that, as stated before, paddy or raggi alone has hitherto been grown on the land. But clearly that by itself is not sufficient to establish the existence of an agreement or understanding that the respondent was not to use the land for the cultivation of any other suitable crop

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or produce. In *Westropp* v. *Elligott* (1), Lord Watson, dealing with an argument similar to that urged here, said :—"Though the tenant were to "use the land mainly for pasture" (that was the purpose for which the land had admittedly been used there for a considerable period), "it would "not, in my opinion, necessarily follow that the holding had been 'let "to be used' for that purpose. I think it would be necessary, in addition "to the mere fact of use, to prove some facts in relation to the character "and capabilities of the holding from which it might be inferred that the "tenant could not reasonably have contemplated any other use." Next has the respondent acted in an unhusbandlike manner? This question, of course, implies that the obligation imposed by law on an ordinary tenant that, in the absence of a contract to the contrary, he should manage the land in a husbandlike manner, is applicable to a raiyat such as the respondent. Having regard, however, to the fact that such raiyats possess in their lands a heritable and alienable interest of a permanent character, it would seem to be improper and mischievous to hold that the implied obligation, just referred to, is an incident [44] of their holdings, inasmuch as, on the one hand, it is not at all to the raiyat's interest to depart from the usual and regular course of good husbandry ; and on the other such a ruling might be utilized by landholders for improper ends and might lead to vexatious litigation on their part against raiyats whom they dislike. But it is not necessary to decide that point now. For, assuming that an obligation as aforesaid is an incident of the respondent's holding, there is not a tittle of evidence to prove that, in planting the trees, the respondent acted in a manner unwarranted by good husbandry. It would be quite unreasonable to hold that a tenant, who has been in the habit of raising one kind of crop for many years, by simply changing the crop does an unhusbandlike act. If authority were necessary for so plain a proposition, I would refer to Lord Chancellor Selborne's conclusion in the case already cited, to the effect that the mere fact of use in a particular manner for a considerable period of time without more is not enough to show that any other use would be contrary to the covenant "to manage, till, and use the lands "in a good husbandlike manner, and in due and regular course of good "husbandry, so that the same might not be in any way injured or dete-"riorated" (*Westropp* v. *Elligott* (1)). It may not be superfluous to add that, even if I were unaware of the fact that, in different parts of the country, notably in parts of Coimbatore, valuable topes of cocoanut and arecanut trees have been and are being grown on irrigated lands paying revenue to Government, I should decline to say that the planting of such trees on similar lands, held by raiyats in zamindari and inam villages, is *prima facie* opposed to good husbandry which is a relative term, since, in the words of Lord Ellenborough in *Legh* v. *Hewitt* (2), "what shall be "considered in farming, as good and husbandlike manner must vary "exceedingly according to soil, climate, and situation."

Lastly, does the respondent's act complained of amount to waste? It cannot be waste unless it has caused lasting or permanent injury to the appellant's right. The right to rent, which is the only tangible one that he now possesses, is obviously not affected in any way. On the contrary as the trees grow and the value of the land increases, the security for the rent would become better and better. It is quite true that if no trees had been [45] planted, but paddy or raggi continued to

(1) L.R., 9 App. Cas. 815 at p. 820 (832).

(2) 4 East, 154 at p. 159.

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be grown, the appellant would have been in a position to distrain crops of that description for any rent remaining unpaid when such crops are on the land; whereas, in the present altered condition of the land, there would be no crop on it to proceed against until the trees come to bearing. But suppose the respondent, instead of planting the trees, had merely allowed the land to remain uncultivated. In that case also the appellant would have found nothing on the land to distrain, and such an omission would have given him no legal ground for complaint. How then is he entitled to say that the absence of distrainable crops, in the case suggested on his behalf, is an injury to him? The only other argument put forward with reference to the present point, is even more unsubstantial than the one just dealt with. It may be that, if the respondent relinquishes the land at some future time and the appellant is then disposed to remove the trees, if any, then standing on the land, in order to grow paddy, &c., thereon, he would be put to a slight expense. But the contingency of any relinquishment of the land and of the removal of any of the trees is so very unlikely and the cost of the removal would be so trifling that, in my opinion, Courts would not be justified in accepting such circumstances to constitute, in point of law, any injury to the appellant and much less a lasting or permanent injury. I have consequently no hesitation in holding that the planting of the trees does not amount to waste. It is, therefore, unnecessary to consider the contention that, even if there was waste, relief should be refused to the appellant on the ground that the waste was, as it is called, meliorating or improving waste.

As to the authorities relied on behalf of the appellant, they are clearly distinguishable from the present. In *Lakshmana* v. *Ramachandra* (1), certain tenants from year to year were held disentitled to grow a mango grove on the land let. This was on the ground that such tenants were under the obligation to return the land in the condition in which it was when it was leased to them. In cases like that, it does not seem unfair on the part of the landlord to say that, as the tenant's interest was determinable on notice to quit, the planting of trees that would take years to grow would ordinarily not do any good to the tenant, whilst it [46] might prove to be a burden on the landlord who is most interested and therefore such trees ought not to be grown without his consent. The next case cited (*Kunhammed* v. *Narayanan Mussad* (2) is, in principle, similar to the decision just noticed. For, although the tenant, in the case in question, was not a tenant from year to year, yet he was one who had to surrender the land at the end of the customary kanom term of twelve years and under the instrument of kanom which created the tenancy, even earlier if the rent fell in arrear. The reasoning, rightly adopted, in that class of cases is quite inapplicable to cases such as the present since in this latter class, there is no obligation to surrender at all. In *Ramanathan* v. *Zamindar of Ramnad* (3) the raiyat, no doubt, possessed the same permanent interest which, the respondent possesses. But there, agricultural land was used as the site of a house built for non-agricultural purposes. Such an alteration the law prohibits because it is calculated to subject the landlord to risk and inconveniences pointed out by Lord Macnaghten in *Kehoe* v. *Marquess of Lansdowne* (4) and to which it is unjust to expose him. At page 466 of the report, his Lordship observed, "He (the Marquess) let an agricultural holding; he must take

(1) 10 M. 351.
(2) 12 M. 320.
(3) 16 M. 407.
(4) [1893] App. Cas. 451.

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"back a congested district. 'Oh,' said the leading Counsel for "the appellants, 'these cottages can be easily removed; they need "not subsist a day longer than anybody likes. They have only "'to be raised from the grounds and thrown aside.' Well, that "is a summary mode of eviction which would not, I should think, "commend itself to any landlord in Ireland, and which, I am sure, the "appellants themselves would hesitate to put in force. The learned "Counsel, who spoke second for the appeal, took a more practical view; "he admitted that if the land were returned to Lord Lansdowne with "these cottages upon it, he could only get rid of them by actions of eject-"ment. Everybody knows what that means—expense, delay and odium! "And all the time while the landlord was vindicating his rights, and pro-"bably for a very long time afterwards, the lands would lie idle and "unprofitable. To my mind, that is a grave injury as well as an imminent "danger." Between such a case and this, there is no similarity.

I therefore concur in dismissing the second appeal with costs.

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22 M. 47 = 2 Weir 430.

[47] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* SRI AHOBALAMATAM JEER.*
[1st December, 1898.]

Criminal Procedure Code—Act X *of* 1882, *Section* 350—*Transfer of Magistrate—Part—heard case.*

A Head Assistant Magistrate during the pendency of a criminal case, of which the trial was almost finished, was appointed to the office of Deputy Magistrate in another part of the same district. The case was transferred by an order of the District Magistrate to the file of the Deputy Magistrate:

Held, that the Deputy Magistrate could proceed with the trial from the point at which he had arrived as Head Assistant Magistrate.

[R., 3 A.L.J. 825 (827) = A.W.N. (1906) 201 = 4 Cr. L.J. 140.]

PETITION under Criminal Procedure Code, Section 526, praying the High Court to transfer calendar case No. 62 of 1897 on the file of the Special Deputy Magistrate of Salem to the file of the Head Assistant Magistrate of Tiruppattur.

The Head Assistant Magistrate of Tiruppattur, having almost completed the trial of a criminal case, was appointed to the office of Deputy Magistrate of Salem in the same district; and the case was, by the order of the District Magistrate, brought on to the file of the Court of the Deputy Magistrate. The accused applied to have the case transferred to the Court of the Head Assistant Magistrate on the ground that the Magistrate before whom it was pending would be compelled in his new capacity to begin the proceedings *de novo*.

Mr. *E. Norton*, for the petitioner.

The Public Prosecutor (Mr. *E. B. Powell*), *contra*.

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* Criminal Miscellaneous Petition No. 138 of 1898.

JUDGMENT.

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Mr. Norton urges the transfer solely on the ground that, if it is not made, the Magistrate Mr. Gopalasami Ayyar must, under Section 350, Criminal Procedure Code, commence the trial *de novo*, and that, as the case is now nearly completed, this will involve unnecessary expense to his client and delay in the disposal of the case. We are unable to see that there is any objection, either on legal or on any other grounds to **[48]** Mr. Gopalasami Ayyar, as Deputy Magistrate, proceeding with the case from the point at which he had arrived as Head Assistant Magistrate prior to his transfer to the post of Deputy Magistrate.

The present case is not provided for by Section 350, nor, as far as we know, by any other section of the Criminal Procedure Code, nor is there anything in that Code to prohibit the proposed procedure, and it is obviously convenient. There is no change of Magistrate, and consequently no reason for commencing the trial *de novo*. It is the same judicial mind that is brought to bear on the evidence throughout the case, and the Magistrate has the same magisterial powers, though his judicial designation and his local jurisdiction are changed. But the change of local jurisdiction does not matter since the want of local jurisdiction is cured by the special jurisdiction given by the order of the District Magistrate transferring the case.

The Calcutta case referred to by Mr. Norton (*The Queen* v. *Khan Mohomed* (1)) has no bearing on the present question, nor has the decision of the Full Bench of the Allahabad High Court (*Empress of India* v. *Anand Sarup* (2)). In the latter the Magistrate who completed the trial had been transferred to another district before he completed it, and there was no legal transfer of the case to him as a Magistrate of that district. He therefore had no jurisdiction.

The remarks of the Judges seem to imply that, had he remained in the same district, they would have regarded the verbal order of the District Magistrate, directing him to complete the trial as a sufficient transfer of the case and as an authority to proceed with the trial from the point at which he had arrived before his transfer to the other district. Such being our view of the law, there is no ground for the transfer applied for. We dismiss the petition.

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(1) 24 W.R. (Cr. R.) 53.

(2) 3 A. 563.

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Full Bench.

22 M. 49 (F.B.) = 8 M.L.J. 312.

22 M. 49 (F.B.) = 8 M.L.J. 312.

[49] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Subramania Ayyar, Mr. Justice Benson, and Mr. Justice Moore.

In appeal No. 9 of 1898 :—

Ramasami Nadan (*Plaintiff*), *Appellant v.* Ulaganatha Goundan and others (*Defendants*), *Respondents.*

In Appeal No. 22 *of* 1898 :—

Arunachala Goundan and another (*Defendants Nos.* 2 *and* 4), *Appellants v.* Ramasami Nadan (*Plaintiff*), *Respondent.**
[30th September and 4th, 14th, 17th, and 18th October and 4th November, 1898.]

Hindu Law—Son's liability for father's debts in lifetime of father—Suit against father and sons—Decree against sons.

A creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons.

Held, that the plaintiff could have prosecuted his claim against the sons in that suit, and have obtained a decree making their shares in the family property liable for the father's debt.

[R., 21 A. 301 (305) = 19 A.W.N. 79; 22 M. 166 (169); 23 M. 292 (296) (F.B.); 16 C.P.L.R. 19 (24); 9 Ind. Cas. 300 = 26 P.R. 1911 = 34 P.L.R. 1911 = 33 P.W.R. 1911; Cons., 4 Bom. L.R. 587 (593).]

Appeals against the decree of G. T. Mackenzie, District Judge of Coimbatore, in original suit No. 68 of 1896.

The facts of the case are stated sufficiently for the purpose of this report in the following order of reference to the Full Bench, which was made by Shephard, Offg. C.J., and Moore, J., before whom the appeals first came on for hearing.

Order of Reference to the Full Bench.

The defendants are the sons of one Tirumalai, who died on the 13th December 1893. At the time of his death two suits were pending in which the present plaintiff charged Tirumalai as the executant of certain bonds and sought to make his sons also liable on the ground that the bonds were executed by the father for the family benefit. On the 8th January 1894, the fact of Tirumalai's death not having [50] been notified to the District Munsif, judgment was given against Tirumalai, but as regards the defendants the suits were dismissed.

The question now raised is whether it is open to the plaintiff to bring a second suit against the defendants. If the decision in *Natasayyan* v. *Ponnusami* (1) is right, there seems to be no doubt that the present suit is maintainable, for it was there held that the claim to enforce the obligation of sons under Hindu Law gives a cause of action arising only on the death of the father, and that case was approved, certainly not disapproved, in *Ramayya* v. *Venkataratnam* (2). It seems to us extremely doubtful whether this decision can be supported, and the point is one of general

* Appeals Nos. 9 and 22 of 1898.

(1) 16 M. 99. (2) 17 M. 122.

importance. In the particular case cited the point was one of limitation, and it was held that the creditor's suit against the son was governed by Article 120 of the schedule to the Limitation Act, the time being counted from the date of the father's death. At the same time it is observed in the judgment that the creditor might, if he chose, bring a suit during the father's life-time to establish his right against the son (see page 102). This observation is difficult to reconcile with the conclusion at which the Court arrived. But it is cretainly correct to this extent that a creditor may, when suing the father for a debt, also obtain a declaration as against the sons that the debt is of such a kind as to make their shares of the property responsible for it. It seems impossible to say that such a suit may not be brought in order to anticipate any objection which the sons might otherwise raise on the occasion of effect being given to an order for sale of the property. If it is right to say that such a suit may be brought, it is but a short step to say that a decree may be obtained against the sons which can itself be executed against their property. It is certainly desirable that all the questions between the creditor and his debtor and the debtor's sons should be raised and determined in one suit.

The precise question we wish to refer is :—

Whether the plaintiff could, in the suits 160 and 324 of 1893, have prosecuted the claim against the sons of Tirumalai and have obtained a decree making their shares in the family property liable for Tirumalai's debt ?

[51] The case then came on for hearing before the Full Bench constituted as above.

V. Krishnasami Ayyar, for appellant in appeal No. 9 of 1898.

Sivasami Ayyar, for respondent No. 2.

Hon. *Bhashyam Ayyangar* and *Sivasami Ayyar*, for appellants in appeal No. 22 of 1898.

V. Krishnasami Ayyar and *R. A. Krishnasami Ayyar*, for respondent.

Bhashyam Ayyangar, for defendant No. 4.—The question is whether there is a cause of action against the son before the father's death. For a debt contracted by the father for a purpose not illegal or immoral the son is liable to be sued, the debt being recoverable out of the joint family property of father and son and the other property of the father. In regard to such debts, the British Courts under Civil Courts Act, Section 16, enforce the liability arising under Hindu Law to this extent only, and hold that the debt is not payable out of the son's self-acquired property. Under Hindu Law, the son was liable to pay the father's debt as his own—this obligation is not enforced under Civil Courts Act, Section 16. In Madras before *Girdharee Lall* v. *Kantoo Lall* (1), it was supposed that this obligation only began on the death of the father who therefore could not alienate *inter vivos* as against the son unless it was for a family purpose. The Privy Council laid down the true rule and the obligation of the son as such to pay a debt of his father (apart from all questions of agency) is the same whether or not the debt was incurred for family necessity, provided it was not illegal or immoral. The debt cannot be recovered from the son personally, but against joint family property. A plaint against the father and son should aver that the debt was incurred for a purpose not illegal or immoral, the son may say it is immoral and would have the *onus* of

(1) 1 I.A. 321 (330.)

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proving it; it is a suit on a contract against a person not a party to it. If the debt is proved to be immoral, the plaint should be amended accordingly and the son's name should be removed from the record. The cause of action is the character of the debt. If the plaintiff succeeded in full, the decree would be (1) against father personally and (2) against the joint family property. But the plaintiff is not bound to sue the son; he can get a decree against the father, attach family property and sell; [52] but the sale will have no greater effect than that of a private alienation by father to discharge his debt. The son would not be bound and can deny the debt or assert its immorality and recover his share of the property brought to sale. But the plaintiff is prudent to join the son in order to have the decree in the form I have suggested. On one cause of action against several defendants, different reliefs may be got against them. It is so in such a case as the present.—X sues A and B on B's contract; when the law allows such a suit to be brought the relief against A need not be the same as against B. Compare the case of a suit against a legal representative of a deceased debtor, in which case, though the legal representative is sued on the same cause of action, his liability is limited to assets derived from the deceased. If the plaintiff does not get such a decree, but only one against the father, I do not say he cannot sue the sons, but he executes the decree against the father, or against his property in the hands of the sons as legal representatives. If he wants another decree and sues the son the suit is on the same cause of action. The cause of action against the sons exists against them in the father's lifetime. See *Girdharee Lall* v. *Kantoo Lall* (1) and *Ponnappa Pillai* v. *Pappuvayyangar*(2). The obligation to be enforced is incidental to the heritage and so attaches in the father's lifetime. See *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3), where the Privy Council made it clear that *Girdharee Lall* v. *Kantoo Lall*(1) was applicable in Madras. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (4) the law is elaborated and explained. *Mussamut Nanomi Babuasin* v. *Modun Mohun* (5) points out the distinction between the question of the liability of the entire estate and the question of the sons being bound by proceedings against the father, and it is shown that the creditor could, by joining the sons, show that he wished to proceed against the whole estate, though the sons could show the debts to be illegal. See *Laljee Sahoy* v. *Fakeer Chand* (6) as to which it must be noticed that the Madras Court allows a coparcener to alienate his share, but that does not affect this case where only a money decree is in question. *Laljee Sahoy* v. *Fakeer Chand* (6) was [53] a mortgage case, but as against the sons that was immaterial. See *Luchman Das* v. *Giridhur Chowdhry* (7); *Gunga Prasad* v. *Ajudhia Pershad Singh* (8); where the form of decree is discussed at pages 136, 137; *Kalilul Rahman* v. *Gobind Pershad* (9); *Badri Prasad* v. *Madan Lal* (10); *Kunhali Beari* v. *Keshava Shanbaga* (11) where Muttusami Ayyar, J., had to change his mind after the case of *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3) had been decided in Privy Council. When a decree is passed against a father and the whole estate in the property is attached, the sons ordinarily put in claims under Civil Procedure Code, and sometimes though erroneously their shares are released under Civil

(1) 1 I.A. 321 (330.) (2) 4 M. 1 (64, 71.) (3) 9 I.A. 128=6 M. 1 (16.)
(4) 6 I.A. 88 (106)=5 C. 148. (5) 13 I.A. 1=13 C. 21.
(6) 6 C. 135. (7) 5 C. 855. (8) 8 C. 131.
(9) 20 C. 328. (10) 15 A. 75. (11) 11 M. 64 (75).

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Procedure Code, Section 278. Really all should be sold in view of the extensive powers of the father, and the sons should not be allowed to object to the execution, but should be left to sue. *Sami Ayyangar* v. *Ponnammal* (1) which accords with *Kunhali Beari* v. *Keshava Shanbaga* (2) is the latest case—the sons were parties and the decree as a money decree bound them because the debt was not proved illegal, but the mortgage as such was not binding. *Umed Hathisingh* v. *Goman Bhaiji*(3) is against the Madras view as to the effect of such a decree and its execution against the sons as legal representatives. [SHEPHARD, J.—That seems to be beside the point.] The view of the Bombay Judges is erroneous; it would no doubt prevent a second suit, but to allow the nature of the debt to be gone into in execution must be wrong. The distinction between debts binding against the father and the son and debts binding against the father only is very slight; practically almost all debts not binding against the sons are not binding against the father either. In *Natasayyan* v. *Ponnusami* (4) the question of limitation was raised, and the Judges said (*quære* whether *obiter*) the time runs from the death of the father. It cannot be so any more than in the case of a suit against a representative on the death of the debtor. We must clearly go back to original obligation. [SUBRAMANIA AYYAR, J.—That view assumes the son is a representative.] I only use that as illustrative. Another illustration is the case of a husband **[54]** who was sued in England for ante-nuptial debts of his wife (*Beck* v. *Pierce* (5)). Under the common law the husband was liable without assets, as was the case here in Hindu Law, before the English Courts began to enforce this pious duty only in connection with property and succession thereto. See Civil Courts Act, Section 16. [SUBRAMANIA AYYAR, J.—If a creditor gets a decree on a bond against the father and executes it and sells the whole estate, and the purchaser seeks a declaration that an after-born son is liable, from what date does limitation run ?] It would be six years from the date when he is interested to deny that his interest is bound. That is not a suit to enforce the obligation. Moreover under Specific Relief Act, Section 42, such a suit for declaration would not lie; however the point is that that would not be a suit to enforce the obligation. So the question when the obligation arose would be immaterial. [SUBRAMANIA AYYAR, J.—If in such a case the father dies before execution what is the creditor to do ?] He cannot execute against the son, but can sue to recover the unrecovered part of the debt from the sons. The father and sons are not jointly liable as joint debtors; but the obligation is the same. In *Natasayyan* v. *Ponnusami* (4) the decree was against the father, the decree-holder sought to execute against sons who objected that the property was not liable to be attached, and the decree-holder was referred to a regular suit against the sons. The decree-holder sued and got a decree that the property was liable. [SHEPHARD, J.—The question of limitation is the only question relevant now.] My contention in arguing that case was it should be regarded in some sense as a suit on the judgment, and that for that reason the suit was not barred, not because the obligation does not arise until the death of the father. The Judges say, however, the obligation does not arise on the father's death. But they say on the limitation question that as the right to sue does not arise till the father's death, the period of limitation does not run till then. That is clearly illogical. It

(1) 21 M. 28. (2) 11 M. 64 (75). (3) 20 B. 385.
(4) 16 M. 99. (5) L.R. 23 Q.B.D. 316.

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must be noted that as against the son the creditor could get exactly the same relief before or after the father's death. In cases falling under Section 244, Code of Civil Procedure, a suit cannot be brought on a judgment as it can be in England ; and where a suit can be [55] brought on a judgment against the son as such, it would be open to him to show that the decree debt was illegal and immoral. See *Muthumadeva Naik* v. *Sevattamuthumadeva Naik* (1), as to the analogy from *res judicata* under the old law when it was lawful to bring two suits for the same relief on different causes of action—asserting the same right on different grounds was disallowed. See also *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (2) and *Arunachalam Chetty* v. *Meyyappa Chetty* (3). The closest parallel is the English law as to ante-nuptial debts. The husband was liable personally under the common law apart from the question of his getting any property with his wife ; then his liability was limited by statute to the property that came with her and under the Married Woman's Property Act the wife remains liable in respect of ante-nuptial debts to the extent of her separate property. In *Beck* v. *Pierce* (4) part of the plaintiff's work was done more than six years from date of suit. *First*, it was held that *King* v. *Hoare* (5) was inapplicable, because the liability was not joint (nor is the liability of son here joint with the father). *Secondly*, that the suit was barred in respect of all work done six years before suit. After B becomes liable on A's contract his position as defendant is just the same as it would be, if he had been a party to the contract throughout. This is an analogy, but the Hindu son's position is not the same in all respects as that of an English husband. No suit could be brought against the son alone in the father's lifetime for the latter's debt, because the son during the father's lifetime has no power to sell joint family property except to the extent of his individual share, *i.e.*, the interest of the whole family in the property to pay the father's debt which may be binding on all the sons, and the creditor cannot do by suit what the judgment-debtor cannot do. [Shephard, J.—What do you say the accurate form of decree would be in a suit against father and son on father's debt ?] Decree against father personally and in default of payment by father or son, the same be recoverable out of the joint family property of first and second defendants—just like a decree against assets in the hands of an executor. No declaration of charge or anything else of the sort is necessary. Nor is there any need to fix a time. If the debt [56] is proved to be illegal or immoral, then declare the debt does not bind the son, amend the plaint and give a decree against the father alone. [Subramania Ayyar, J.—Why not merely a decree against the father personally and declare the debt is binding on the son ?] That would be inadequate. The son is joined because a remedy is wanted against him. [Subramania Ayyar, J.—It is unnecessary to mention the fund against which the decree can be executed. It is not done in an ordinary suit for debt.] The sale in execution must be one expressly authorized by the decree, otherwise the execution purchaser would not be safe against the sons, who might allege their interest had not passed. The creditor wants more than a bare declaration against the son but actual substantial relief. Under the Privy Council decision in *Deendyal Lal* v. *Jugdeep Narain Singh* (6) the son can be sued with the father on the father's covenant on a mortgage. To summarize. The son was, under Hindu law, liable

(1) 7 M.H.C.R. 160. (2) 20 C. 79. (3) 21 M. 91.
(4) L.R. 23 Q.B.D. 316. (5) 13 M. & W. 494. (6) 3 C. 198 (204.)

for father's debt like his own after his father's death. [Sometimes also in his lifetime (*e.g.*, when he had gone to live abroad, &c.).] But British Courts enforce the son's obligation only to a limited degree by reason of the son's succession as joint owner by birth with the father to the entire joint family property by survivorship on the death of the father. [SUBRAMANIA AYYAR, J.—Under Hindu Law the absolute liability could not ordinarily arise till father's death. Has that been abrogated or maintained subject to limitations ?] Absolute obligation is not recognized. Justice, equity and good conscience does not warrant the enforcement of the father's debt against the son as his own personal debt. The whole Hindu Law is not enforced by English Courts as binding, but only so much of it as relates to marriage, inheritance and succession which is applicable as much to succession by birth as by survivorship. Therefore till *Girdharee Lall* v. *Kantoo Lall* (1) the Courts enforced the obligation only against joint family property after father's death. The next step was inasmuch as all is liable after father's death it was held to follow logically that the son cannot question the father's alienation, *inter vivos*, which prevents the liability arising later. This is in exact accord with Hindu Law apart from the judicial and legislative changes. The son could not interfere if the father himself sold to save himself from the effects of sin which the son would have been **[57]** afterwards personally bound to obviate. The next step is the joinder of the sons in suits against father. See *Ponnappa Pillai* v. *Pappuvayyangar* (2), per TURNER, C.J. [SHEPHARD, J.—Turner, C.J., says personal obligation. Is that right ?] Not "purely personal." [SUBRAMANIA AYYAR, J.—Then the decree you propose is wrong ; you do not propose a personal decree against the son.] It follows that the obligation of the son arises before his father's death, and the son's obligation then is, not to interdict the alienation discharging the debt. So limitation runs from the time when the obligation begins.

Krishnasami Ayyar contra.—Can a suit be brought against father and son to recover the debt ? I answer no. There is no authority to the contrary (mortgage cases being distinguishable) in spite of the long time since *Girdharee Lall* v. *Kantoo Lall* (1). On the texts, sons are under no obligation to pay debts of father out of joint estate during the father's lifetime except when the father is civilly dead and in other especially excepted cases. Civil Courts Act, Section 16, allows portions of Hindu Law other than those specified to be administered, and they are administered by the Courts as being in accord with equity and good conscience. (SUBRAMANIA AYYAR, J.—You say that on a simple bond no suit can be brought against father and sons.] I say so ; there is no case in the reports allowing that course and there is authority to the contrary. The Privy Council cases are to be taken with the texts :—(1) Volume VII, Sacred Books of the East, page 44, Vishnu, Chapter VI, sloka 27 ; (2) Volume XXXIII, Sacred Books of the East, page 41, Narada, sloka 2 ; (3) Volume XXXIII, Sacred Books of the East, page 328, Vrihaspati, Chapter XI, slokas 47, 48 ; (4) Volume II, Sacred Books of the East, page 241, Gautama, Chapter XII, slokas 40, 41 ; (5) Volume XXV, Sacred Books of the East, page 282, Manu, Chapter VIII, slokas 158—166 ; (6) Volume XIV, Sacred Books of the East, page 82, Vasishta, Chapter XVI, sloka 31 ; (7) Macnaghten and Colebrooke's Translation of the Mitakshara, page 109, Chapter VI, sloka 50. None of these writers make the sons liable before the father's death. [SUBRAMANIA AYYAR, J.—In cases of partition, would not sons be so

(1) 1 I.A. 321. (2) 4 M. 1 (64).

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liable?] No, because t is not said so, though the [58] Mitakshara at any rate treats fully both of partition and of the son's liability for the father's debts. With the texts already cited must be taken :—(1) Mandilk's Translation of Vyavahara Mayukha, Part II, pages 112, 113; (2) Volume I of Colebrooke's Digest of Hindu Law, 4th edition, pages 183, 184, 186, 187, and pages 193, 198. [SUBRAMANIA AYYAR, J.—Do they not assume that the father has such full and complete control of ownership over the family property that the present question could not arise?] They do not assume that, for they declare the son's liability subject to certain limitations stating the exceptional cases in which it arises in the lifetime of the father. West and Buhler's Hindu Law, 3rd edition, page 642. Sons must discharge the father's debt. The estate taken by a son is liable, but none of the commentators say that the son is liable during the father's lifetime, even if the debts be incurred for the benefit of the family. [SUBRAMANIA AYYAR, J.—Then no suit cannot be brought during the father's life-time for a son's debt. SHEPHARD, J.—It is quite clear his interests can be jeopardised; it is only a question of when this may occur.] The liability of the son should not and cannot be enlarged. If a creditor could sue both father and son, there would have been boundless cases so framed. [SHEPHARD, J.—Such cases have been brought in this Court.] Only in cases when the debt is contracted for a family purpose. The observations in *Laljee Sahoy* v. *Fakeer Chand* (1) go too far. [SHEPHARD, J.—That case shows it is a common thing to join father and son.] In the case of *Sami Ayyangar* v. *Ponnammal* (2) the point was not argued. Where the cause of action against the father and son is the same, where you bring a suit against the father, you cannot bring a second suit against the son. In *Gurusami* v. *Chinna Mannar* (3), it was held a second suit could not be brought against the son, because the cause of action was the same—*vide* observations of Muttusami Ayyar, J., at page 46. The force of this is great, for it is to be remembered that this followed the case of *Ponnappa Pillai* v. *Pappuvayyangar* (4). If the cause of action against both the father and son is the same, only one suit can be brought. *Narasinga* v. *Subba* (5) is the only case where, upon a bond executed by a father, a suit was brought against him and his sons; the sons [59] were exonerated from liability. [SHEPHARD, J.—The only question then was whether a second appeal lies.] I submit the Divisional Bench considered the question of son's liability. See as to the applicability of *King* v. *Hoare* (6), and the general question as to whether the obligation is joint, *Hanumantha* v. *Hanumayya* (7), *Gurusami* v. *Chinna Mannar* (3), *Arunachala* v. *Zamindar of Sivagiri* (8), and *Venkatarama* v. *Senthivelu* (9) follow *Hanumanta* v. *Hanumayya* (7). *Arunachala* v. *Zamindar of Sivagiri* (8) is in accord with the doctrine established by these cases. *Natasayyan* v. *Ponnusami* (10) and *Jamna* v. *Nain Sukh* (11) recognized the distinction I contend for between cases of suits against the sons themselves and suits (at page 494) where sons come in to get relief against a sale in execution of a decree against father and it explained *Luchmun Dass* v. *Giridhury Chowdhry* (12) and *Gunga Prosad* v. *Ajudhia Pershad Singh* (13). In cases of mortgage it is of vital importance to determine whether there is an antecedent debt

(1) 6 C. 135 (138).
(2) 21 M. 28.
(3) 5 M. 37.
(4) 4 M. 1 (38).
(5) 12 M. 139.
(6) 13 M. & W. 494.
(7) 5 M. 232.
(8) 7 M. 328.
(9) 13 M. 265.
(10) 16 M. 99.
(11) 9 A. 493.
(12) 5 C. 855.
(13) 8 C. 131.

or not; see in addition to the cases already cited *Sami Ayyangar* v. *Ponnammal* (1). In *Laljee Sahoy* v. *Fakeer Chand* (2) the Judge's observations go very far, but the facts were simple and the case clear and does not touch the present point. *Khalilul Rahman* v. *Gobind Pershad* (3) employing the word antecedent with relation to the suit is wrong; there must be a debt in all cases before suit. The Privy Council cannot be taken to have employed the expression in that sense. As to *Deendyal Lal* v. *Jugdeep Narain Singh* (4), the debt was a family debt; it was like *Hanumantha* v. *Hanumayya* (5) and does not touch the present point. It does not show a suit for a father's personal debt can be brought against father and sons. [SUBRAMANIA AYYAR, J.—It does not show that such a suit will not lie.] The Privy Council's use of the word pious indicates the obligation to pay a father's debt (resting on the theory of releasing father from sin) does not arise till his death. *Mussamat Nanomi Babuasin* v. *Modun Mohun* (6) is a case like *Luchmun Dass* v. *Giridhur Chowdhry* (7). The next **[60]** question is limitation. It is argued limitation runs from the date of the debt even if sons not liable till the death. But the question is covered by authority. *Beck* v. *Pierce* (8) is distinguishable on the facts and the analogy is not perfect on the question of law. [SHEPHARD, J.—As far as limitation is concerned the son's position is worsened, if the cause of action did not arise till the death of the father —a longer period and a later starting point. Will a suit lie against father and son in the father's lifetime—that is the substantial question.] Put the case of a money decree against the father followed by a partition and an application to execute against the son's shares. On the position taken up by the other side he could not do so, but this is clearly wrong and shows how radically wrong that position is. [SHEPHARD, J.—Take this case: debts incurred by father, partition; no provision for payments of debts; then the father dies. Whose property is liable?] My contention is the father's property alone is liable. Only one liability exists under Hindu Law, *viz.*, that arising after the father's death. The causes of auction against father and son are distinct. One cause of action arises in the father's lifetime, and the other only after his death. It would be really a misjoinder of causes of action. If it were a joint cause of action, *King* v. *Hoare* (9) would preclude a separate suit, but *Gurusami* v. *Chinna Mannar* (10) shows a separate suit is maintainable. *Badri Prasád* v. *Madan Lal* (11) is immaterial here, because it is exactly covered by the Privy Council decision. The only case exactly in point is *Narasinga* v. *Subba* (12) which is not shaken. The question whether the father has been sued to judgment or not is immaterial (*Krishnasami Ayyangar* v. *Vedanta Chari*(13)).

JUDGMENT.

SHEPHARD, OFFG. C.J.—The question referred appears to me in itself a very simple one when once the true nature of a son's obligation under Hindu Law is understood. The reference was rendered necessary by the decision in *Natasayyan* v. *Ponnusami* (14), which has apparently been approved in later cases. There are, moreover, dicta in the reports to the effect that the son's liability under Hindu Law in respect of the

(1) 21 M. 28. (2) 6 C. 135 (133). (3) 20 C. 328.
(4) 3 C. 198 (204). (5) 5 M. 232. (6) 13 I. A. 1=13 C. 21.
(7) 5 C. 855. (8) L.R. 23 Q.B.D. 316. (9) 13 M. & W. 494.
(10) 5 M. 37. (11) 15 A. 75. (12) 12 M. 139.
(13) Second Appeal No. 1650 of 1891 (unreported). (14) 16 M. 99.

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father's debts arises only on [61] the death of the father. The question is whether that opinion can be reconciled with the doctrine of the son's liability which has been developed in a series of cases beginning with *Hanoomanpersaud Panday* v. *Mussumat Babosee Munraj Koonweree* (1) in 1856. Referring to that case in 1874 the Judicial Committee say:—"That "is an authority to show that ancestral property which descends to a father "under the Mitakshara law is not exempted from liability to pay his debts, "because a son is born to him. It would be a pious duty on the part of the "son to pay his father's debts, and it being the pious duty of the son to pay "his father's debts, the ancestral property, in which the son as the son of "his father acquires an interest by birth, is liable to the father's debts" (*Girdharee Lall* v. *Kantoo Lall* (2)). Since 1874, the decisions of the Judicial Committee are consistent in holding that as the son's liability may be enforced through the medium of a sale of the ancestral property executed by the father, so it may be enforced by a sale in execution of a decree against the father and that in neither case can the son recover the property except by proving that the debts were of a kind for which he would not be liable (*Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3)). As regards both of the two points involved in this proposition there was considerable reluctance on the part of this Court to abandon their former view and to adopt that enunciated by the Judicial Committee. In the Sivagiri case (1880) (*Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (4)) this Court held that although there was a pious duty binding the son to pay his father's debts, the duty was not a legal one unless it were shown that the debt was incurred for the benefit of the family. This decision was overruled by the Judicial Committee and so the legal obligation of the son to pay his father's debts was distinctly declared for this Presidency.

On the other point, *viz.*, the operation of a decree against the son of a Hindu judgment-debtor, not made a party to the suit, this Court was also unwilling to adopt the view which favoured the interest of the creditor. This point arose alike in cases in which there was a decree against the father and in cases in which it was sought to use the decree against members of the family not [62] being sons of the judgment-debtor (*Ponnappa Pillai* v. *Pappuvayyangar* (5), *Sivasankara Mudali* v. *Parvati Anni* (6), *Gurusami* v. *Chinna Mannar* (7), and *Subramanian* v. *Subramanian* (8)). For both cases alike, the Judicial Committee has authoritatively declared the law. Although the decree may have been passed against the father or the manager of the family only, the son or the other members of the family are not at liberty to challenge the consequent sale except by questioning the existence or nature of the debt (*Mussamut Nanomi Babuasin* v. *Modun Mohun* (9) and *Daulat Ram* v. *Mehr Chand* (10). In the matter of proof there is undoubtedly a distinction between the two cases,—against the son the creditor has to make a negative allegation while against other members of the family he has to assert that the debt was incurred by the manager for their benefit. In other respects, as it appears to me, the two kinds of claim stand on the same footing. In either case the creditor is seeking to do through the Court what the father or manager who has incurred the debt could lawfully do for

(1) 6 M.I.A. 393. (2) 1 I.A. 321 (331). (3) 6 I.A. 88=5 C. 148 (169).
(4) 9 I.A. 128=6 M. 1. (5) 4 M. 1 (38). (6) 4 M. 96.
(7) 5 M. 37. (8) 5 M. 125. (9) 13 I.A. 1=13 C. 21.
(10) 15 C. 70 (81).

himself. The same form of decree would serve in both cases. The decree after stating the sum due should declare that the debt is binding on the defendant who, as father or manager, incurred it and on the other defendants as members of an undivided Hindu family and should then direct payment of the same by the father or manager in the ordinary way and, as to the other defendants, should direct payment by them out of the ancestral property of the said family.* It is argued that, notwithstanding the operation which may be given to a decree against the father, there is no cause of action against the son during the father's lifetime, because under Hindu Law the liability to pay the debt arises only after his death, and texts of Hindu Law are cited in support of the argument. But when in effect it is conceded that the qualified obligation of the son may be enforced in the only way possible during the father's lifetime, this contention is, in my opinion, wholly unsustainable. For no apparent reason a distinction must be made between the two cases above mentioned. Against the members of the family along with the manager the creditor may bring a suit founding his claim against the manager on the contract, and against the others on [63] the rule of law making the ancestral property liable for debts properly incurred by the manager. In that case all the questions which can arise between the creditor and the family may be decided in one suit to which they are all parties, and, according to the view formerly taken, that was the only proper way for bringing such questions to decision. But as against the son, it is said that the creditor's cause of action does not arise until the father dies; and then it is said the cause of action is not founded on the contract with the father, and therefore as regards the law of limitation both the starting point and the period are different from what they are in the father's case. This was the point apparently decided in *Natasayyan* v. *Ponnusami* (1). In the judgment in that case the contention that a son's obligation arises only on the father's death was overruled, and it is not denied that a suit may be brought against the sons in the lifetime of their father. The suggestion, as I understand, is that there may be a declaratory suit against the son combined with the claim against the father, or the creditor may wait till the father has died and then get an executable decree against the son. The reasoning of the judgment I am unable to follow. In my opinion it is a mistake to say that a creditor wants a declaratory decree against the debtor's son. The decree which he requires and to which he is entitled is, as I have said, precisely the same decree as that which he can, on proper proof, obtain against other members of the family. The fact that such a decree may be obtained means that the son is subject to a present obligation, and if there is such an obligation, it cannot be said that there is not a cause of action.

For these reasons I answer the question in the affirmative.

SUBRAMANIA AYYAR, J.—For the purposes of the present reference it is not quite necessary to enter into the history of the general question of a Hindu son's liability in respect of his father's debt discussed with much learning in the elaborate judgments delivered in *Ponnappa Pillai* v. *Pappuvayyangar* (2). Nor do I consider it necessary to deal with the points incidentally raised in the argument before us. I shall, therefore, confine myself to the sole question referred, which, notwithstanding what

* [Compare judgment against married women, page 75, Annual Practice, 1896.—ED.]

(1) 16 M. 99.

(2) 4 M. 1.

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was strongly urged on behalf of the respondent, seems to be scarcely arguable from the point of view suggested for him. The argument on his behalf to [64] the effect that the Hindu Law does not recognise any liability on the part of a son with respect to his father's personal debt, not secured by a mortgage of their joint property, so as to entitle the creditor to sue the sons in the father's lifetime, was rested, if I am not mistaken, on the circumstance that, while numerous direct and distinct statements are to be found in the smritis and the commentaries as to a son's (now obsolete) liability independent of assets, no similar statement is to be found in those works as to the existence of the liability now in question. This absence of express authority on the matter in the Hindu treatises of the class mentioned is, however, in my opinion, quite explicable consistently with the view that such liability was nevertheless recognised by the old Hindu Law. Now attachment and sale of family lands for debt are among the peculiar features of British Judicature and are creatures of modern legislation, such remedies having been entirely unknown to the indigenous system of law. The chapter of the Mitakshara "on the administration of justice," so far as one can ascertain from Macnaghten's translation, make no allusion at all to remedies of that description, and it may be taken that no other early Hindu treatises on law provide for such remedies, considering that West and Buhler in their Digest say that "nowhere amongst the provisions of the Hindu Law "for enforcing payment of debts is such a process as the attachment and "sale of the lands of a family mentioned" (page 649). Again the rule that a son is not estopped by adjudications in judicial proceedings to which his father is a party, but he himself is not (now generally enforced strictly), was apparently not so enforced according to the Hindu system, under which the representative character of a father appears to have been admitted to a much greater extent than our Courts are disposed to allow at the present day. For, a suit by a father alone with reference to what concerns the family can now be objected to successfully on the ground of non-joinder of the sons, whereas, such an objection was clearly untenable in the days of the commentators as will be seen by what Vijnaneswara says when treating of a plaint or declaration. He there points out that "the term plaintiff or complainant includes the sons and "grandsons of those persons, their interest being equally involved" (Mitakshara, Chapter I, Section IV, 13, Macnaghten and Colebrooke's translation, page 19). When such a state of things prevailed, questions like those which so frequently crop up since the decision of the Judicial [65] Committee in *Girdharee Lall* v. *Kantoo Lall*(1), with reference to the effect of decrees obtained by a creditor against a father and of the attachment and sale thereunder upon the rights of the judgment-debtor's sons, could not possibly have arisen when the smritis or the commentaries were written. And it seems to me that is why no rules bearing on such questions are propounded in those works. Moreover, notwithstanding the recognition of the equal right of coparceners inclusive of sons in the family property, the position of a manager in a family appears to have been in those early days one of such trust and responsibility that even with regard to debts unquestionably binding on all the members of an undivided family consisting of brothers, the books speak as if the duty of meeting those obligations lay, not on all the coparceners as it really did, but on the managing member alone. In support of this statement I may quote from that

(1) 1 I.A. 321.

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portion of the Mitakshara which relates to the topic of "Debts payable by "whom and when" the following passage:—"(In the text under considera- "tion) the plural number has been used as 'sons or son's sons'; "consequently if there are many sons if divided, they must pay the debt, "according to their respective shares. It appears from this, that if they "are undivided, and have joint concern, he, amongst them who is the head or chief, is bound to pay." (Mitakshara, Chapter VI, Section III, 18.) When such was the view in regard to a brother in management, it is easy to understand why old Hindu writers, in dealing with the law as to payment of debts in the father's lifetime, do not expressly refer to the sons except where that natural and pre-eminent head of a family is unwilling or incapacitated to perform the functions incident to his position. The point will be rendered still clearer when we consider the ground on which payment of debt is enforced. The duty of paying one's debts was perhaps never more impressively laid down than it was by the smirits and the commentaries. The duty is sought to be enforced not only as a legal and moral duty, but also as a religious duty, it being laid down that one dying indebted must undergo pains and penalties in his *post mortem* existence and even in future births. It is to extricate the father from continuing to suffer from such evils that the son was, after the former's death, compelled by that law to pay his debts notwithstanding that [66] he left no assets. How then can it, with any show of reason, be maintained that there was under that law, as it stood before the British rule, no liability on the part of the son, even when he is possessed of assets, because the father is alive? Such a contention must have appeared very strange to legislators and lawyers who admitted that even in the lifetime of a father his creditor was legally entitled to arrest the son and detain him in order to put pressure on the father to pay up the debt as will be seen from a text of Vrihaspati quoted by commentators, where it is stated:—"When a debtor is forced to pay his debt by the tying of his "son, wife, and cattle, and by the doorway being obstructed (by the "creditor), then is acharitam (confinement) said to be used" (see *e.g.*, Vyavahara Mayukha, Chapter V, Section IV, 1-4, Mandlik's Hindu Law, page 109; see also Colebrooke's, Jagannatha's Digest, CCXXXIX, Higginbotham's Edition, Volume I, page 233).

No doubt owing to the facility now unavoidably afforded to an unscrupulous person, whether he be a creditor of one who is undivided, or an undivided member who is concerned in the payment of a debt, to commit fraud through the machinery of the Courts, the question of the liability of a son in respect of his father's debts, in so far as the former's interest in the joint estate is concerned, has become one of great practical importance. But that was not the case, as already stated, in times when involuntary alienation of family lands by attachment and sale was unknown; and a point like the one we are considering naturally enough called for no notice at the hands of the lawyers and legislators of those times, and was therefore not discussed or provided for by them.

Be this as it may, it is impossible to hold under the law, as it stands established by the repeated decisions of the ultimate Court of Appeal, that a creditor suing a Hindu for his personal debt is not entitled to include, as defendants in the suit, debtor's sons. For, in cases like the present, the sons, as persons likely to be affected by proceedings taken against their father, have an undoubted right to raise questions as to the existence or the character of the debt, notwithstanding any decree passed against the

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father without the sons having been made parties, and to raise such questions during the lifetime of the father. How could the other party, concerned in the trial thereof, be held to be precluded from calling upon his adversary in the matter to raise any objection he wishes to urge against the creditor's claim to recover his debt [67] even against the adversary's share of the estate, so as to guard against further litigation which might arise and very often does arise if a decree is obtained against the father alone, and to render impossible the doubt, uncertainty, and trouble, which generally attend an execution sale under such a decree? For the due protection of the rights of the class of creditors and debtors under consideration, and on the general principle that all persons having any interest in the subject of litigation may be made parties, it must be held that a creditor, in the position of the appellants, is entitled to make the sons defendants in a suit for the father's debt, even when it has not been incurred for the benefit of the family or has not been secured by a mortgage of the joint estate.

The answer to the question referred is in the affirmative.

BENSON, J.—I am of opinion that the question referred to us must be answered in the affirmative.

However reluctant this Court may have been to admit to the fullest extent the liability of a Hindu son's interest in the joint family property for a personal debt incurred by his father, it must be conceded that that liability has been established by a series of decisions of the Privy Council by which we are bound.

Speaking broadly the father may himself alienate the property in order to satisfy such a debt, or the creditor may obtain a decree against the father, and, in execution of it, he may by proper steps bring the whole family property to sale, and the son can resist such alienations if he can show that the alleged debt had no existence or was incurred for "an illegal or immoral purpose" in the technical sense in which those words are understood in the law books; but otherwise the alienations will bind the son's interest, even though he has not joined in the sale or been a party to the suit, or execution proceedings (*Girdharee Lall* v. *Kantoo Lall* (1), *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (2), *Muttayam Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3), and *Mussamut Nanomi Babuasin* v. *Modun Mohun* (4)). Such a suit therefore affects, or may affect, the son's interest, and the son, if not made a party to it, may, in the execution proceedings thereon, or in a subsequent suit even in the lifetime of the father, question the existence or binding character of the debt. It follows that the [68] creditor suing the father, in a case like the present, may, and in fact ought to, join the sons whose interest he intends to bind, and thus obtain a determination of the whole question in one suit, rather than leave the liability of their interests to be determined in subsequent litigation.

This view is in no way repugnant to the principles of Hindu Law, but is in accordance with them as shown in the judgment of my learned colleague Mr. Justice Subramania Ayyar, with whom I concur.

MOORE, J.—I concur with Mr. Justice Subramania Ayyar in holding that a creditor suing a Hindu for a personal debt is entitled to include as defendants in the suit the debtor's sons, and therefore return an affirmative answer to the question referred to the Full Bench.

(1) 1 I.A. 321.
(2) 6 I.A. 88 = 5 C. 148.
(3) 9 I.A. 128 = 6 M. 1.
(4) 13 I.A. 1 = 13 C. 21.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Subramania Ayyar, Mr. Justice Davies, Mr. Justice Benson, Mr. Justice Boddam and Mr. Justice Moore.

CHAPPAN (*Respondent*), *Appellant v.* MOIDIN KUTTI (*Petitioner*), *Respondent.** [15th and 18th August and 14th, 28th and 31st October, 1898.]

Letters Patent, Section 15—*Appeal from judgment of a single Judge made under Civil Procedure Code, Section* 622.

An appeal lies against an order made by a single Judge of the High Court under Civil Procedure Code, Section 622, when such order amounts to a judgment.

[F., 25 M. 555 (557) = 11 M.L.J. 346 (347); Appl., 30 M. 311 = 17 M.L.J. 123 (124) = 2 M.L.T. 84 (85) = 5 Cr. L.J. 288; R., 23 M. 329 (351); 35 M. 1 = 8 Ind. Cas. 340 = 21 M.L.J. 1 (13) = 8 M.L.T. 453; 13 C.L.J. 90 = 15 C.W.N. 848 (851) = 9 Ind. Cas. 183; 17 Ind. Cas. 593 (594); D., 36 M. 135 (136) = 12 Ind. Cas. 38 = 24 M.L.J. 457 = 10 M.L.T. 260 = (1911) 2 M.W.N. 198.]

APPEAL under Letters Patent, Section 15, against the order of Mr. Justice Boddam made in civil revision petition No. 371 of 1897, which was an application under Civil Procedure Code, Section 622, praying the High Court to revise the order of M. R. Kelappan Nayar, Acting District Munsif of Quilandy, on miscellaneous petition No. 156 of 1897.

The application in the Court of the District Munsif was made under Civil Procedure Code, Section 315. The karnavan of the **[69]** applicant had in 1875 purchased certain land at a Court sale on behalf of the tarwad, and subsequently the representative of another tarwad instituted a suit to recover possession of the land and obtained a decree as prayed. The present application was for the purchase money together with interest thereon which should be paid to the applicant. The District Munsif dismissed the application on two grounds, *viz.*, firstly, that Section 315 of the Civil Procedure Code of 1882 was inapplicable as the sale in question had taken place before its enactment, and secondly, that it was not shown that the judgment-debtor in the first of the abovementioned suits had no saleable interest in the property. He accordingly dismissed the application.

The petition under Civil Procedure Code, Section 622, came on for hearing before Mr. Justice Boddam who set aside the order of the District Munsif and remanded the petition to be reheard. Against this order the respondent in the petition preferred this appeal under the Letters Patent, Section 15.

The appeal having come on for hearing before Subramania Ayyar and Moore, JJ., an objection was taken that the appeal was not maintainable, and their Lordships referred the matter to a Full Bench as follows:—

ORDER OF REFERENCE TO THE FULL BENCH.

This is an appeal from an order of a single Judge of this Court under Section 622, Code of Civil Procedure.

It is urged that there is no appeal and reference is made to the provisions of Section 591, Code of Civil Procedure. In *Achaya* v. *Ratnavelu*(1)

* Letters Patent Appeal No. 4 of 1898.

(1) 9 M. 253.

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it was held that Section 15 of the Letters Patent was controlled by Section 629 of the Code of Civil Procedure, and that there was consequently no appeal from an order of a single Judge of this Court rejecting an application for review of judgment. In *In re Rajagopal* (1) it was laid down that, as Section 15 of the Letters Patent was controlled by Section 588 of the Code of Civil Procedure, no appeal lay from an order of a single Judge of this Court rejecting an application for leave to appeal *in forma pauperis*. In *Sankaran* v. *Raman Kutti* (2) it was decided that no appeal lay from a decree passed by a single Judge of this Court in an appeal against an order of remand passed under Clause 28 of Section 588 [70] of the Code of Civil Procedure. Again, in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (3) it was held that no appeal lay from an order of a single Judge of the Court dismissing an appeal against an order of remand passed under Section 562, Code of Civil Procedure (Clause 28, Section 588, Code of Civil Procedure).

On the analogy of these rulings it would appear that we should decide in view of the provisions of Section 591 of the Code of Civil Procedure that no appeal lies from an order by a single Judge of the High Court passed under Section 622, Code of Civil Procedure.

We may add that the question now under consideration does not appear to have been raised when the decision in *Vanangamudi* v. *Ramasami* (4) was arrived at. Our attention has, however, been drawn to the following observation of their Lordships of the Privy Council made in a judgment in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (5) :—" It "only remains to observe that their Lordships do not think that Section " 588, Act X of 1877, which has the effect of restricting certain appeals, " applies to such a case as this where the appeal is from one of the Judges " of the High Court to the Full Court." We are of opinion that it is advisable that the decisions of this Court which we have now quoted should be re-considered with reference to this observation, and we would accordingly refer the following question to a Full Bench :—

" Does an appeal lie from an order passed by a single Judge of the High Court under Section 622, Code of Civil Procedure ? "

The Rules of Practice of the High Court, Appellate Side, provide, *inter alia*, (Rule I, Clause 4) that 'every application for the admission of 'an application for revision of proceedings of a Civil Court shall ordinarily 'be heard and determined by a Bench of one Judge,' and (Rule II, Clause 3) that 'every application for the revision of the proceedings of any Civil 'Court admitted under the preceding rule shall ordinarily be heard and 'determined by a Bench of two Judges.'

The case was then argued before a Bench constituted of Shephard, Offg. C.J., Subramania Ayyar, Boddam and Moore, JJ.

[71] *K. Narayana Rau* and *Rangachariar*, for appellant.

Appu Nedungadi, for respondent.

Narayana Rau.—The question is under Letters Patent, Section 15, whether an appeal lies from any decision under Civil Procedure Code, Section 622. The decision clearly is a judgment, and the only question is whether Section 15 is controlled by the Civil Procedure Code. The provisions of the Civil Procedure Code relied on are Sections 588 and 589. I submit that Section 15 in the special Act, Letters Patent, cannot be

(1) 9 M. 447. (2) 20 M. 152. (3) 20 M. 407.
(4) 14 M. 406. (5) 10 I.A. 4 = 9 C. 482.

modified by the Civil Procedure Code, which is a general Act, by implication. See Maxwell on the Interpretation of Statutes, page 198. The two provisions stand together and effect can be given to each independently. Section 589 defines the forum, the orders of which are within the purview of Chapter XLIII. See also Sections 590, 591; also 595, 597, as to Privy Council appeals, under which the order or decree of one Judge is not appealable. Therefore Section 15 of the Letters Patent is unaffected. [SHEPHARD, J.—You mean there must be some appeal, but that begs the question whether this order is final.] The view I contend for is in accordance with the interpretation placed on the provisions in question by the Privy Council in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (1). [SHEPHARD, J.—The observation is made with reference to the argument that the order was not a judgment.] It is submitted that the observation is made with reference to the reasoning of the Chief Justice which is not restricted to that argument. See also at pages 486—87. The other side relies on, firstly, *Achaya* v. *Ratnavelu* (2) as to appeal after a review, but the Privy Council decision was not considered; also the case is under Section 629 and is distinguishable on that ground, but it is submitted that the decision is erroneous. Secondly, reliance will be placed on *In re Rajagopal* (3) which followed the previous case, and related to a pauperism application. [SHEPHARD, J.—There would be no judgment if it was a finding that there was no pauperism, but that does not appear.] The other Madras cases against me are *Sankaran* v. *Raman Kutti* (4) related to Section 562, and *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*(5). Here Benson, J., is wrong in distinguishing *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (1), putting the order of **[72]** Pontifex, J., as being a decree within Section 2 and so appealable under Section 540, on a different footing from the orders within Section 588. But it was not a decree and it could not come under Section 540, where the appeal is from one Court to another Court which is not the case under Section 15. I rely on *R.* v. *R.* (6) therein referred to as showing that a discretionary order is subject to appeal under Letters Patent, Section 15. That was an order which under Civil Procedure Code would have come under Section 591 and not Section 588. *Vanangamudi* v. *Ramasami* (7) is under Section 622 and is in point because the objection taken to the appeal (turning on the word judgment) was cognate to the present objection. [SHEPHARD, J.—Is it clear that Section 15 applies to High Court as an appellate or revisional Court—that it applies otherwise than to cases on the original side?] It is submitted that it is. See High Court Charter Act, Section 15, apart from Letters Patent. [SHEPHARD, J.—If the Letters Patent had stopped at Section 15 there would have been no mofussil appellate jurisdiction, and the question could not have arisen.] See Charter Act, Sections 8, 9 and 10. In the absence of Section 16, Letters Patent, the High Court would have all the powers of the Sudder and Supreme Courts. *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan* (8) is the latest decision of Allahabad High Court. See at page 230 the observations on the Privy Council case which are much the same as those of Benson, J., and at page 232 as to the applicability of Section 10 to orders under Section 622. [BODDAM, J.—How do you meet that?] There is a fallacy, the appellant under Section 15 in such a case asks the Divisional Bench to exercise the revisional

(1) 10 I.A., 4=9 C. 482 (494). (2) 9 M. 253. (3) 9 M. 447.
(4) 20 M. 152. (5) 20 M. 407. (6) 14 M. 88.
(7) 14 M. 406. (8) 14 A. 226.

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functions of the High Court. It is not an appeal in the ordinary sense—not an appeal against the order or decree sought to be revised. Section 622 does not contemplate the revisional jurisdiction being exercised by a single Judge. [SHEPHARD, J.—That contention would include also references, &c.] That is so: the jurisdiction is that of the High Court and not of one Judge. The one Judge only acts for the Court under the rules, but that does not exclude the jurisdiction of the Full Court when it is invoked. See *Venkata Reddi* v. *Taylor* (1). Section 597 shows by implication that any decree of one Judge is appealable to two Judges, otherwise why should it not be appealed **[73]** to the Privy Council? Compare the phraseology of this section with Section 15 of the Letters Patent. Section 591 does not affect the matter. Appeals against the order of a single Judge under Section 622 have often been entertained without objection. See *Krishnayya* v. *Unnissa Begam* (2), *Appandai* v. *Srihari Joishi* (3), *Kammathi* v. *Mangappa* (4), *Subbarayadu* v. *Pedda Subbarazu* (5), *Sriramulu* v. *Sobhanadri Appa Rau* (6), *Srinivasa Ayyangar* v. *Seetharamayyar* (7), and *Kaliyanaramayyar* v. *Mustak Shah Saheb* (8). The case would come under the general revisional powers which are uncontrolled by the Code. See *Shiva Nathaji* v. *Joma Kashinath* (9). [SUBRAMANIA AYYAR, J.—There are like decisions in the Calcutta reports.] See also *Tej Ram* v. *Harsukh* (10). [SHEPHARD, J.—Then Section 36 has to be considered.] But I contend the revisional jurisdiction cannot be exercised by one Judge. Assuming that the revisional jurisdiction is part of the appellate jurisdiction as seems to be implied by the rules, the Section 15 clearly applies.

Appu Nedungadi, for respondent.—The case is concluded by the Madras cases cited and *Banno Bibi* v. *Mehdi Husain* (11), which considers *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (12), in dealing with Sections 588, 591, and was followed in *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan* (13). See at page 233, especially as to Section 622 and compare *Guise* v. *Jaisraj* (14). *Navivahoo* v. *Narotamdas Candas* (15) also supports my case; see also *The Bombay and Persia S.N. Company. Limited* v. *The S.S. "Zuari"* (16). [SUBRAMANIA AYYAR, J.—That is not on the Letters Patent.] MUTTUSAMI AYYAR, J., one of the Judges in *Achaya* v. *Ratnavelu* (17) who took part in *Venkata Reddi* v. *Taylor* (1), made reference to *Achaya* v. *Ratnavelu* (17) and was dealing with Provincial Small Cause Courts Act which has no provision corresponding to Section 588. The rest of the arguments adduced on the other side are answered by BENSON, J. Revisional power is part of the appellate jurisdiction. In the cases quoted in which appeals against orders **[74]** of a single Judge acting under Section 622 have been entertained the point was not raised. Again, this is not a judgment and for that reason too there is no appeal—no rights are determined. See also *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (18), *Somsundaram Chetti* v. *Administrator-General* (19), *Tirunarayana* v. *Gopalasami* (20), and *Kalikristo Paul* v. *Ramchunder Nag* (21).

Rangachariar in reply: referred to *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* (22).

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(1) 17 M. 100. (2) 15 M. 399. (3) 16 M. 451. (4) 16 M. 454.
(5) 16 M. 476. (6) 19 M. 21. (7) 19 M. 72. (8) 19 M. 395.
(9) 7 B. 341. (10) 1 A. 101. (11) 11 A. 375. (12) 10 I.A. 4=9 C. 482.
(13) 14 A. 226. (14) 15 A. 405. (15) 7 B. 5. (16) 12 B. 171.
(17) 9 M. 253. (18) 8 B.L.R. 433. (19) 1 M. 148 (151). (20) 13 M. 349.
(21) 8 C. 147. (22) 10 C. 814.

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In consequence of a difference of opinion among the Judges the case was re-argued before a Full Bench constituted of six Judges as above.

Rangachariar, for appellant.—Appeal is claimed under Section 15 of the Letters Patent; there must therefore be a judgment of a Judge acting under Section 13 of the Charter Act which applies (*Ranee Surnomoyee* v. *Luchmeeput Doogur* (1)) to the appellate as well as the original side of the High Court. I assume there was a judgment. [BODDAM, J.—The reference says order not judgment.] I assume the order was a judgment in view of what took place at the last argument. Then was the case heard under Section 13? Yes, the Judge heard it under Rule 1 framed under Section 13 which empowers one Judge to dispose of civil revision petitions. But though that was so as a question of fact it may perhaps be said it was not so in law. See Charter Act, which in Section 9 onwards give the powers of the High Court including powers of superintendence including revision in its appellate jurisdiction. [SHEPHARD, J.—Why in appellate jurisdiction?] It is so because the superintendence is over the Courts subject to appellate jurisdiction under Section 15. The Charter Act contemplates no revisional jurisdiction as distinguished from appellate. The distinction in Section 9 is between appellate and original. In *Queen* v. *Nyn Singh* (2), four Judges agreed as to this construction to be put on the word appellate in Section 13. It is only under this section that the revisional work can be entrusted to a single Judge or two Judges—if the construction is wrong all revisional work must come before a Full **[75]** Bench. See also *In the matter of the Petition of Huris Chunder Mitter* (3). [SHEPHARD, J.—Was that original or appellate?] It was revisional, *i.e.*, exercise of powers of revision in appellate jurisdiction. [SUBRAMANIA AYYAR, J.—There was no judgment there; it was an order of dismissal, under disciplinary powers.] Possibly that is the right view, but it is Section 13 of the Act which covers all the functions of the High Court and under which alone rules can be made for the distribution of work among the Judges. The same view is taken in *Girdharee Singh* v. *Hurdoy Narain Sahoo*(4) where Section 39 of the Letters Patent was in question with Section 15 of the Charter Act. For thirty-four years this view has been acted on and revisional work has been done by single Judges under rules framed by Courts under Section 13. [BODDAM, J.—Then one Judge can make rules or call for a return. DAVIES, J.—And you say an appeal would lie.] Then there would be no judgment; such would not be judicial but ministerial acts. Anyhow such powers have not been delegated to one Judge and probably could not be under Section 9, because it is not a matter of administration of justice. [SHEPHARD, J.—Consider what the power of superintendence amounted to at that time; then it was power of prohibition and the power of compelling the exercise of jurisdiction. See the Code of 1877.] Code of 1861, Section 31, was insufficient; so, Section 15 of the Charter Act was invoked; the cases are collected in *Tej Ram* v. *Harsuk* (5) and *In the matter of the Petition of Lukhykant Bose* (6). [SHEPHARD, J.—Suppose the Court is not set in motion by a party, but the case is taken up *suo motu* by a Judge?] He acts in the exercise of the appellate jurisdiction coming under Section 15 of the Charter Act. The rules prescribe that such jurisdiction may be exercised by one Judge. The Code of Civil Procedure cannot be taken as guide in construing the

(1) B.L.R. Sup. Vol. 694.
(2) 2 N.W.P.H.C.R. 117 (124).
(3) 10 B.L.R. 79.
(4) 21 W.R. C.R. 263.
(5) 1 A. 101.
(6) 1 C. 180.

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Letters Patent and Charter Act. Section 320 enacted in 1888 is the only section which makes any distinction between appellate and revisional jurisdiction. It may be, though that is not clear, that the distinction is valid throughout the Code where no absurdity would result but that does not help here. Letters Patent, Sections 27 and 28, help my argument as to Civil cases. The jurisdiction in referred **[76]** cases, and it is submitted in revisional cases also is clearly part of the appellate jurisdiction. [SHEPHARD, J.—Can you not associate Section 28 of the Letters Patent with Section 9 of the Statute?] It is all part of the appellate jurisdiction—the powers of reference and revision were exercised under the Procedure Code of 1861, which is referred to in the letter enclosing the Letters Patent. With Section 28 of the Letters Patent as to criminal matters compare Section 16 of the Letters Patent as to Civil matters. [DAVIES, J.—That assumes revisional powers.] Because they are included in appellate jurisdiction. [BODDAM, J.—Section 15 of the Act gives powers of superintendence which are not mentioned in the Letters Patent but are nevertheless valid. SHEPHARD, J.—The Letters Patent effectuate Section 9; the following sections gave the jurisdiction and operated immediately apart from the Letters Patent.] Nevertheless, it is only in the appellate jurisdiction that they can be exercised. Properly speaking there is no revisional jurisdiction; there are only revisional powers in the appellate jurisdiction. Therefore Section 13 cannot be said not to apply to revisional cases. Assuming then that Section 15 applies, the argument on the other side is that the appeal there given is taken away by Civil Procedure Code. It is not taken away expressly; repeal by implication is not favoured and special Acts are not, unless expressly affected, at all affected by a General Act. Here the Letters Patent and the Civil Procedure Code can co-exist. See *Dodds* v. *Shepherd* (1), *Thorpe* v. *Adams* (2) and *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (3). Really the intention of the Civil Procedure Code was to keep the Letters Patent intact; the Chapter XLIII relied on on the other side relates only to interlocutory orders, which do not come under Section 622; see *In re Nizam of Hyderabad* (4). See Section 591 which leaves the party the remedy of appeal ultimately after the decree is made. [SHEPHARD, J.—Look at Section 588, Clauses (17) and (29).] These are matters really in the execution of decree. See Section 589, which provides for appeals from one Court to another; compare also Sections 632 and 638. If the chapter applies to High Courts what forum is to hear appeals against orders by High Court Judges of the class mentioned in **[77]** Section 588, Clause (28), since there is no forum under Section 589? Clearly the forum is supplied in the Letters Patent. Section 597 again compared with Letters Patent, Section 15, supports my view; also Section 575. See *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* (5). Again appeals lie to the Privy Council against an order made under Section 622 by two Judges (see *Amir Hassan Khan* v. *Sheo Baksh Singh* (6) and *Girdharee Singh* v. *Hurdoy Narain Sahoo* (7), but Section 575 would prevent this if the order was by one Judge only. *Muhammad Nain-ul-lah Khan* v. *Ihsan-ul-lah Khan* (8) will be relied on against me. The Chief Justice points out that the power under Section 622 is discretionary. What we want is not an appeal from the original decree, but against the order of the single Judge. Compare the extensive right of appeal in England against orders of mandamus, which order is the remedy where

(1) L R. 1 Ex. 75 at p. 78. (2) L.R. 6 C.P. 125. (3) 20 M. 407 (418).
(4) 9 M. 256. (5) 10 C. 814. (6) 11 C. 6.
(7) 21 W.R. C.R. 263. (8) 14 A. 226.

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the applicant cannot appeal. See *Pritchard* v. *Mayor, &c., of Bangor* (1). Then I say the question is concluded by the Privy Council decision in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (2). The constitution of the Court determines the question whether appeals lie under the Letters Patent and the nature of the order determines the question under the Civil Procedure Code. The Privy Council authority just cited has not been considered in any Madras case, except *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (3). *In re Rajagopal* (4), the pauper appeal case, is in point against me, but the Privy Council case was not cited. In numerous cases the Court has acted on the view I contend for, *e.g.*, *Venkata Reddi* v. *Taylor* (5) and *Vanangamudi* v. *Ramasami* (6) where the point was taken; and about ten more in four years. Here in the particular case the order under Section 622 is reversed and the case remanded. If the point is decided against me, an anomaly arises under Section 588, Clause (28), which contemplates and allows an appeal.

Appu Nedungadi, for respondent.—The distinction between appellate and revisional jurisdiction is substantial. The High [78] Court, as an appellate tribunal, had the powers given to it under Act VIII of 1859 as amended in 1861. As a revisional tribunal, it had jurisdiction in cases not within its appellate jurisdiction. A Court will not interfere of its own motion or otherwise in revision where appeals will lie. The distinction appears clearly in the Charter Act and also it is submitted in the Letters Patent. There were no revisional powers under the Act of 1859, but they were first given in an incomplete form in 1861. Then comes the present Section 622 which gives the same power of superintendence as the Charter. See *Muhammad Suleman Khan* v. *Fatima* (7)—a power only exercised where there is no appeal. In *Sreemutty Dossee* v. *Sreenibash Dey* (8), appellate and revisional jurisdictions are clearly distinguished. *Anthony* v. *Dupont* (9) is a case of revision without application of party. Revisional jurisdiction is an extraordinary jurisdiction not part of the appellate jurisdiction which is ordinary; for instances where revision cases are so treated, see *Madhub Chunder Giree* v. *Sham Chand Giree* (10), *Rayachand Mayachand* v. *Sultan Rahimbhai* (11), *Gurubasaya* v. *Chanmalappa* (12), and *Shidhu* v. *Bali* (13). As to *In the matter of the Petition of Lukhykant Bose* (14) cited against me, it really maintains the distinction for which I contend. In *Nilmoni Singh Deo* v. *Taranath Mukerjee* (15), the Privy Council treats revisional powers as equivalent to the powers of superintendence. It follows that the judgment was not under Section 13, and therefore no appeal under Section 15. As to the practice for one Judge to exercise the jurisdiction—it must be taken that he acts for the High Court as a whole, and his order is the order of the High Court. Even if that practice is irregular, even if the delegation of the functions of the High Court to one Judge is illegal that does not affect the legal aspect of the question and it does not make the revisional powers of the High Court, part of the appellate jurisdiction. As to the second point—the effect of Civil Procedure Code on Letters Patent—Section 9 of Charter Act refers to the future legislation in India and see Section 44 of the Letters Patent. If the Civil Procedure Code does not operate, no [79] judgment of a single Judge can ever be final, *i.e.*, not subject to appeal.

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(1) L.R. 13 App. Cas. 241. (2) 10 I.A. 4 = 9 C. 482 (494). (3) 20 M. 407 (413).
(4) 9 M. 447. (5) 17 M. 100. (6) 14 M. 406.
(7) 9 A. 104. (8) 12 W.R. C.R. 74. (9) 4 M. 217.
(10) 3 C. 243 (248). (11) 18 B. 347. (12) 19 B. 286.
(13) 15 B. 180. (14) 1 C. 180. (15) 9 C. 295.

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Section 588 is conclusive on the point which is not affected by Section 589. Sections 632-648 show that Chapter XLIII applies to the High Court. As to the Privy Council case (*Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (1)) I refer to the observations of BENSON, J., in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (2) and see cases there cited. Then this order is not a judgment and it is not final. [SHEPHARD, J.—That is not within the reference.]

Rangachariar, in reply.—Letters Patent, Sections 19 and 21, maintain the sole distinction between original and appellate jurisdiction. The revisional jurisdiction must be exercised according to the law applied in the appellate side of the High Court. The argument from Bombay decisions is based merely on the mode of arrangement and classification of the cases, and does not go to the substance of the question. *

JUDGMENT.

SHEPHARD, OFFG. C. J.—The first question is "Whether any appeal lies under Clause 15 of the Letters Patent from orders passed under the provisions of Section 622 of the Civil Procedure Code ?" Considering this question with exclusive reference to the language used by the framers of the Letters Patent and the Charter Act, I should have great difficulty in holding that Clause 15, read as it must be with Section 13 of the statute, was intended to give a right of appeal in such matters. In order to hold that orders passed on revision come within the scope of Clause 13 it must be held that they are made by the High Court in the exercise of its appellate jurisdiction. But for the opinion expresssd in Allahabad shortly after the passing of the statute and practically acquiesced in by all the High Courts since that time, I should have thought that the power of superintendence conferred on the High Courts by Section 15 of the statute stood quite apart and distinct from their appellate jurisdiction, so that it could not possibly be said that in passing orders of a revisional character the High Court was exercising its appellate jurisdiction. I hesitate however to assert my opinion in contradiction to the opinion hitherto entertained and acted upon by this as well as by the other High Courts, **[80]** especially when I find that cases have been brought before the Judicial Committee in which the present question might have been but was not raised.

Accordingly I think it must be assumed that the judgment of a single Judge acting under Section 622 of the Code is open to appeal unless the right of appeal has been taken away by Section 588 of that Code. On that question I entirely agree with Mr. Justice Subramania Ayyar. The question is, in my opinion, concluded by authority which it is beyond our province to criticise.

The answer which I would give to the question referred is that, if the order appealed against amounts to a judgment, an appeal against it does lie.

SUBRAMANIA AYYAR, J.—The first question for consideration is "Whether the power of revision exercised by this Court under Section 622 of the Code of Civil Procedure is, within the meaning of the High Courts Act and the Letters Patent constituting this Court, a part of the Court's appellate jurisdiction ?"

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* See *Hiralal* v. *Bai Asi* (22 B. 891) which was reported after the decision of the present case by the Full Bench.—REPORTER'S NOTE.

(1) 10 I.A. 4=9 C. 482 (494). (2) 20 M. 407 (418).

Now, according to Webster's Dictionary the first meaning, in law, of the noun 'appeal' is "the removal of a cause or a suit from an inferior to a "superior Judge or Court for re-examination or review." The explanation of the term in Wharton's Law Lexicon, which is only different in words, is "the removal of a cause from an inferior to a superior Court for the pur-" pose of testing the soundness of the decision of the inferior Court." And in consonance with this broad meaning of the word, "appellate jurisdiction" means "the power of a superior Court to review the decision of an inferior Court" (*Ib.*). Here the two things, which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. This has been well put by Story :—" The essential " criterion of appellate jurisdiction is, that it revises and corrects the pro-" ceedings in a cause already instituted and does not create that cause. In " reference to judicial tribunals an appellate jurisdiction, therefore, neces-" sarily implies that the subject matter has been already instituted and " acted upon, by some other Court, whose judgment or proceedings are to " be revised," (Section 1761. Commentaries on the constitution of the United States).

It was, however, argued that, except where the Superior Court is called upon to revise a decision of the inferior Court by a party [81] entitled so to set it in motion, the exercise of the power of revision cannot be said to be an exercise of appellate jurisdiction. This argument clearly misses the true point which is intended to be conveyed and is conveyed by the term appellate jurisdiction. That point is the capital distinction between jurisdiction which is original and jurisdiction which is *not* original, irrespective of the circumstances and conditions in which the latter is to be exercised. Those circumstances and conditions are important, no doubt. Clearly they do not affect the abstract character of the jurisdiction but relate only to its application and practical working. "An appellate juris-" diction," as pointed out by Story in the passage immediately following that already quoted, " may be exercised in a variety of forms and indeed in "any form which the Legislature may choose to prescribe." Such jurisdiction may be exercisable only in certain specified classes of cases. Its exercise may be claimable by a party as a matter of right or only subject to his obtaining the leave of the Court which passed the decision to be appealed against. Again, the power to review or revise may be confined to points of law or may extend to matters of fact also. Clearly legislative provisions as to such matters only lay down some of the limitations under which the jurisdiction is allowed to be exercised. Nor are the conditions, prescribed by Section 622 for the exercise of the power of revision conferred by it, different in essence from the kind of limitations just above referred to and more commonly imposed by Legislatures on the exercise of appellate functions. But none of such limitations, however much it may circumscribe the exercise of the power, touches, as already remarked, the intrinsic quality of the power itself. Now, as Section 622 in question gives in terms to this Court the power to revise decisions of Courts subordinate to it, it follows that the essential criterion of appellate jurisdiction, enunciated in the above quotation, is present in the case of proceedings held by this Court under that section and that the power exercised in such proceedings is therefore a part of the Court's appellate jurisdiction. It may not be out of place to add that to take the word "appellate" in the sense explained above, is not opposed even to ordinary usage. In support of this remark it is perhaps sufficient to refer to the fact that such writers as Sir Frederick Pollock

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and Professor Maitland speak in their History of English Law not only of the "process in error," but also of the processes known as "attaint," "certification," "prohibition," [82] "removal of actions" and "false judgment" as "processes which have about them more or less of "an appellate character" (Vol. II, pages 661-665). It is scarcely necessary to say that there is nothing in any portion of the High Court Act or the Letters Patent inconsistent with the construction put, as above, on the term "appellate jurisdiction." On the contrary, there are clear indications in some of the provisions that that is the meaning intended. In Clauses 19, 20 and 21 of the Letters Patent, with reference to the law to be administered in civil cases by the High Court, its jurisdiction is for that purpose classified into ordinary original, extraordinary original, and appellate; from which it is clear that all the powers exercisable by the Court, that are not included under original, must come under appellate jurisdiction—a classification which is adopted and recognized by the Judicial Committee in the case, to be referred to hereafter, relying on these very clauses.

It seems, therefore, to be clear that the term "appellate jurisdiction" is both grammatically and logically wide enough to comprehend the power exercisable under Section 622 referred to.

Turning now to the decisions on the point, *Queen* v. *Nyn Singh*(1) is a direct authority in favour of the above construction; Morgan, C.J., Ross, Turner and Spankie, JJ., having therein unanimously held that the term "appellate" does include a High Court's judicial functions as a Court of revision. The only other decision bearing on the point, so far as I am aware, is that of the Judicial Committee in the Bombay case of *Navivahoo* v. *Turner* (2). There, Counsel contended that under the High Court's Act and Charter the division of jurisdiction is fourfold, ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. Their Lordships, however, held that the last mentioned specially provided matters did not form a distinct head of jurisdiction and that the real division is threefold; ordinary, extraordinary, and appellate. This decision seems to go against the view that the power to revise exercisable under Section 622 is not a part of the appellate jurisdiction.

The power to revise may be taken to be, so far as it goes, analogous to the power of superintendence, exercisable by the Court under Section 15 of the Statute under which the Privy Council held, in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3), that a High Court [83] is competent to revise certain decisions of the Courts subordinate to it. And the ruling of the Judicial Committee that the classification is threefold implies that the power of superintendence, though specially provided for, being obviously neither ordinary original jurisdiction nor extraordinary original jurisdiction, within the meaning of the Statute and the Letters Patent as expounded by the Committee itself in the case cited, must come under the remaining head specified by their Lordships, *viz.*, appellate jurisdiction. Consequently the analogous power to revise, exercisable under Section 622, must likewise come under that head.

Before passing to the remaining question, I would briefly notice the suggestion that, if the view taken above is correct, the powers of this Court exercisable as a Court of reference, under the chapter of the Civil

(1) 2 N. W. P. H. C. R., 117. (2) 16 I.A. 156. (3) 9 C. 295.

Procedure Code in which Section 622 is to be found, should also be held to come under appellate jurisdiction. This, I admit, must be conceded. But, that there is nothing anomalous in such a conclusion will be evident if the real character of the proceeding on a reference under the chapter is borne in mind. Such a reference is not merely consultative and is therefore unlike the case of *Ex parte County Council of Kent and Council of Dover* (1), where the Court of Appeal held that, upon the application made to the Court under the Statute there in question, the Court was not even bound to hear the parties concerned if any; that there was no actual determination of an existing dispute in which a private right was involved; that the application was consequently purely consultative and therefore that form of procedure did not involve a right of appeal (see also *In re Knight and Tabernacle Permanent Building Society* (2). But in the case of references under the Code of Civil Procedure this Court must hear the parties and is expressly empowered to alter, cancel, or set aside any decree or order which the Court making the reference has passed in the case, out of which the reference arose, and make such order as it thinks fit, the Lower Court being bound to give effect to the judgment or order so passed by this Court. *Overseers of the Poor of Walsall* v. *London and North-Western Railway Co.* (3), is an authority (if authority were necessary with reference to such a plain point) for the view that the decision of this Court on a reference of the kind under consideration is a judicial determination of the rights of the parties [84] which, as Lord O'Hagan expressed it in the last mentioned case, is mandatory or, as Lord Bowen put it (*In re Knight and Tabernacle Permanent Building Society* (2), effective, and is therefore attended with the ordinary and usual incidents attaching to such determinations.

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With reference to the remaining question in the case, I have but few observations to make. If I am right in the view that appellate jurisdiction includes revisional powers, it follows that against an order passed under Section 622 an appeal lies if the particular order amounts to a judgment within the meaning of Clause 15 of the Letters Patent; unless the said clause has, as contended before us, been modified by Section 588 of the Code of Civil Procedure. This contention is, however, opposed to the ruling of the Judicial Committee in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (4), in which their Lordships laid down that that section does not apply to a case such as the present where the appeal is from one of the Judges of the Court to the full Court. I am unable to persuade myself, as I have already stated on a previous occasion, that the observations of the Committee on the point are mere *obiter dicta*. The contention that Section 588 modified Clause 15 was not only distinctly raised but was also strongly pressed by Counsel in the argument. Their Lordships had therefore to give a decision upon the soundness or unsoundness of the contention. That, it appears to me, they did in unmistakeable terms.

I, therefore, hold that an appeal does lie against an order passed by a single Judge of this Court under Section 622 of the Code of Civil Procedure when such an order is a judgment within the meaning of Clause 15 of the Letters Patent.

DAVIES, J.—The question referred to us is "Does an appeal lie from an order passed by a single Judge of the High Court under Section 622 of the Code of Civil Procedure?" The said Section 622 empowers

(1) [1891] 1 Q.B. 725.
(2) [1892] 2 Q.B. 613.
(3) L.R. 4 App. Cas. 30.
(4) 10 I. A. 4=9 C. 482.

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the High Court to pass orders in cases in which no appeal lies when any Civil Court subordinate to it has (1) exercised a jurisdiction not vested in it by law, or (2) has failed to exercise a jurisdiction so vested, or (3) has acted in the exercise of its jurisdiction illegally or with material irregularity The power exercised by the High Court is therefore one exercised [85] in its revisional capacity. The Chapter XLVI of the Code under which Section 622 appears indeed describes the power as one of revision. Now, under the rules of this Court of the 6th of November 1879, the only order which a single Judge of this Court can pass in relation to the revision of the proceedings of a Civil Court is to admit an application for such revision or to reject it *in limine* (*vide* rule 1, Clause 4). When such application has been admitted by a single Judge it must be heard and determined by a Bench of two Judges under rule II, Clause 3. In the present case the order of a single Judge was not one of admission or rejection but was passed on the merits after hearing the parties.

My answer to the reference therefore is that an appeal does lie against the order passed in the present case but on the sole ground that it was passed without jurisdiction, a single Judge not being empowered to pass it and an appeal being the only remedy for cancelling the order which must have full force and effect and be binding on the Lower Court so long as it remains uncancelled. But in cases where the order is one admitting or rejecting the application for revision which can be legally passed by a single Judge no appeal under Clause 15 of the Letters Patent in my opinion lies. I consider that the right of appeal given by Clause 15 of the Letters Patent from the judgment of one Judge of this Court extends only to cases falling within the original or appellate jurisdiction of the High Court, and that the phrase "appellate jurisdiction" does not include its revisional jurisdiction under Section 622 of the Code of Civil Procedure.

Section 622 of the Civil Procedure Code which may be compared with Section 35 of Act XXIII of 1861, under which a limited power of revision was given to the Sadr Court, may be said to be a development of the provision contained in Section 15 of the Statute 24 and 25 Vict., Cap. 104. That section declares that each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and then goes on to give other powers, the power of calling for returns, directing transfer of cases, making rules of practice, and the like. In the original Letters Patent it is clear that orders passed by the High Court in the exercise of its powers of superin-the dence were not judgments in respect to which an appeal could be brought under Clause 14 of those Letters Patent corresponding to Clause 15 of the amended Letters Patent; [86] because Clause 14 of the Letters Patent of 1862 mentions only judgments in cases of original civil jurisdiction. Clause 15 of the amended Letters Patent is, however, expressed in wider terms. An appeal is given from the judgment "of one Judge of the said High Court or one Judge of "any Division Court pursuant to Section 13 of the said recited Act." This clause and Section 13 of the Statute must therefore be read together. Section 13 of the Statute provides for the exercise of the original or appellate jurisdiction vested in the High Court. Reading the section with the clause of the Letters Patent it could not have been intended to give an appeal in any matters other than those arising in the exercise of the original or appellate jurisdiction of the High Court. Clause 36 of the

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Letters Patent when considered with Clause 15 and with Section 13 of the Statute puts the matter in a still clearer light.. Clause 36 is founded on Section 13 of the Act and like Clause 15 refers to it expressly. Section 13 having provided for the exercise of the original and appellate jurisdiction by one or more Judges or by Division Courts, Clause 36 declares that "any function which is hereby directed to be performed by the said "High Court in the exercise of its original or appellate jurisdiction" may be performed by any Judge or by any Division Court constituted under the provision of the 13th section of the Act. It goes on to provide that in the event of a difference of opinion among the Judges of a Division Court the opinion of the majority or of the senior Judge shall prevail. This provision is supplemented by that contained in the latter part of Clause 15, which, in the case of an equal division of opinion in a Division Court, gives the right of appeal to the High Court. It can hardly be doubted that the two clauses thus related to each other and both expressly referring to Section 13 of the Statute refer to the same jurisdiction of the High Court and that, if the provision for a difference of opinion made in Clause 36 refers only to matters arising under the original or appellate jurisdiction of the Court, the provision in Clause 15 refers to no other matters. The language of Clause 36 is clear. It refers to the functions hereby directed to be performed in the exercise of the original or appellate jurisdiction of the Court, and the language indicates that the appellate jurisdiction does not include revisional jurisdiction, for the mention of functions hereby directed to be performed in the exercise of original or appellate jurisdiction cannot include the function of [87] superintendence because that is not a function directed by the Letters Patent to be performed. The power of superintendence conferred by Section 15 of the Statute is not controlled by anything in the Letters Patent.

Further, it does not seem possible to identify the appellate jurisdiction with the power of superintendence given under Section 622 of the Code. So far from it being correct to say that the two powers are identical, it would be more correct to say that the one is exclusive of the other. The power of revision or superintendence is invoked when there is no right of appeal and its existence may be attributed to the absence of that right. There is no necessary connection between the one jurisdiction and the other. A jurisdiction similar to that which may be exercised under Section 15 of the Statute or under Section 622 of the Code was exercised by the Court of Queen's Bench over inferior Courts which were not subject to its appellate jurisdiction. The writ of *certiorari* serves the purpose for which the power of transferring suits or appeals is given by Section 15 of the Statute, and there is the writ of *mandamus* the object of which is to compel the inferior Courts to exercise their jurisdiction and there is the writ of prohibition devised to restrain the inferior Courts from acting beyond the bounds of their jurisdiction. In view of the same objects, namely, that of compelling Courts to exercise their jurisdiction and that of keeping them within their jurisdiction, a power of superintendence was given to the High Court by Section 15 of the Statute, and Section 622 of the Code of Civil Procedure refers solely to questions of jurisdiction. An appeal involves a re-hearing of the case—an entire re-hearing or a re-hearing limited to questions of law. It involves a possibility of a new decree or a judgment substituted in the place of that passed by the Lower Court. The power of superintendence involves neither a re-hearing nor a fresh decree. It extends only

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to ordering a thing to be done, or not to be done, or to be undone and done over again. It is in the interests of the public as much as in those of the individual that this power of control is given, and the Court may therefore act of its own motion under Section 622 which it cannot do in appellate matters. Again, the connection in which the power of superintendence is given under Section 15 of the Statute shows that it is something distinct from appellate jurisdiction. It appears as one of a group of powers conferred on the High Court. In the same sentence the section [88] says the High Court shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for returns and to direct the transfer of any suit or appeal and shall have power to make rules of practice and to prescribe forms. If the term "appellate jurisdiction" be taken to denote the first-mentioned power, it would be difficult to say why it should not equally denote all the other powers mentioned in the section. Yet it could hardly be argued that the power of making rules is one of the functions for which provision is made in Clause 36 of the Letters Patent. It seems to me therefore that it would involve a strain on the plain language of the Statute and of the Letters Patent to hold that an order passed in revision is a judgment passed in the exercise of the appellate jurisdiction of the Court. Such are my reasons for holding that when a single Judge of this Court has passed an order admitting or rejecting an application for revision made under Section 622 of the Code, which he may lawfully do under our rules, no appeal lies against that order.

BENSON, J.—The question referred for our decision involves two other questions, *viz*:—

(1) whether the jurisdiction exercised by the High Court under Section 622, Civil Procedure Code, is included in the expression "appellate jurisdiction" as used in Section 13 of the High Court Act (24 and 25 Vict. Cap. 104) and in Section 36 of the Letters Patent of 1866 and

(2) whether the right of appeal given by Section 15 of the Letters Patent against an order passed by a single Judge of the High Court is controlled and limited by Sections 588 and 591, Civil Procedure Code?

I am of opinion that both of these questions, must be answered in the affirmative, the first for the reasons stated by my learned colleague Mr. Justice Subramania Ayyar in the judgment which he has just delivered, and the second for the reasons stated at length in the judgment which I recently delivered in the case of *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (1).

As to the first question, I think that, in considering what was the intention of the Legislature, we may well look to the consequences that would follow from our adoption of any interpretation [89] that is urged upon us for acceptance. Now if we accept the view that the term "appellate jurisdiction" refers only to appeals properly so called, but does not include the powers which the High Court possesses as a Court of reference and revision under Chapter XLVI of the Civil Procedure Code (which are essentially similar to the powers in regard to reference and revision possessed by the High Court under Act XXIII of 1861 before the High Court Act was passed); if we accept this view, it follows that every reference to, and every act of revision by, the High Court must be dealt with by the whole Court consisting of the Chief Justice and five

(1) 20 M. 407.

Judges. More than this, even the transfer of a suit or appeal under Section 15 of the High Court Act will require to be made by the whole Court. Again Section 25 of the Provincial Small Cause Courts Act empowers the High Court to call for the records in order to satisfy itself that any decree or order of a Small Cause Court is according to law, and pass such order thereon as it thinks fit. Is it possible to suppose that the Legislature required that such comparatively small matters should be dealt with by the whole Court, while it allowed the largest interests, civil and criminal, original and appellate, including even life and death to be dealt with by one or two Judges of the High Court under rules made by the High Court in that behalf? The jurisdiction of the High Court on a reference made under Chapter XLVI is essentially appellate in its character. The reference may be originated by either party moving through the Lower Court, and the High Court is obliged to hear the parties in person or by pleader. Is it not a greater strain on language to hold that this function of the High Court is included in the general power of "superintendence" under Section 15 rather than in the term "appellate jurisdiction" in Section 13 of the High Court Act, and can it be supposed that the Legislature intended the whole Court to sit and hear parties or their pleaders in each of these references? In applications for revision under Section 622 and under the Small Cause Courts Act and for transfer of suits it is also the practice, founded on obvious convenience, to hear the parties by their pleaders. The procedure is of an essentially appellate character as invoking the interference of a superior Court, and I am of opinion that all these acts were intended to be included in the term "appellate," as opposed to "original," jurisdiction in Section 13 of the High Court Act and in Section 36 of the Letters Patent founded thereon.

[90] As to the second question, every argument urged before us in the present case has been fully dealt with in my judgment already referred to. The reasons I have there set forth would, I think, be regarded as absolutely conclusive, but for an observation of their Lordships of the Privy Council in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (1). I have, however, given reasons for thinking that that observation was not intended to lay down a general interpretation of the law applicable to all cases in which an appeal is sought to be made to the Full Court under Section 15 of the Letters Patent against an order of a single Judge, but was made with reference to the particular case then before their Lordships. If I am right in this view it is open to us, notwithstanding that observation, to consider what the general law is. Reading Sections 632 and 638 of the Civil Procedure Code with Sections 588 and 591 it seems to me impossible not to hold that the Legislature intended thereby to restrict, and did, in fact, restrict in certain particulars the general right of appeal against the orders of a single Judge given by Section 15 of the Letters Patent.

I would, therefore, give an answer in the negative to the reference made to us.

BODDAM, J.—The question to be decided on this reference is—"Does an appeal lie from an order passed by a single Judge of the High "Court under Section 622, Code of Civil procedure?"

Section 622 of the Civil Procedure Code is as follows:—

"The High Court may call for the record of any case in which no appeal "lies to the High Court, if the Court by which the case was decided

(1) 10 I.A. 4=9 C. 482.

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"appears to have exercised a jurisdiction not vested in it by law, or to "have failed to exercise a jurisdiction so vested, or to have acted in the "exercise of its jurisdiction illegally or with material irregularity; and "may pass such order in the case as the High Court thinks fit."

The practice under this section has for many years been for one or other of the parties to the proceedings in the Court below who thinks that that Court has acted so as to come within this section to file a civil revision petition before the High Court and this comes on before a single Judge who either acts or declines to act in the matter for the High Court and passes his order accordingly.

[91] It is argued that under Section 15 of the amended Letters Patent whatever order the single Judge makes—whether he dismisses the petition or remits the case with an intimation that the Court below has acted wrongly—there is an appeal from that order to a Bench of the High Court and thence possibly to the Privy Council.

If this is so, it appears obvious that there is no case in which there is not an appeal (limited it may be in its extent but still an appeal) and that to the High Court, thence to a Bench of the High Court and thence possibly to the Privy Council. I feel satisfied that this is not the intention.

Here there is no question referred as to whether the particular order amounts to a judgment or not because the reference is as to an "order" alone, nor do I imagine that it was the intention of the Court referring the question that the answer to the reference should amount to nothing more than that it depends upon what the order is (*e.g.*, whether it amounts to a judgment or not and is final or otherwise): for in that case the particular order should have been set out in the reference.

It must, therefore, in the first place be assumed that the question is confined to an order in its limited sense. The argument was that as the Civil Procedure Code did not in so many words repeal any part of Clause 15 of the Letters Patent, in every case where a single Judge sat, his decision was appealable to a Bench of two Judges under that clause even when it resulted only in an order and no more as distinct from a judgment. This argument has been carefully and exhaustively refuted by Mr. Justice Benson in his judgment in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (1). He says, *inter alia*, and I adopt his words, "Section 44 of the Letters Patent expressly contemplates the Governor-"General in Council passing laws which shall have the effect of amending "or altering the provisions of the Letters Patent, and declares that all the "provisions of the Letters Patent are subject to such laws and may be "in all respects amended and altered thereby. When the Governor-"General in Council enacted the Code of Civil Procedure he deliberately "restricted the right of appeal in regard to certain specified orders, and "**[92]** distinctly declared that those restrictions applied to the High "Court, &c."

Chapter XLIII of the Civil Procedure Code (Sections 588 to 591 inclusive) deals with appeals from orders. Section 588 sets out the orders that are appealable. It says "an appeal shall lie from the following orders "under this Code and from no other *such* orders." In the list of orders following, orders under Section 622 are not included and Section 591 says except as provided in this chapter no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction.

(1) 20 M. 407.

Assuming that when an order is passed under Section 622 it is passed by a Court in the exercise of its appellate jurisdiction, as was held to be the case in *Queen* v. *Nyn Singh* (1) by two of the Judges, no appeal lies from an order under Section 622 unless the order is *ejusdem generis* with the orders specified in Section 588.

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The words of Section 588 are "from no other *such* order" and I have no doubt that it is in reference to these words that their Lordships of the Privy Council in their judgment in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (2) say:—"It only remains to observe that their Lordships " do not think that Section 588 of Act X of 1877, which has the effect of " restricting certain appeals, applies to such a case as this, where the appeal " is from one of the Judges of the High Court to the full Court." On this reference I conceive that it is no part of our duty to consider the particular order out of which the reference to the Full Bench is made and without doing so it is in my opinion impossible to say whether the order in question is appealable or not.

The result of this judgment (so far as it applies to the question before us) appears to me to come to this, that if the order made by a single Judge only amounts to an order such as is intended by Chapter XLIII of the Code, it is not appealable unless it is within Section 588, but if it amounts to more and is a judgment then it is appealable; in other words, that the right given by Section 15 of the Letters Patent to appeal from the order of a single Judge is only limited by the Code to such orders as do not amount to a judgment whereby the rights of the parties are concluded, but, where this is the case, the order amounts to a judgment within the meaning [93] of Section 15 of the Letters Patent (*Desouza* v. *Coles* (3)) and an appeal lies.

If the question before us were whether the particular order passed out of which this reference arose is appealable under Section 15 of the Letters Patent (and I was responsible for the order), I should have no hesitation in holding that the answer should be in the affirmative as it amounts to a judgment; but as I have said before that is not the question referred and indeed the vakil supporting the affirmative proposition distinctly stated in answer to a question put to him from the Bench when the question was first argued that he contended that all orders made under Section 622 were appealable, so that if the High Court calls for the records of a case or declines to do so in either case, according to this contention, the order is appealable. If this is the question we are required to answer in this reference I should have no hesitation in answering the reference in the negative, for that would be to include as appealable orders within Chapter XLIII other than those mentioned in Section 588.

Another question has been raised, *viz.*:—"Whether an order passed under Section 622 is an order passed in the exercise of the appellate jurisdiction of the Court or merely under its power of superintendence as distinct from its appellate jurisdiction?" Assuming, however, that orders under Section 622 were intended to be passed by the Court under its power of superintendence as distinct from its appellate jurisdiction, it is perfectly clear to my mind that in that case no order could be passed legally by a single Judge, for there is no power to delegate to a single Judge the right to pass orders for the Court under its power of superin-

(1) 2 N.W.P.H.C.R. 117. (2) 10 I.A. 4=9 C. 482.
(3) 3 M.H.C.R. 384.

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tendence as distinct from its appellate jurisdiction. Inasmuch, therefore, as this order was made by a single Judge and the reference refers only to orders so passed, it seems to me that such orders in all cases must be illegal and should be set aside even if there is no appeal under Section 15 of the Letters Patent. The fact that these applications are placed before a single Judge shows that whether rightly or wrongly it has hitherto been assumed that they come within the appellate jurisdiction of the Court and have been so treated for some time. I do not think, therefore, that we should be serving any useful purpose in determining that which would stultify [94] all previous orders so passed and I have therefore refrained from giving any opinion upon the question.

On the whole I am of opinion that it is not possible to answer this reference either in the affirmative or in the negative. I can only say that in some cases there may in my opinion be an appeal and in others there is no appeal. It depends upon the order in question.

MOORE, J.—At the hearing of an appeal preferred from an order of a single Judge of this Court under Section 622, Civil Procedure Code, it was urged that under the provisions of Section 591, Civil Procedure Code, there was no appeal and the following question has accordingly been referred to the decision of a Full Bench :—"Does an appeal lie from an "order passed by a single Judge of the High Court under Section 622, "Civil Procedure Code?"

It is admitted that if an order passed under Section 622, Civil Procedure Code, is not a judgment within the meaning of Section 15 of the Letters Patent, there can be no appeal from it under the provisions of the Letters. As to what is a judgment under this section, reference may be made to the decision of Mr. Justice Bittleston in *Desouza* v. *Coles* (1) where he observed :—"The word judgment there (*i.e.*, Section 15 of the "Letters Patent) used cannot be limited to a final judgment in a suit, nor "indeed to a judgment in a suit at all, but must be held to have the "more general meaning of any decision or determination affecting the "rights or the interest of any suitor or applicant." (Reference may also be made to the decision of Markby, J., on the point in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (2), followed in *In the matter of the Petition of Kally Soondery Dabia* (3)). The question therefore, to be considered is, whether an order amounting to a judgment having been passed under Section 622, an appeal from it lies, no express appeal being provided for from such an order in the Civil Procedure Code in view of the provisions of Section 591, Civil Procedure Code, which lays down that no appeal is to lie from any order passed by any Court in the exercise of its original or appellate jurisdiction except as provided for in Chapter XLIII of the Civil Procedure Code.

It must be admitted that this Court has not adopted a uniform course in dealing with the question as to whether appeals of the class now under consideration lie or not.

[95] In certain reported decisions referred to by my learned colleague and myself in our order of reference to the Full Bench the question as to how far Sections 588 and 629 of the Civil Procedure Code control the provisions of Section 15 of the Letters Patent has been considered, the view taken being that where those sections expressly direct that orders passed under them are final there can be no appeal under the Letters Patent. In

(1) 3 M.H.C.R. 384. (2) 8 B.L.R. 433. (3) 6 C. 594 (601.)

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Vanangamudi v. *Ramasami* (1) where an appeal under the Letters Patent from an order passed under Section 622 of the Civil Procedure Code was considered, the only question adjudicated on in considering as to whether an appeal lay or not was as to whether the order was a judgment. The point now at issue was not raised. In a number of decisions (*Appandai* v. *Srihari Joishi* (2), *Kammathi* v. *Mangappa* (3), *Subbarayadu* v. *Pedda Subbarazu* (4), *Sriramulu* v. *Sobhanadri Appa Rau* (5), *Srinivasa Ayyangar* v. *Seetharamayyar* (6), and *Kaliyanaramayyar* v. *Mustak Shah Saheb* (7)), appeals preferred under Section 15 of the Letters Patent Act from orders under Section 622 of the Civil Procedure Code were heard and disposed of but in all these cases as far as can be seen from the reports the question as to whether such appeals lay was not discussed. In *Venkata Reddi* v. *Taylor* (8) the question as to whether, when a single Judge of this Court acting under Section 25 of the Provincial Small Cause Courts Act (IX of 1887), revises a decree of a Small Cause Court, his order could be appealed against under Section 15 of the Letters Patent was considered and it was decided that notwithstanding Section 27 of that Act such an appeal lay. It appears to me that it would be difficult to differentiate this case from the one now under consideration. If, in spite of Section 27 of the Small Cause Courts Act, an appeal can be preferred from an order passed under Section 25 of that Act, it seems to me to follow logically that, notwithstanding Section 591 of the Civil Procedure Code, an appeal lies from an order passed by a single Judge under Section 622, Civil Procedure Code. I cannot find any definite rulings on this question in the reported decisions of the Calcutta and Bombay High Courts. The very important decision of their Lordships of the Privy Council referred to in the order of reference (*Hurrish Chunder Chowdry* v. [96] *Kali Sundari Debia* (9)) remains for consideration. The ruling of their Lordships to be found there as to the effect of Section 588, Civil Procedure Code, is as follows:—"It "only remains to observe that their Lordships do not think that Section "588, Act X of 1877, which has the effect of restricting certain appeals, "applies to such a case as this where the appeal is from one of the Judges "of the High Court to the Full Bench." This ruling has been recently considered at length by Subramania Ayyar and Benson, JJ., in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (10). It has there been held by Mr. Justice Benson (pp. 411 and 412) that the words used by their Lordships as quoted in the present order of reference do not lay down as a general rule that Section 588 of the Civil Procedure Code does not apply to any case in which an appeal is sought to be made under Section 15 of the Letters Patent from the order of a single Judge. It is pointed out that in the case there under consideration a Judge of the High Court of Calcutta had by an order passed under Section 610, Civil Procedure Code, refused to transmit to the Court of First Instance for execution a decree of the Privy Council and Mr. Justice Benson was of opinion (following no doubt the view expressed by Edge, C.J., in *Banno Bibi* v. *Mehdi Husain* (11) and *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan* (12) that although the order made by the Judge was under Section 610 of the Civil Procedure Code, yet it was none the less an order determining a question arising between the parties to the suit in which the decree was passed and relating to the execution thereof (Section 244, Civil

(1) 14 M. 406. (2) 16 M. 451. (3) 16 M. 454.
(4) 16 M. 476. (5) 19 M. 21. (6) 19 M. 72.
(7) 19 M. 395. (8) 17 M. 100. (9) 10 I.A. 4=9 C. 482.
(10) 20 M. 407. (11) 11 A. 375. (12) 14 A. 226.

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Procedure Code). "It was therefore," Mr. Justice Benson goes on to observe, "an order of the kind expressly declared by Section 2 of the Code "to fall within the definition of 'a decree' and, as such it was obviously an "order against which an appeal would lie as against a decree." According to Mr. Justice Benson the language used by their Lordships amounted to nothing more than this. "Section 588, no doubt, has the effect of "restricting appeals in the case of orders which are not decrees, but it "does not apply to such a case as this before us which is an order in "execution and therefore a decree. When therefore such an order has "been made by a single Judge an appeal lies to the Full Court." With "all due deference to my learned colleague I cannot [97] accept the interpretation here put on the clear and unambiguous language of their Lordships. There is nothing to show that they looked upon the order of Mr. Justice Pontifex then under consideration (vide *In the matter of the Petition of Kally Soondery Dabia* (1) as a decree under Section 244, Civil Procedure Code, or that the provisions of that Section were in their minds when they made the observation under consideration. If the report is referred to, it will be found at pages 486 and 487 that Counsel for the respondent strongly urged on the consideration of their Lordships that whatever might have been the case before the enactment of Section 588 of Act X of 1877 the provisions of that section rendered it clear that there was no appeal. Their Lordships, it is shown, duly considered this argument and overruled it in the observation now under consideration: and this being the view that they have taken of Section 588 of the Civil Procedure Code, it can scarcely, I think, be doubted that they would take a similar view of the argument that Section 591 takes away an appeal given by Section 15 of the Letters Patent if the question came before them for decision. It appears to me to be very difficult to understand why if the Legislature intended by Sections 588, 591 and 629 to take away the right of appeal from decisions of single Judges of the High Court granted by Section 15 of the Letters Patent this very important change in the law was not made by clear and distinct enactment. It must, I think, in considering this question be borne in mind that no attempt is made in Act XIV of 1882 to provide a complete Code of Procedure for the High Courts in all branches of their civil judicial work. Nothing is said for example, as to whether appeals are to be heard by one Judge or by a Bench of two or more Judges. The power given to the Chief Justice to make rules as to such matters under Sections 13 and 14 of 24 and 25 Vict., Cap. 104, is not interfered with. If it was intended that the right of appeal given by Section 15 of the Letters Patent from all judgments of a single Judge should be taken away, it is only reasonable to presume that the Code would have gone further and provided as to what judicial acts may be done by a single Judge and what matters should go before a Bench of at least two Judges.

It is further urged that Sections 632 and 638, Civil Procedure Code, show that Sections 588 and 591 apply to the High Court, and [98] that if it was intended that the right of appeal given by Section 15 of the Letters Patent should not be affected by the provisions of Sections 588, and 591, it may be presumed that these two sections would have been included in those mentioned in Section 638 as sections which do not apply to the High Court. It is clear, however, that this could not have been done, for the provisions of Sections 588 and 591 do, in certain cases,

(1) 6 C. 594.

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most certainly apply to the High Court. For example, Section 588, Clause 1, provides that if a District Munsif passes an order under Section 20 of the Code, an appeal lies to the District Judge, but that there is no second appeal to the High Court, while if a District Judge passes such an order an appeal can be preferred to the High Court. Whatever view be taken of Section 15 of the Letters Patent it would have been impossible to include Section 588 among those sections that do not apply to the High Court.

It has further been urged that when a Judge of the High Court acting under Section 622 of the Code of Civil Procedure passes a judgment in revision, he has not done so in the exercise of either the original or appellate jurisdiction vested in the High Court (24 and 25 Vict., Cap. 104, Section 13) and that there is consequently no appeal from his judgment under Section 15 of the Letters Patent. It does not appear to me that this is a valid contention. Under Section 8 of 24 and 25 Vict., Cap. 104, it was directed that the Supreme Court and the Court of Sadr Adalat and Fouzdary Adalat in Madras should be abolished and that (Section 9) a High Court should be established which should have and exercise all jurisdiction and every power and authority whatsoever vested in any of the Courts thus abolished at the time of their abolition. The extensive powers of revision now exercised under Section 622 of the Civil Procedure Code were first given to the Sadr Court in a very restricted form by Section 35, Act XXIII of 1861, which received the assent of the Governor-General on the 28th August 1861. The Sadr Court was not abolished and the High Court, which was to take its place, established till the first Letters Patent were issued in 1862. When, therefore, the High Court was established, among the powers vested in it were those of revision given to the Sadr Court under Section 35 of the Act of 1861 which is the basis of Section 622 of the present Code. The question therefore that arises for consideration is as to whether these powers of revision are included in the matters dealt with in Section 13 of 24 and 25 Vict., [99] Cap. 104, or with those treated of in Section 15. Such powers are, I am of opinion, certainly not dealt with in Section 15 which treats of acts of superintendence over Subordinate Courts, such as, calling for returns, transfer of appeals and suits from one Court to another and the power to issue rules regulating practice and procedure and to prescribe forms, and clearly gives no power such as that exercised under Section 622 of setting aside a judgment of a Subordinate Court and passing a revised judgment in lieu thereof. Reference may be made to *Tej Ram* v. *Harsukh* (1) where it is held that Section 15 of the Charter Act confers on a High Court administrative authority and not judicial powers and where it is pointed out in a foot-note that this is the view that has been followed by the Calcutta High Court in a long series of cases. The powers of revision now under consideration must, therefore, come under Section 13 and as such powers are certainly not exercised by the High Court in its original jurisdiction, it follows, in my opinion, that they come under the appellate jurisdiction of that Court. If this view be correct a judgment under Section 622, Civil Procedure Code, is passed pursuant to Section 13 of 24 and 25 Vict., Cap. 104, and an appeal accordingly lies from it under Section 15 of the Letters Patent.

For the foregoing reasons I am of opinion that it was not the intention of the Legislature that the provisions of Section 15 of the Letters

(1) 1 A. 101.

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Patent should be affected by Section 591 of the Civil Procedure Code, that consequently an appeal lies from any order amounting to a judgment passed by a single Judge under Section 622 of the Civil Procedure Code, notwithstanding the provisions of Section 591, and I would accordingly answer the question referred as follows:—An appeal lies from all orders amounting to judgments passed by a single Judge of the High Court under Section 622 of the Civil Procedure Code.

[This appeal next coming on for final disposal before SUBRAMANIA AYYAR and MOORE, JJ., after the expression of the above opinions of the Full Bench, the Court delivered the following judgment:—

JUDGMENT (OF THE DIVISION BENCH).

The sale with reference to which this dispute has arisen took place in 1875, when the Civil Procedure Code of 1859 was in force. The sale was never set aside on the ground that the judgment-debtor possessed no saleable interest. Consequently the [100] respondent was not entitled to claim a refund of the purchase money either by application or by suit before the Code of 1877 came into force. Section 305 of the present Code on which the respondent relies could not be construed retrospectively so as to give the respondent a title to claim a refund under its provisions on the simple ground that the judgment-debtor has been since found to have had no saleable interest. For this reason, without going into the other questions, we set aside the order of the learned Judge and restore that of the District Munsif with costs throughout].

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22 M. 100.

APPELLATE CIVIL.

Before Mr. Justice Shepard (Officiating Chief Justice) and Mr. Justice Moore.

MUTHAYYA CHETTI (*Plaintiff*), *Appellant v.* SECRETARY OF STATE FOR INDIA (*Defendant*), *Respondent.**
[23rd, 26th and 29th September, 1898.]

Land Revenue, Madras Town—Act XII of 1851, *Sections* 1, 17—*Act* VI *of* 1867, *Sections* 4, 31—*Penal assessment—Jurisdiction of Civil Court—Limitation.*

The plaintiff was in occupation of certain land in Madras, and in May 1895 he received a notice from the Collector, stating that the land belonged to the Government and that a penal assessment of Rs. 100 a month was imposed upon him for the current month, and calling upon him to pay that sum within three days, failing which his property would be distrained, and stating that if he did not vacate the land at once a further penal assessment would be imposed and levied every month. In June 1896 a like notice was served upon the plaintiff calling upon him to pay Rs. 1,300, the amount chargeable up to date. The plaintiff having appealed to the Board of Revenue without success, paid under protest the penal assessment in various sums amounting together to Rs. 3,001-1-0. He now sued to recover that amount and prayed for a declaration of his title:

Held by BODDAM, J., that the High Court had jurisdiction to entertain the suit in respect of the claim for money, but that the suit was barred as to so much of it as had been paid more than six months before the institution of the suit:

Held by SHEPHARD, OFFG. C.J., and MOORE, J. (affirming the judgment of BODDAM, J.) that the land belonged to Government and the plaintiff was in

* Original Side Appeal No. 23 of 1898.

occupation without title; and that it was accordingly competent to Government to impose the assessment.

[101] In order to enable one having paid money under protest to recover money so paid, it is necessary for him to show that the payment was made under illegal coercion.

[R., 33 M. 173 (175) = 4 Ind. Cas. 1070 = 5 Ind. Cas. 121 = 20 M.L.J. 71 = 6 M.L.T. 306; 34 M. 295 (300) = 20 M.L.J. 823 = 8 M.L.T. 389; 13 M.L.J. 269 (271); D., 27 M. 386 (399) = 14 M L J. 37 (54) (F.B.)]

APPEAL against the decree of Mr. Justice Boddam in civil suit No. 303 of 1897.

The plaintiff was and asserted that he and his predecessors had long been in possession and claimed to be the owner of certain land under a title which was set out in paragraphs Nos. 1 to 9 of the plaint. The plaint proceeded as follows :—

"10. That, on or about the 24th day of May 1895, the plaintiff received a notice from the Deputy Collector of Madras informing him that the land measuring 3 cawnies 10 grounds and 2,230 square feet comprised in Survey Nos. 54 and 56 of Tondiarpett being Government land, a penal assessment of Rs. 100 is imposed upon him by the Collector of Madras for the current month and calling upon the plaintiff to pay the said sum of Rs. 100 within three days from the date of service of the said notice upon him, failing which a warrant would be issued for the realization of the said sum by the distraint and sale of the plaintiff's moveable property and also intimating to the plaintiff that, if he did not vacate the said land at once, a further penal assessment would be imposed and collected from him every month.

"11. That, on or about the 1st day of June 1896, the plaintiff received a notice purporting to be issued by the Collector of Madras under Section 4 of Act VI of 1867 calling upon him forthwith to pay the sum of Rs. 1,300 being the amount charged as a penal assessment from May 1895 till the end of May 1896 upon the said land and intimating to the plaintiff that, in default of payment of the said sum of Rs. 1,300, plaintiff's moveable property would be distrained and sold, and that the penal assessment would be recovered every month till the said land is vacated.

"12. That, on or about the 4th day of September 1896, the plaintiff appealed to the Honourable Members of the Board of Revenue at Madras against the illegal imposition of the penal assessment made by the Collector of Madras as aforesaid; but, on or about the 25th day of November 1896, the plaintiff was informed that his said appeal was rejected.

[102] "13. That, in consequence of the said notice of the 1st day of June 1896, the plaintiff paid under protest the said penal assessment of Rs. 100 a month and has paid in all a sum of Rs. 3,004-1-0 up to the filing of this suit.

"16. The plaintiff further charges that the action of the Collector of Madras in imposing a penal assessment of Rs. 100 a month on the said land and in recovering the same from the plaintiff is illegal, and the defendant is liable to repay the said sum of Rs. 3,004-1-0 paid by the plaintiff as aforesaid with interest thereon at the rate of 6 per cent. per annum.

"The plaintiff therefore prays judgment :—

"1. That the land mentioned in the schedule to the plaint mentioned be declared to be the property of the plaintiff.

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"2. That the said imposition of penal assessment may be declared to be illegal, and the defendant may be decreed to pay to the plaintiff the said sum of Rs. 3,004-1-0 with interest thereon at the rate of 6 per cent. per annum together with further interest thereon at the rate of 6 per cent. per annum from date of decree to the date of realization."

In the written statement it was alleged that the land in question was the property of Government and the statements in paragraphs Nos. 10, 11, 12 and 13 of the plaint were admitted. The written statement proceeded as follows:—

"6. The defendant states that the Collector of Madras was legally entitled to fix and impose a rent or assessment of Rs. 100 per month on the plaint land, and that the decision in respect of such rent or assessment of the Board of Revenue in appeal referred to in paragraph 12 of the plaint is under law final, and that the Collector of Madras was legally entitled to recover the same from the plaintiff, and that he is not liable to repay the whole or any portion of the sum of Rs. 3,004-1-0 recovered from the plaintiff, and interest thereon at the rate of 6 per cent. per annum as claimed in paragraph 16 of the said plaint.

"7. The defendant states that this Honourable Court has no jurisdiction in respect of the said assessment or rent or concerning any act or acts done in the collection thereof, and that the claim for the recovery of the said sum of Rs. 3,004-1-0 is barred by limitation under Section 17 of Act XII of 1851 and Section 31 of Madras Act VI of 1867."

The chief issues were the following:—

[103] "*First.*—Is the plaintiff the legal owner of the plaint land as "alleged therein or is the land the property of the Government as "alleged in the written statement?

"*Second.*—Was the order of the Collector of Madras assessing the "plaint land at Rs. 100 per month illegal?

"*Fourth.*—Is the plaintiff's claim to recover the Rs. 3,004 barred "as alleged in paragraph 7 of the written statement or at all?

"*Fifth.*—Has this Court jurisdiction by reason of the facts stated "in paragraphs 6 and 7 of the written statement?"

Boddam, J., after consideration of the evidence, held on the first issue that Government and not the plaintiff was the owner of the land in question. The judgment then proceeded as follows:—

"But Mr. Daly raised a contention that even assuming that the land is the land of the Government, nevertheless the plaintiff is entitled to claim and have a decree for the return of the money paid by him under protest as he says. . . . He contended that Act XII of 1851 applied only to land which was private land, and he read the first Section which runs as follows:—'All assessable lands not the pro-'perty of the East India Company, within the limits of the town of 'Madras, as defined in Section 12, Regulation II of 1802 of the Madras 'Code, of which the rate of assessment is not known, or which have 'not heretofore been assessed, shall be assessed at the rates customarily 'charged upon lands of a similar description in the neighbourhood, 'according as they may be situated respectively within or without the 'walls of Black Town.' Mr. Daly says that this section applies to land which is not the property of the East India Company and that when it is the property of a private individual Government can assess only at the rates customarily charged upon land of a similar description in the

neighbourhood, and that any excess charged is illegal. He omitted to read further on. Section 7 runs thus:—'If any owner of assessed land 'or any person holding land subject to a rent payable to the East India 'Company, shall, upon the written demand of the Collector, refuse 'or neglect to pay any sum at which the land is assessed, or with which 'it is charged as rent, the Collector may levy the same by distress and 'sale of the goods and chattels, wherever found, of such owner or 'lessee; or, after written demand upon the tenant or occupier, and on 'his refusal or neglect to pay the sum lawfully demanded, by distress [104] 'and sale of any goods and chattels found upon the land, in the 'manner appointed for regulating distresses for small rents in Calcutta by 'Act VII of 1847, extended to Madras by Section 89, Act IX of 1850.' Then he refers to the amending Act which is Madras Act VI of 1867 and reads Section 4 which he says does not add at all to the power of the Collector to levy, but simply points out the manner in which the levy is to be made. That is true enough. Then he goes on to say that, except Section 1 of the first Act and this Act, no other Act enables the Collector to levy the assessment, and therefore the imposition of the assessment is illegal and the plaintiff is entitled to recover his money back. I pause there and assume for the moment that this is the law on the subject. Nevertheless the plaintiff is not entitled to get his money back. The only action he can have will be an action for illegal distress. He has no right to recover back the money paid by him, unless it was paid and received without prejudice. Any payment under protest is a payment nevertheless. This was not a payment under duress nor was this a payment owing to any mistake of fact. It was a payment to enable the plaintiff to remain in possession of the land, and the plaintiff by paying under protest does not alter his position. If the assessment was illegal and the distress was illegal, the plaintiff's proper course was to bring a suit for damages. He cannot sue for the money to be repaid. Therefore for this reason alone his action must fail, the action being that the money paid by him ought to be repaid to him. But that is not the law. The law is that 'any person holding land subject to a rent shall, upon the 'written demand of the Collector, refuse or neglect to pay any sum at 'which the land is assessed (leaving it absolutely in the hands of the 'Collector to assess it at any sum), the Collector may levy by distress 'and sale of the goods and chattels of such owner or lessee.' It is not suggested that there was any irregularity in the distress or in the notice. The only objection taken is that the Collector has no power to impose any assessment so great and therefore his act in imposing assessment in this case is illegal. So far with regard to that I find on the law that the Collector has power to levy this assessment, call it penal or by whatever name you like, and that the order of the Collector assessing the plaintiff's land at Rs. 100 a month is not illegal. I find the second issue against the plaintiff.

[105] "The fourth issue is 'is the plaintiff's claim to recover the 'Rs. 3,004 barred as alleged in paragraph 7 of the written statement or at 'all?' In order to decide this I must again refer to the Act. So far as the bar is concerned that depends entirely upon Section 17 of Act XII of 1851 and Section 31 of Act VI of 1867. Section 17 is:—'All actions 'concerning any trespass or injury committed by any Revenue officer, 'acting under colour of this Act, or concerning any claim in respect of any 'goods taken by, or any moneys paid to, any Revenue officer under this 'Act, or concerning any claim of rent or revenue on the part of the East

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'India Company under this Act, shall be tried and determined in the Civil 'Courts established by the East India Company in the Zillah of Chingle-'put, notwithstanding the cause of action in respect of which such action 'is brought, arose, or the defendant therein reside, within the limits of the 'town of Madras, and every such action shall be brought within six 'months after the cause of action arose, and not afterwards.' In the present case the plaintiff brought this suit on the 13th December 1897. So that six months after the cause of action arose would relate back to the 13th May 1897. Since that date only Rs. 1,000 of this sum has been paid. So that with regard to the rest of the claim it would be barred. As regards the Rs. 1,000, the claim would not be barred.

"The next issue is 'has this Court jurisdiction by reason of the facts 'stated in paragraphs 6 and 7 of the written statement?' I am of opinion that the High Court has jurisdiction.

"The result is that the suit must be dismissed with costs."

The plaintiff preferred this appeal.

Mr. *J. G. Smith*, for appellant.

The Advocate-General (Hon. *C. A. White*) and the Government Pleader (Mr. *E. B. Powell*), for respondent.

Mr. *J. G. Smith.*—The plaintiff was not a trespasser; his title is established by the evidence. Moreover, he has shown long possession in himself and his predecessors who had a heritable interest even if it was not shown that they had title when they entered. See *Sundur* v. *Parbati* (1), *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (2), *Secretary of State for India* v. *Bavotti Haji* (3), *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (4), [106] and *Asher* v. *Whitlock* (5). Apart from these cases it was not necessary for the plaintiff to prove sixty years' adverse possession with reference to Limitation Act, Article 149. See *Secretary of State for India* v. *Bavotti Haji* (3) and *The Secretary of State for India* v. *Kota Bapanamma Garu* (6) as Government was defendant in the suit, and the evidence shows at least twelve years' adverse possession. Even if the learned Judge was right in holding that the plaintiff was a trespasser, the decree cannot stand as the Acts in question do not provide for the levy of penal assessment on trespassers. The land was not land paying rent, nor does Government say it was private land. So Act XII of 1851, Section 4, does not apply, nor does Section 7 apply on the view that the plaintiff was a trespasser, and Section 12 is silent as to trespassers. Moreover, Act VI of 1867, Section 4, gives to the Government no power to enforce a penal assessment. The money paid under the colorable legal process is consequently recoverable. See *Cadaval* v. *Collins* (7) and *Pitt* v. *Coomes* (8). It is submitted that the observations of the learned Judge as to the effect of payment under protest are not supported by authority. The right to dispute the claim is preserved by such payment. See *Scott* v. *Uxbridge and Rickmansworth Railway Co.* (9), *Green* v. *Duckett* (10), and *Greenwood* v. *Sutcliffe* (11). And the plaintiff's right to recover money so paid is recognized in Limitation Act, Schedule II, Article 16, and see *Kebul Ram* v. *Government* (12). As to the special rule of limitation held to bar part of the claim, it is inapplicable if the proceedings of Government were, as the plaintiff contends, totally null and void. See *Baijnath*

(1) 12 A. 51 (54.) (2) 14 C. 740 (748.) (3) 15 M. 315.
(4) 6 B. 215. (5) L.R. 1 Q.B. 1. (6) 19 M. 165.
(7) 4 A. & E. 858. (8) 2 A. & E. 459. (9) L.R. 1 C.P. 596.
(10) L.R., 11 Q.B.D. 275. (11) [1892] 1 Ch. 1, at p. 10. (12) 5 W.R. (C.R.), 47.

Sahu v. *Lala Sital Prasad* (1), *Venkata* v. *Chengadu* (2), and *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* (3).

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The Government Pleader (Mr. *E. B. Powell*), supported the judgment appealed against on the grounds stated therein.

JUDGMENT.

SHEPHARD, OFFG. C. J.—I see no reason whatever to think that Mr. Justice Boddam has come to a wrong conclusion on the facts of the case. The appellant's Counsel has failed to convince me that the learned Judge misappreciated the evidence of title adduced [107] on the appellant's behalf or indeed that any fact has been established in his favour except the fact of recent possession. It was argued on behalf of the appellant that, notwithstanding want of proof of title in himself, he is entitled to a declaration, unless it is proved that the land is the property of Government and *Asher* v. *Whitlock* (4) was cited. It was further contended that in any event the appellant was entitled to recover the sums exacted from him by the Revenue authorities under the name of penal assessment.

In order to deal with these arguments, I must first determine whether the Government has made out its title to the land. The learned Judge answered this question in the affirmative, and after a perusal of the evidence I have come to the conclusion that he was justified in that finding. It was admitted by the plaintiff's Counsel at the trial before Mr. Justice Boddam that a search had been made by the Revenue officials for the documents of title relating to this and the neighbouring lands, and that those documents could not be found. This being so, secondary evidence pointing to purchases made by Government was admitted, and this evidence shows that the land in question was bought by Government about 60 years ago. Until quite recently it should be stated, the land was left waste, and unenclosed. There is, however, evidence that it was occupied for sometime by sepoy lines and more recently as a famine camp. Later again, in 1882, it was included in lands let by Government to the witness Linga Chetti. During his tenancy it appears that the plaintiff, though he had not then acquired the title now set forward, laid claim to the land, No overt act was done by him as far as we can see till he planted a hedge. That must have been between 1888 and 1891; the fact was reported by the karnam to the Tahsildar. It was in 1891 that the protracted inquiry before the Deputy Collector was opened. The ultimate result of this inquiry was that in May 1895 the notice was issued to the appellant charging him with the payment of Rs. 100 a month for the land as long as he remained in occupation. When this period during which the plaintiff's title was *sub judice* is deducted, there remains a very short space of time during which he can claim to have been in possession of the land. No doubt it is incumbent on the respondent even against an occupant who has held for a few years without any title to prove a title to the land. [108] The Government cannot be placed in a better position because treating the appellant as a trespasser they have exacted from him the payment of impositions which, if they had not considered him a trespasser, they would not have demanded. I think, however, that the Government has made out a *prima facie* case, and there is certainly no evidence on the other side to rebut it. It follows that the appellant must fail so far as the declaration is concerned.

(1) 2 B.L.R. (F.B.), 1 (4, 18, 20.)
(2) 12 M. 168 (175.)
(3) 11 C. 200.
(4) L.R. 1 Q.B. 1.

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The question then is whether the monies paid by the appellant in obedience to the notice dated 24th May 1895 and the subsequent notices can be recovered. The appellant charges that the action of the Collector in this matter was illegal and alleges that the monies were paid under protest. He does not allege in the plaint that the payments were made under coercion and with regard to most of the payments there is no evidence that they were made in consequence of the distraint of the appellant's goods or any other form of coercion. In the absence of such evidence and there being no evidence of mistake on the appellant's part, I am unable to understand on what principle he can be entitled to recover the monies though he may have made payments under protest. That circumstance, can, in my opinion, make no difference, but it is said that with regard to one or two of the payments it is shown that it was in order to prevent distraint of his goods that the appellant paid the money. And though I doubt whether he is entitled to have the case treated on that footing I will assume that there is such evidence. It is incumbent on the appellant to prove not only that there was coercion, but that the coercion exercised was illegal. It is argued that if the land belongs to Government no revenue could be charged against the occupant and that, therefore, the imposition which is called penal assessment must be illegal. If the Act of 1851 stood by itself and if land revenue only was dealt with in that enactment, there would be some force in the argument, for Section 1 deals only with lands which are not the property of the Company and Section 3 declares in what manner the rate of assessment is determined. It would be difficult to justify the charge of Rs. 100 a month for the two cawnies or so of land, if land revenue only in the proper sense had to be taken into account. There is in the two Acts relating to the Town of Madras no section corresponding to Section 58 of Act II of 1864 precluding the Civil Courts from taking into consideration or deciding as to the rate of revenue. But in the Act of 1851 and more clearly in **[109]** the supplementary Act of 1867 provision is made for the collection of other charges besides land revenue. In this latter Act it is declared to mean "assessment, quit-rent, ground-rent or other charge upon the land "payable to Government." While in the former Act, it is assessed or assessable land and land charged with or subject to a rent payable to the Company that is dealt with, in the latter the comprehensive phrase used is "land subject to the payment of revenue." Since in the present case the Government was the owner of the land and the appellant was an occupant holding without title, it was competent to the Government as to any private landholder to charge rent and to exact payment of it in the manner ordained by law. I do not think it makes any difference that the Revenue officials called the charge by another name. Apart from the special provision made in favour of Government, as a revenue collecting authority I think there is a complete answer to the appellant's claim. He has no claim to recover rents voluntarily paid—moneys which he need not have paid had he not chosen to remain in occupation—or to recover moneys paid under pressure of lawful process. As to the greater part of the claim, moreover the suit is barred by the six months' rule contained in Section 31 of the Act of 1867.

I would dismiss the appeal with costs.

MOORE, J.—I concur.

Grant & Greatorex, attorneys for appellant.

The Government Solicitor, for respondent.

22 M. 109.

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APPELLATE CIVIL.

22 M. 109.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

SRIRAMULU (*Petitioner*), *Appellant v.* RAMASAM AND OTHERS (*Counter-petitioners*), *Respondents.** [28th October, 1898.]

Letters Patent, Section 15—*Civil Procedure Code—Act XIV of* 1882, *Section* 622—*Rejection of petition by a single Judge—Appeal.*

No appeal lies under Letters Patent, Section 15, against an order made by a single Judge dismissing an application under Section 622.

[F., 28 A. 133 (135) = A.W N. (1905) 218 (219) ; 26 M. 437 (438) ; R., 30 M. 311 = 17 M. L J. 123 (124) = 2 M.L.T. 84 (85) = 5 Cr. L.J. 288.]

[110] APPEAL under Letters Patent, Section 15, against the order of Mr. Justice Shephard (Officiating Chief Justice), by which he rejected civil revision petition No. 276 of 1898, which was preferred under Civil Procedure Code, Section 622, and prayed the High Court to revise the order of the District Judge of Vizagapatam made on miscellaneous petition No. 478 of 1897.

This appeal was preferred by the petitioner as above under Letters Patent, Section 15.

Venkatarama Sarma, for appellant.

Respondents were not represented.

JUDGMENT.

The order was one declining to exercise the power of revision conferred on this Court by Section 622 of the Code of Civil Procedure, which order a single Judge of this Court is authorized to pass under the Rules of this Court (see Rule I, Clause 4, of the Rules of the 6th November 1879).† In our opinion, no appeal lies against such order under the Letters Patent.

We therefore dismiss this petition.

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22 M. 110.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

ABDUL AZIZ KHAN SAHIB AND OTHERS (*Plaintiffs and Legal Representatives of Plaintiff No.* 4), *Appellants v.* APPAYASAMI NAICKAR AND OTHERS (*Defendants*), *Respondents.*‡ [18th July, 1898].

Execution sale—Sale of right, title and interest of zamindar—Impartible primogenitary zamindari—Interest taken by purchaser.

In 1873 and 1876, portions of an impartible primogenitary zamindari, which were in the possession of a lessee from the zamindar, were attached and brought to sale in execution of decrees against the zamindar. The purchase-money was very inadequate as the price of the full ownership of the property (subject to the lease), but what was sold according to the sale certificate was the right, title and interest of the judgment-debtor without any restriction. The judgment-debtor died in 1891, and the lease having run out, the purchaser now sued in 1893 for possession :

*Letters Patent, Appeal No. 60 of 1898.

† Appeal No. 66 of 1895.

‡ See 22 M. 70.

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[111] *Held*, that the plaintiff must be taken to have purchased an interest for the life only of the judgment-debtor.

[R., 27 M. 131 (135) (P.C.) = 6 Bom. L.R. 7 = 8 C.W.N. 186 = 31 I.A. 1 = 8 Sar. P. C. J 568; 3 Bom. L.R. 322 (339).]

APPEAL against the decree of P. Narayanasami Ayyar Subordinate Judge of Madura (West), in original suit No. 26 of 1893.

The plaintiff sued for possession of certain villages being part of the zamindari of Kannivadi, which was an impartible estate governed by the law of primogeniture. The late zamindar was the brother and predecessor in title of defendant No. 1 and died without issue in February 1881. On the 20th July 1861, the late zamindar had leased the villages now in question for a period of thirty years to one Audimulam Pillai. Subsequently in 1873 and 1876 the remaining interest of the zamindar was attached in execution of certain decrees and brought to sale and purchased by plaintiff No. 1. The order for sale and the sale proclamation and the sale certificates were all in the terms of Act VIII of 1859, Section 249. The villages had been attached as the property of the late zamindar and according to the sale certificates what had been sold was his right, title and interest therein. The value of the property was stated in the plaint to be six lacs of rupees, but the aggregate purchase-money paid by the plaintiff was Rs. 6,000 only, and it appeared that the plaintiff had not asserted his present claim for long after the death of the late zamindar. The plaintiffs Nos. 2 to 4 were joined as being interested in the property jointly with plaintiff No. 1 under an agreement dated 1892. Defendants Nos. 2 and 3 were the sons of defendant No. 1 and defendant No. 4 was a bank claiming the rights of a mortgagee over the estate. The defendants pleaded, *inter alia*, that the plaintiff under his purchase acquired an interest in the property for the life of the late zamindar only. As to this plea the Subordinate Judge framed the second and sixth issues as follows:—

"2. Whether the sales relied on by the plaintiffs are true, valid in law "and binding as against the first defendant?

"6. Whether what was attached, bargained for, sold and purchased by " the first plaintiff is only the life interest of the deceased Bangaru Appaya " Naik?"

His finding on the sixth issue was in the affirmative and consequently he dismissed the suit. In his judgment he referred to the conduct of the plaintiff, and to the current understanding of the law relating to impartible property previous to the decision of [112] *Sartaj Kuari* v. *Deoraj Kuari* (1), and he cited, *inter alia*, *Manson* v. *Thacker* (2). *Besley* v. *Besley* (3), *Okill* v. *Whittaker* (4), *Simbhunath Pandy* v. *Golab Singh* (5), *Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* (6), *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar* (7), Sugden's Vendors and Purchasers, 14th edition, page 743.

The plaintiffs preferred this appeal.

Ramasubba Ayyar, *Pattabhirama Ayyar* and *Ayya Ayyar*, for appellants.

Hon. *Bhashyam Ayyangar*, *Bhashyachariar*, *Ranga Ramanujachariar*, *Tiruvenkatachariar* and *Seshachariar*, for respondents.

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(1) 10 A. 272. (2) L.R. 7 Ch. D. 620. (3) L.R. 9 Ch. D. 103.
(4) 2 Ph. 338. (5) 14 I.A. 77.
(6) 17 I.A. 11 (14). (7) 14 I.A. 84.

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APPELLATE CIVIL.

22 M. 110.

JUDGMENT.

The main question in the appeal is what did the plaintiffs buy when they bought in the years 1873 and 1876, the "right, title and interest" of the late zamindar of Kannivadi in some of the zamindari villages. The appellant's vakil contends that the words are clear and that it is simply a question of law as to what the zamindar's interest was, and that that interest according to the ruling in *Sartaj Kuari* v. *Deoraj Kuari* (1) was an absolute interest. But we are unable to accept this contention, it having been clearly laid down by the Privy Council in more than one recent case that what the Courts have to do in such cases as this is to determine "the question of fact whether the thing meant to be sold and "bought was the entirety of the estate or only a share in it" (*Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* (2), *Simbhunath Panday* v. *Golab Singh* (3) and *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar* (4). That being so we have no hesitation in concurring in the conclusion at which the Subordinate Judge has arrived, namely, that the estate sold and bought by the appellants was only the life estate of the late zamindar and determined with his death. The law as then understood gave the zamindar no more than a life estate, and the ridiculously low price given for the property purchased indicates that it was only a limited estate that was sold. The first plaintiff would not venture into the witness-box to swear to the truth of his case, that he understood that he was buying the villages out and out. The plaintiffs' appeal like their suit must therefore fail and it is dismissed with costs. The decree of the Lower Court will however [113] be modified by disallowing the sum of Rs. 1,000 granted as vakil's fee to the fourth defendant in addition to a similar sum granted to the other defendants. The fourth defendant was not entitled to separate costs, as he came in of his own motion, and simply supported the other defendants.

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22 M. 113 = 8 M.L.J. 170.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

RAMASAMI AYYAR (*Plaintiff*), *Appellant v.* VENGIDUSAMI AYYAR AND OTHERS (*Defendants Nos.* 1, 4, 5, 20, 22 *to* 27, 29 *to* 38, 40 *and* 41), *Respondents.** [11th, 12th and 20th July, 1898.]

Hindu Law—Woman's estate — Power of alienation — Gift of land on daughter's marriage.

A Hindu, in whom the whole of the family property had vested, died without issue and his mother took the estate. She subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with her daughter. The gift was not found to be otherwise than reasonable in extent:

Held, that the gift was binding on the reversioner.

[R., 37 B. 251 (260) = 14 Bom.L.R. 1109 = 17 Ind.Cas. 741; 34 M. 422 (425) = 8 Ind. Cas. 195 = 20 M L.J 855 = 9 M.L.T. 26: 35 M. 628 (630) = 10 Ind. Cas. 56 = 21 M.L J. 695 = 9 M L T. 469 = (1911) 1 M.W.N. 422; 13 C.W.N. 994 (998); 4 Ind. Cas. 786 (790) = 5 N.L.R. 161; 4 Ind.Cas. 1094 = 17 M.L.J. 528 (531) = 5 M.L. T. 40 (42); 13 Ind.Cas. 475 = 22 M.L J. 321 = 11 M.L.T. 103 = (1912) M.W.N. 69; D., 30 M. 452 (454) = 17 M.L.J. 405 (407).]

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* Second Appeal No. 324 of 1897.

(1) 10 A. 272. (2) 17 I.A. 11 (14). (3) 14 I.A. 77. (4) 14 I.A. 84.

1898 JULY 20. — APPELLATE CIVIL. — 22 M. 113 = 8 M.L.J. 170.

SECOND appeal against the decree of C. Venkoba Chariar, Subordinate Judge of Tanjore, in appeal suit No. 369 of 1895, affirming the decree of the District Munsif of Tiruvalur in original suit No. 120 of 1893.

The facts of the case appear sufficiently for the purposes of this report from the following judgment.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar and *Tiagaraja Ayyar*, for appellant.

Hon. *Bhashyam Ayyangar* and *Tiruvenkatachariar*, for respondents.

JUDGMENT.

SUBRAMANIA AYYAR, J.—One Seshappayyar died in 1859, leaving him surviving a widow, the late Thaiyyu Ammal, a son and a daughter. The son, as the sole surviving male member of the family to which Seshappayyar belonged, took the whole of the joint estate. On his death, a few years afterwards, while remaining unmarried, his mother Thaiyyu Ammal inherited the estate. [114] Subsequently, she gave her daughter in marriage, and, at the time of the marriage, made a gift of a portion of the lands inherited by her to her son-in-law. The District Munsif and the Subordinate Judge held that the gift was binding upon the appellant, who, as the heir of the last full owner, has, since the demise of Thaiyyu Ammal, become entitled to succeed to the property. On behalf of the appellant, it was urged that a Hindu qualified owner in the position of Thaiyyu Ammal had no authority to make such a gift, and, even should it be held that she had, the gift in question in the present instance ought, having regard to all the circumstances of the case, to be declared unjustifiable. As to the latter part of this contention, it may at once be observed that I see no grounds for differing from the Lower Courts in their conclusion that the gift cannot, with reference to the extent of the whole estate and the other circumstances bearing on the matter, be taken to be otherwise than fair and reasonable. The question therefore is, had Thaiyyu Ammal authority to make a gift of landed property inherited by her to her son-in-law at the time of her daughter's marriage? No direct ruling on the point was cited before us. Reference was, however, made to certain passages in the Mitakshara (1) and the Smriti Chandrika (2) wherein the texts of Manu, Yajnavalkya and other Smriti writers, dealing with the question of allotment to be made by brothers to their maiden sisters at the time of partition, are commented upon. With reference to the true meaning of these texts, commentators are divided. Some of them hold that all that the texts mean is that funds required for the marriage of sisters should be provided out of their father's estate. Other commentators—Vijnaneswara among them—lay down that, inclusive of their marriage expenses, sisters are entitled to a provision not exceeding a fourth of what they would have got had they been males. For the purposes of this case it is not necessary to discuss which of the two views is to be taken as law. Assuming that, as argued for the appellant, the view advocated by Vijnaneswara and his followers is not law, the fact that so high an authority as the author of the Mitakshara propounds a rule thus favourable to maiden daughters, ought to make one hesitate to accept as sound the exceedingly limited construction, which was insisted on on behalf of the appellant and which can scarcely be

(1) Ch. I, Sect. VII, § 6—14. (2) Ch. IV, §§ 20 *et seq.*

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22 M. 113= 8 M.L.J. 170.

[115] said to be in itself very reasonable; *viz.*, that the texts justify a disbursement out of the estate of only the price of things required in connection with the celebration of the marriage. In my opinion, the better and sounder view is, as contended for the respondents, that the authorities should be understood to empower a qualified owner like Thaiyyu Ammal to do all acts proper and incidental to the marriage of a female according to the general practice of the community to which she belongs. Now, it is well known that at the time a girl belonging to the community with which we are concerned in this case, is handed over in marriage, certain other gifts have to be made to the bridegroom of which one is "bhudanam" or gift of land (Dubois' 'Hindu Manners, Customs and Ceremonies,' Beauchamp's edition, page 225). That, according to the notions of these people, a gift of that kind on such an occasion is indispensable is clear from what is done even in cases in which the family of the bride is not really in a position to give any land. In such cases conformity to the requirements of custom is sought to be secured by giving some little money as and for land. Nor is it difficult to understand how such a practice came to prevail from time immemorial. For apart from its being in reality a provision for the married couple the gift is believed to enhance the merit of the primary act, *viz.*, the giving of a virgin in marriage which, from a religious point of view, is supposed to be productive of considerable benefits to the parents of the virgin. It seems, therefore, but right to conclude that a gift of land to the bridegroom on the occasion of his marriage is an act warranted by the authorities and within the power of a qualified owner like Thaiyyu Ammal, provided, of course, the gift, having regard to the then position of the family and all the other circumstances of the case, is of such a fraction of the estate as would, by reasonable persons, be considered fair and proper.

As already stated, the finding in the present instance is to that effect. I therefore concur with the Lower Courts in upholding the gift and I would dismiss the second appeal with costs.

MOORE, J.—I concur.

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22 M. 116=8 M.L.J. 163.

[116] APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

BLAKE (*Plaintiff*) *Appellant v.* SAVUNDARATHAMMAL AND OTHERS (*Defendants*), *Respondents.** [29th July, 1898.]

Kasavargam tenancy—Right to buildings—Compensation on eviction.

A kasavargam tenant has a proprietary right to his house on the land, and, when evicted, he is entitled to compensation for his buildings.

[R., 11 Ind. Cas. 745 (750)=21 M.L.J. 891 (905)=10 M.L.T. 193]

SECOND appeal against the decree of F. H. Hamnett, Acting District Judge of Tanjore, in appeal suit No. 521 of 1895, affirming the decree of S. Dorasami Ayyar, District Munsif of Tanjore, in original suit No. 230 of 1894.

* Second Appeal No. 834 of 1897.

1898 JULY 29. — APPELLATE CIVIL. — 22 M. 116 = 8 M.L.J. 163.

Suit for possession of certain land which had been granted by the late Rajah of Tanjore to the Society for the Propagation of the Gospel, which was represented by the plaintiff. The first defendant's ancestors were kasavargam tenants of the mission and had erected certain buildings on the land. The District Munsif found that the tenancy had been determined in 1895 and he passed a decree for the plaintiff, but decreed that, if the defendants did not elect to remove the buildings on the land, the plaintiff should pay to them the sum of Rs. 1,000 as compensation therefor. The District Judge affirmed this decree.

The plaintiff preferred this second appeal. The second, third and sixth of the grounds stated in the appeal memorandum were as follows :—

"2. The first defendant as a kasavargam tenant is not entitled to "insist on being paid compensation ; but is bound to remove the building "when the landlord desires that he should do so.

"3. Even if a kasavargam tenant is entitled to compensation, the "defendant in this case is not entitled to it, because he is trespasser and "denied the plaintiff's title to the property.

"6. Even if defendants are entitled to compensation, they are "not entitled to more than the amount they themselves paid for the "building."

Sundara Ayyar, for appellant.

Respondents were not represented.

JUDGMENT.

[117] A kasavargam tenant has according to Wilson (see Glossary) a proprietary right to his house, and the Sadr Court ruled in *Appa Pillai* v. *Gopalaswami Reddi*(1) that, when ejected, the kasavargam tenant was entitled to compensation for his buildings. The Munsif found this was a recognized principle and there was no denial that it was an incident of kasavargam tenancy. The Judge agreed with the Munsif, and, as the decision is supported by express authority of old date, we have no doubt that it is correct in law. The amount granted as compensation is not a question of law. The second appeal therefore fails and is dismissed.

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22 M. 117 = 8 M.L.J. 190.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Davies.

SRINIVASA SWAMI (*Defendant*), *Appellant v.* RAMANUJA CHARIAR AND ANOTHER (*Plaintiffs Nos.* 3 *and* 4), *Respondents.** [2nd August, 1898.]

Religious institution—Suit for ejectment of a jeer as being illegally appointed—Prayer for appointment of a new jeer—Elective office.

The jeer of a mutt died in 1888 and the defendant assumed office as his successor. The plaintiffs, who were disciples of the mutt, asserting in the plaint that the office of the jeer was elective, but without having held an election,

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* Appeal No. 62 of 1897.

(1) Sadr Decisions (1860) 41.

brought a suit to eject the defendant and to have a new jeer elected or appointed by the Court and placed in possession of the properties of the institution. It was alleged both that the defendant had not been duly appointed to be jeer and also that he was disqualified for that office by immorality and otherwise:

Held, that the suit was not maintainable.

[R., 7 Ind. Cas. 391 = 8 M.L.T. 248 (249) = (1910) M.W.N. 397; 22 M.L.J. 1 (10) = 10 M L T. 341; D., 3 Ind Cas. 255 = 19 M L.J. 772 (777) = 6 M.L.T. 193.]

1898 AUG. 2.

APPELLATE CIVIL.

22 M. 117 = 8 M.L.J. 190.

APPEAL against the decree of S. Russell, District Judge of Chingleput, in original suit No. 11 of 1891.

The plaintiff sued with the sanction of the Advocate-General under Civil Procedure Code, Section 539, on behalf of all the disciples of the Ahobalam mutt for a declaration that the defendant who claimed to be the jeer of the mutt was not the duly appointed successor of the last head of the institution who died in 1888: [118] and the plaint further prayed that the Court should appoint or cause to be elected a duly qualified disciple to be the jeer, and that the mutt and the property attached to it should be delivered to his possession. Paragraphs 2 and 5 of the plaint were as follows:—

"(2) The usage is for each head of the mutt to appoint as successor "shortly before his death a duly qualified person from among the disci-"ples of the mutt in consultation with and with the concurrence of the "disciples. And if the head of the mutt dies without appointing a suc-"cessor as above stated, the disciples interested in the mutt meet together "and select and appoint a proper successor.

"(5) The defendant has not legally been appointed the successor of "the deceased head of the mutt, and he is unfit to be appointed the head "of the mutt by reason of his immoral character and unworthy conduct "and by reason of his not possessing the requisite qualifications to be a "sanyasi and the head of the mutt. Even after the defendant assumed "the position of the head of the mutt, his conduct had been such as to "incapacitate him from continuing to be the head of the mutt."

The defendant pleaded, *inter alia*, that the suit framed was not sustainable.

The District Judge passed a decree as prayed, directing that a new jeer should be elected by the disciples.

The defendant preferred this appeal.

Mr. *E. Norton*, *Ramachandra Rau Saheb*, *V. Krishnasami Ayyar* and *Seshagiri Ayyar*, for appellant.

Pattabhirama Ayyar, *Ramakrishna Ayyar* and *Raghava Ayyangar*, for respondent No. 2.

JUDGMENT.

In our opinion the plaintiffs have entirely misconceived their rights. Their case is that no successor has been appointed in place of the deceased jeer. They ask for a declaration that the defendant is not the duly appointed successor; they pray that the Court may be pleased to appoint a successor or cause one to be elected according to usage; and they ask that the property be delivered up to the person so appointed.

In the plaint, it is alleged, that the disciples should, when no successor has been appointed by the jeer before death, meet and select a proper successor, and the defendant agrees that this is the custom.

[119] No reason is suggested why the disciples, whom the plaintiffs represent, should not have met and made their selection. There was thus

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no necessity for them to come to the Court to assist them in making the appointment. They might have made an appointment and allowed the appointee to bring a suit for ejectment, if necessary. It is quite clear that the plaintiffs are not entitled to a mere declaration (*Strinivasa Ayyangar* v. *Strinivasa Swami*(1)) and they cannot be the more entitled, because an unnecessary prayer for an appointment by the Court is added.

In the cases cited, we must assume that there were circumstances which made it impracticable for the persons having the right to appoint to exercise that right, and thus entitled them to come to the Court. In those, moreover, the decree was drawn up in such a way as to preclude the possibility of another suit.

In the present case, as the decree stands, it will apparently remain open to the defendant to take objection to the appointment which is made under the decree and thus another suit may be required, whereas, if the suit were brought by a person appointed by the disciples, the whole dispute might be decided in one suit. Nothing has been done on the decree, though it is now nearly two years old, and it is ten years since the vacancy occurred. The reason probably is that the respondents know they cannot obtain a majority.

We reverse the decree and dismiss the suit with costs throughout.

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22 M. 119 = 8 M.L.J. 288.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

GROVES AND OTHERS (*Counter-petitioners Nos.* 1 *to* 3), *Appellants v.* ADMINISTRATOR-GENERAL OF MADRAS (*Petitioner*), *Respondent.** [5th and 19th October, 1898.]

Civil Procedure Code—Act XIV of 1882, *Sections* 234, 298—*Execution—Petition to set aside sale—Death of judgment-debtor after proclamation and before sale—Non-joinder of executors.*

An order for the sale of a debt of Rs. 70,000 (previously attached) owing by H and W to the judgment-debtor was made in execution in two decrees, and [120] on 4th May 1895 a sale proclamation for 20th idem was issued. On 11th May the judgment-debtor died leaving a will, of which W was one of the executors. W brought these circumstances to the notice of the Court stating that the executors would proceed to apply for probate and asking for an adjournment of the sale. The adjournment was refused and the sale proceeded and the decree-holders, who had previously agreed with H and W to sell the debt to them for the amount of the purchase money, purchased the debt for Rs. 30,000, the estate of the judgment-debtor being unrepresented. The Administrator-General, to whom the administration of the estate of the judgment debtor was afterwards transferred, applied to be brought on to the record and to have the sale set aside:

Held, that the sale was vitiated by the omission to bring the legal representative of the judgment debtor on to the record and should be set aside on the application of the Administrator-General, no separate suit being necessary for that purpose.

[R., 12 M.L.J. 24 (33).]

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* Appeal against Order No. 70 of 1898.

(1) 16 M. 31.

APPEAL against the order of J. A. DeRozario, Acting Subordinate Judge of Ootacamund, on miscellaneous petition No. 78 of 1896, in the matter of original suit No. 74 of 1894.

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The facts of the case appear sufficiently for the purposes of this report from the judgment of Mr. Justice Boddam.

Mr. *W. Barton*, for appellant.—The debt sold being moveable property, Section 298 of the Civil Procedure Code applies. The irregularity in conducting the sale could have been rectified only by a suit and not on a petition. The Subordinate Judge erred in finding that R. Woolley died prior to the order for sale. The order was made in February 1895 but was stayed, and was then ordered to be proceeded with on 3rd May 1895, whereas Woolley died on 11th May 1895. There is no provision in the Civil Procedure Code requiring notice to be given to the legal representative of a deceased judgment-debtor of the sale of property which had been attached in his life-time; see *Sheo Prasad* v. *Hira Lal* (1) which was followed in *Abdur Rahman* v. *Shankar Dat Dube* (2). The principle laid down in these cases is that where property has been attached during the life-time of a judgment-debtor, it must be considered as in the custody of the law, and for the purpose of selling that property, it is not necessary to implead any one as a legal representative. The case of *Krishnayya* v. *Unnissa Begam* (3) is against me, but the Full Bench decision of the Allahabad High Court does not appear to have been brought to the notice of the Judges. Moreover this decision has been considered and dissented [121] from by the Calcutta High Court in *Net Lall Sahoo* v. *Sheikh Kareem Bux* (4). The Court had jurisdiction to order a sale of the debt in execution of the decree; the purchasers were not bound to inquire into the correctness of such order any more than into the correctness of the judgment upon which execution issued, *Rewa Mahton* v. *Ram Kishen Singh* (5). See also *Narayana Kothan* v. *Kalianasundaram Pillai* (6). Further it has been found that the purchasers acted *bona fide*, and that no injury has been occasioned by not bringing the legal representatives on the record, the sale should therefore have been upheld. See *Aba* v. *Dhondu Bai* (7) and *Narayana Kothan* v. *Kalianasundaram Pillai* (6).

Mr. *K. Brown*, for respondents, argued that the sale was void for want of representation of the judgment-debtor, submitting that the question was concluded by the authority of the Madras cases cited, the reasoning of which was unaffected by the authorities cited on the other side: he also contended that the admitted facts disclosed fraud on the part of the purchasers. The cases relied on were those referred in the judgment.

JUDGMENT.

BODDAM, J.—This is an appeal from an order of the Acting Subordinate Judge of Nilgiris on a petition presented on the 6th July 1896 by the Acting Administrator-General of Madras under Section 244, Civil Procedure Code, to set aside a sale in execution which took place on the 8th July 1895.

The facts are as follows:—One Harvey owed Rs. 70,000 to Richard Woolley, and in March 1893 he executed a power of attorney to Richard Woolley authorising him to dispose of his coffee estates and pay himself. In April 1893, however, Harvey took P. W. Woolley, a son of Richard

(1) 12 A. 440. (2) 17 A. 162. (3) 15 M. 399. (4) 23 C. 686.
(5) 14 C. 18. (6) 19 M. 219. (7) 19 B. 276.

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Woolley, into partnership with him. In October 1894 Richard Woolley agreed with Harvey and P. W. Woolley not to exercise his rights under the power of attorney until 1st June 1896, but in the meanwhile they were to pay him 10 per cent. interest instead of 8 per cent. per annum. In November 1894 one Groves, who had commenced an action for a debt of Rs. 17,342 against Richard Woolley (civil suit No. 74 of 1894), applied for and obtained an attachment order (Exhibit B) before judgment of Harvey's debt, prohibitory orders Exhibits (A and H) being issued to Harvey and Richard Woolley on the [122] 27th November, 1894. On the 22nd January 1895 Groves got judgment and on the 26th February 1895 applied for execution of his decree by sale of the debt, and the sale was ordered for the 18th March 1895. In the meanwhile R. G. Carbry and W. Johnson had obtained a decree against R. Woolley in original suit No. 13 of 1894 in the District Court of Coimbatore for Rs. 8,059. Their decree was transferred for execution to the Subordinate Judge's Court of Ootacamund and the same debt was attached. The sale ordered for the 18th March was stayed pending the hearing of a petition by R. Woolley to the High Court, but this having been dismissed it was, on the 3rd May 1895, ordered to proceed, and on the 4th May 1895 sale proclamation was issued for the 20th May 1895.

On the 11th May 1895 Richard Woolley, the defendant, died in England, leaving a will and codicil whereby he appointed three executors, one of whom was P. W. Woolley, his son.

On the 20th May 1895 P. W. Woolley presented a petition under Section 234 of the Civil Procedure Code, stating that his father was dead, that the executors would soon apply for probate, and asking that the sale should be postponed in order that the executors may be joined. His petition was dismissed. On the same day Messrs. Carbry and Johnson applied for execution of their decree by sale of the same debt. Whether or not any order was made on this petition is by no means clear; nor is it in any way material, for the sale had already been ordered in original suit No. 74 of 1894 to take place on this 20th May. The sale commenced and was conducted from the 20th to the 23rd, but no bidders came forward and it was consequently adjourned. On the 7th June 1895, a fresh proclamation was issued fixing the sale for the 8th July 1895, the property to be sold being described as "a debt of Rs. 70,000 due by H. F. "Harvey to the judgment-debtor and secured by an irrevocable power of "attorney and mortgage of certain estates in Wynaad." In the meanwhile P. W. Woolley and his sister applied for probate of their father's will, and an arrangement was made to transfer the administration to the Administrator-General of Madras after grant of probate. Prior to the sale taking place, the decree-holders in the two suits entered into an agreement with Harvey and P. W. Woolley to bid at the sale and after purchase to assign the same to Harvey and P. W. Woolley for the same amount for which they might purchase [123] it. At the sale the decree-holders were the only bidders and purchased the debt for Rs. 30,682-8-0, and this amount was credited to the two decrees and they assigned their interest (in accordance with their previous agreement) to Harvey and P.W. Woolley after having got the Court to issue notices under Section 301 of the Civil Procedure Code to Harvey and the Administrator-General to whom the administration of the estate of Richard Woolley had been transferred on the 9th September 1895.

Now it is apparent on this state of facts that the debt of Rs. 70,000 due from Harvey to the estate of Richard Woolley has been sold to Harvey

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and his partner, P. W. Woolley, for Rs. 30,682, and that the estate of Richard Woolley has lost the balance amounting to nearly Rs. 40 000, the purchasers (the persons benefited) being the debtor and P. W. Woolley his partner, to whom probate was originally granted. *

It is also apparent that the Subordinate Judge has made a mistake in the facts upon which his judgment is based. He states that R. Woolley died prior to the order for sale. This is not so. The order for sale, as is apparent from Exhibit L, was made on the 26th February 1895, and though the sale was stayed by the High Court it was on the 3rd May 1895 ordered to proceed and the sale proclamation was issued on the 4th May 1895 for the sale on the 20th May, whereas Richard Woolley did not die till the 11th May 1895, and though the sale on the 20th May 1895 proved abortive and was adjourned till July 1895 no fresh order for sale was made after the 3rd May which was prior to his death.

It was argued before us that the sale was void inasmuch as at the time of the sale the person to whom the debt was due, the judgment-creditor, was dead and there can be no sale of a dead man's rights, that at the time of the sale the property that was of the dead man was vested in his executors, and as they were not brought on the record or made parties no interest which was vested in them at the time of the sale was sold. On the other hand, it was argued that the effect of selling the debt without the executors being joined was merely an irregularity in publishing or conducting the sale and the only remedy was under Section 298, Civil Procedure Code, by action.

If the argument of the petitioner is well founded, it is clear that this is not a mere irregularity in publishing or conducting the sale and Section 298 does not apply.

[124] The difficulty in deciding the question lies in adverse decisions which have been come to upon the question. There are cases decided in each of the other High Courts which practically decide the question adversely to the petitioner's contention (though all the cases do not turn upon Section 298), whereas the Madras High Court has practically decided the question the other way.

The Subordinate Judge in his judgment says:—"In regard to the "property sold it is not disputed that it was a simple debt due to the "deceased judgment-debtor and secured by an irrevocable power of "attorney and that it was sold as a mere debt." If that is so the only thing that was sold was the right of a dead man to be paid a debt. In *Ramasami* v. *Bagirathi* (1) it was held that where a judgment-debtor died after his land had been attached and the judgment-creditor brought the land to sale without making the representatives of the deceased parties to the proceedings, the sale was illegal and ought to be set aside. Again in *Krishnayya* v. *Unnissa Begam* (2) where a decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made and the sale proceeded, though the execution-debtor died before the sale his representatives not having been brought on to the record, it was held that the sale was void and must be set aside. This case is absolutely on all fours with the present case and would decide the question; but the Full Bench case of *Sheo Prasad* v. *Hira Lal* (3) was not cited or

* After this add the following:—"*and the estate of R. Woolley losing more than half the debt*"—which form a part of the judgment.—ED.

(1) 6 M. 180. (2) 15 M. 399. (3) 12 A. 440.

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referred to, and as that case decides exactly the contrary though it does not bind us, we have to determine which is right.

For myself (and I say it with all respect to the Judges who constituted the Court), I think the reasons given for the decision of the Allahabad High Court are wrong. The fact that property attached is in the custody of the law does not vest the property in the Court. The attachment does not effect the legal devolution of the property ; it only gives at the best the custody of the property, without affecting the right to the property, to the Court. Where the property is a mere chattel which passes by delivery, possession of the property may be sufficient to pass the property, but where the possession of the property may be rightfully in one person though the title to the property is in another, this does not apply.

[125] In the present case the only thing sold was the right of a dead man which passes no property, as the dead man had no right at the time of the sale, the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record.

Section 234 of the Civil Procedure Code says if a judgment-debtor dies before a decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives. The Allahabad High Court hold that this does not apply to cases where the judgment-debtor dies after attachment but before sale. I cannot understand why. Take the present case. It cannot be said that the decree had been fully executed until the sale took place, and if the decree has not been fully executed the section applies. If an execution-creditor does not choose to avail himself of this section, he must take the consequences. In the present case if the sale had been postponed, as in fact it was (the first sale having proved abortive) until probate was taken out and the executors (P. W. Woolley and his sister) had been joined, it is more than probable that the attachments would have been satisfied and no sale would have been necessary, the result being that the executors or the Administrator-General acting for them would have had an opportunity of recovering something for the benefit of the estate of R. Woolley, deceased.

In *Narayana Kothan* v. *Kalianasundaram Pillai* (1) the judgment of SUBRAMANIA AYYAR, J., rather supports this view, though the case is under a different section and the judgment-debtor did not die but was declared insane before the sale. Now let me consider what will be the effect if the sale is declared void. The assignees of the purchasers knowing the facts before the sale agreed to buy what was sold for the price bid by the actual purchasers who were the judgment-debtors, and they have paid the judgment-debtors' debts in order to acquire whatever they bought. If they so bought they cannot recover anything from the judgment-debtors, though the actual debtor to the estate may become liable to the Administrator-General for the balance of the debt.

On the merits, therefore, as well as on the law I have come to the conclusion that the sale should be set aside.

DAVIES, J.—I entirely agree with my learned colleague that the legal representatives of the deceased should in such cases be **[126]** placed on the record before sale, and that in this case the sale was vitiated by the

(1) 19 M. 219.

omission; for if P. W. Woolley had been brought in as the executor of his father's estate, he would not have been able to enter into the arrangement that he did as P. W. Woolley, the debtor to his father's estate, by which he endeavoured to reduce his own liability to his father's estate by some Rs. 40,000.

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The appeal is therefore dismissed with costs.

Barclay, Orr & David—solicitors for respondent.

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22 M. 126 = 9 M.L.J. 19.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

SUBBA REDDI (*Defendant No.* 5), *Appellant v.* CHENGALAMMA AND OTHERS (*Plaintiffs and Defendant No.* 1), *Respondents.** [10th, 11th and 19th October, 1898.]

Hindu Law—Lessee from widow—Quarries worked for purposes of State Railway—Compensation money.

Land inherited by a widow from her husband was leased by her. The authorities of a State Railway worked quarries on part of it and Government paid Rs. 5,000 as compensation to the lessee. The reversionary heirs sued to establish their right to the money:

Held that the money paid by Government whether regarded as the price of stone bought or compensation for wrong done should be regarded as part of the produce of the estate, and should not be treated as part of the estate itself or as proceeds of the conversion of part of it into money.

The right of a widow to work quarries on land inherited from her husband considered.

[R., 11 C.L.J. 533 (536) = 6 Ind. Cas. 508 (509).]

APPEAL against the decree of T. M. Saminadha Ayyar, District Judge of Nellore, in original suit No. 8 of 1894.

The plaintiffs sued as the reversionary heirs of one Kristappa Nayudu, deceased, who had died without issue leaving a widow. Land forming part of his estate, which was held by defendant No. 5 as lessee and mortgagee from the widow defendant No. 1, was taken up by the Government for quarrying purposes at the construction of the Nellore State Railway and Government paid the [127] compensation money, *viz.*, Rs. 5,940-4-4 to defendant No. 5. The plaintiffs sought a declaration of their reversionary right to this sum of money and other reliefs.

The District Judge decreed that the amount of Rs. 5,940-4-4 paid into the hands of defendant No. 5 be declared to be available for the benefit of the reversioners (plaintiffs) on the death of defendant No. 1.

The defendant No. 5 preferred this appeal.

Pattabhirama Ayyar and *Nagabhushanam*, for appellant.

Hon. *Bhashyam Ayyangar* and *Tiruvenkatachariar*, for respondents.

JUDGMENT.

SHEPHARD, OFFG. C.J.—The plaintiffs (respondents) or some of them are admittedly the presumptive heirs of C. Kristappa Nayudu, entitled on the death of his widow Narayanamma. The appellant is the holder under

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* Appeal No. 250 of 1897.

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a lease for thirty years executed by the widow on the 30th August 1868 of two villages, part of the property of the late Kristappa Nayudu. It is admitted that, under this lease and a subsequent mortgage, the appellant is entitled to hold the villages during the life-time of the widow and her mother-in-law the second defendant. In the plaint it is alleged that the Railway authorities opened quarries in the said two villages and took out stone for which compensation was paid to the amount of Rs. 5,940-4-4. It is charged against the appellant that he improperly represented to the Government, that he was entitled to receive this, and that notwithstanding the objection of the plaintiffs, the money was paid to the appellant. The cause of action is stated to have accrued on the date when the appellant improperly obtained the money from Government, and the plaint concludes with a prayer for a declaration that "for the sum so received with interest "henceforward, the reversionary heirs of the first defendant are the heirs "after her death and that the fifth defendant (appellant) had no right to "receive the amount."

This is how the plaint stands as amended. As originally framed there was a further prayer that the money should be brought into Court. The appellant in his written statement denied the plaintiffs' right to have the money brought into Court and insisted on his right as lessee of the two defendants to enjoy the produce of the two villages. He denied any injury to the permanent rights of the reversionary heirs. It may be noted that in the plaint there was no express allegation of such injury or any [128] complaint of waste. Several issues were adjudged, but there is no definite finding on any of them and it is somewhat difficult to say on what data the judgment is actually based. In substance, I take it, that the Judge means to find that the removal of the stone was an act which if done by the widow could not have been justified, that the money paid in compensation must be deemed to be the price paid for the stone and that accordingly the money represents a part of the heritage to which ultimately the respondents may become entitled. The evidence adduced by the plaintiffs was directed to showing the nature of the ground before the quarrying took place, the extent and the results of the quarrying. There appears to be no doubt that the thirteen acres in question were grazing ground; there is some evidence that quarrying had been begun on part of the land or on neighbouring land before the operations of the railway officials began. As to the extent of these operations, the evidence of the witnesses is exceedingly vague. They say that the quarrying went on for three or four years; they are indefinite about the depth of the pits and do not venture to give an estimate of the amount of stone carried away. The only measure of it which we have is the sum awarded in compensation.

As to the result of the quarrying, the plaintiffs' witnesses say that most of the stone has been removed and that the land is no longer fit for grazing and is practically of no value. What it would cost to fill up the pits and level the ground they do not say. The Judge refers to the appellant's letter to the Collector, and considers that to afford proof that the land has become 'spoiled.' The letter does not say anything of the sort, and, even if it did, I do not think it would be safe to attach much weight to the terms used in such a letter of complaint. The evidence of the defendants' witnesses is of much the same character as that of the plaintiffs.' The former say the pits are much less deep than the plaintiffs' witnesses assert and that at a small cost per acre they might be filled and the land rendered fit for cultivation.

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On the evidence I think it is impossible to find as a fact that the land has been ruined or rendered valueless by the operations which have been carried on, nor do I think it proved that the quarrying has been conducted in such a way or to such an extent as to exhaust the resources of the land. It was argued on behalf of the respondents that the widow and her lessee must be taken to have acquiesced in the operations conducted by the Railway [129] authorities on the land and to have consented to a conversion of part of the soil—that is part of the heritage—into money. The money received in exchange for the stone removed must, it is argued, form part of the heritage. This argument is based on the supposition that systematic quarrying on the part of a widow is an act in excess of her powers, and therefore one which may be designated as waste and may entitle the reversionary heirs to an injunction. That the reversionary heirs are entitled to have the widow restrained from working destruction of the property, there can be no doubt (*Hurrydoss Dutt* v. *Rungunmoney* (1), *Gobindmani Dasi* v. *Shamlal Bysak* (2)). The question in this case is whether the quarrying, if it had been conducted by the widow, would have been a lawful act on her part. Although it does not follow that the plaintiffs are entitled to a decree against the appellant if this question is answered in the negative, it seems clear that an affirmative answer must lead to the conclusion that no suit lies against the widow or against her lessee. We were referred to some English cases on the law of waste, and we were invited to treat the widow as if she were in the position of a tenant for life according to English law. That is not, however, the position assigned to the widow in the cases above cited (see too *Katama Natchiar* v. *The Rajah of Shivagunga* (3)). Nor is there any case which goes the length of deciding that a widow may not open new mines or cut down timber or that, if she does so, she must account for the proceeds. The widow is certainly not in the position of a trustee accountable for her management to the heirs of her husband. If English cases are to be cited, it appears to me that the cases most nearly in point are those in which a Court of Equity has restrained tenants not impeachable for waste from doing acts which amount to a spoliation or destruction of the estate (see White and Tudor's notes to *Garth* v. *Cotton* (4), and *Bowles*' case (5)). In the present case, as it appears to me, the evidence falls far short of proving such a case as that. It may be that quarrying, except for domestic purposes, had not taken place on the estate before the railway works were opened. There was probably little or no quarrying because there was no market for [130] the stone. The mere novelty of the operation does not show that it was an improper act on the part of the widow or that it was an act destructive of the estate. The extent of the quarrying might perhaps be material to show that spoliation and not fair use of the estate was intended. But as I have already observed it is not shown what amount of stone was taken nor what remains. All that we know is that in the course of three or four years a considerable amount of stone was taken. There is little doubt that this particular mode of enjoying the property is the most profitable, and I think the Courts ought to be slow to hold that a Hindu widow is not at liberty to use her land to her own advantage in the manner and for the purposes to which it is naturally best suited.

Holding that the plaintiffs have failed to prove a case against the

(1) 2 Sev. 657.
(2) B.L.R. Sup. Vol. 48 (53).
(3) 9 M.I.A 539 (604).
(4) 3 Atk. 751 = 1 White & Tud. p. 697.
(5) Tudor's Leading Cases on Real Property, p. 115.

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widow, on the assumption that she is responsible for the acts of the railway authorities, I do not find it necessary to embark on the further question whether any case for a declaratory decree has been established against the appellant. In my opinion the money paid to the appellant, whether it is regarded as the price of stone bought or compensation for wrong done, is part of the produce of the estate and cannot be treated as part of the estate itself. Accordingly I reverse the decree of the District Judge and dismiss the suit with all costs.

Benson, J.—We are asked to uphold the decision of the District Judge on the ground that there has been a virtual conversion of a part of the corpus of the estate—that is of the heritage—from land into money, and that the plaintiffs are therefore entitled to regard that money as part of the estate and to protect the ultimate interests of the reversioners therein by obtaining the declaration sought for in the plaint. I do not think that there is any sound basis for this contention. It is true that stone has been quarried and sold as a source of profit off part of the estate, but I think it is impossible to hold that this amounts to a destruction of the land where the quarries were worked. At most it is but the removal of a portion of the surface of the ground. There can be no doubt but that by a moderate expenditure, not, perhaps, by the expenditure of so small a sum as Rs. 5 per acre, as some of the witnesses say, but still by a moderate expenditure the ground could be made fit for cultivation or at least for grazing—the purpose to which it was formerly applied. It is also certain that the quarries are not really exhausted, but could [131] still be worked, though at a greater depth and therefore with less profit than heretofore. In these circumstances I am of opinion that it would be pushing the rights of reversioners to an undue length to say that they are entitled to claim that the money realized by the widow or her lessees by working the quarries should be set apart as a fund for their ultimate benefit. No authority in the Hindu law or in reported cases in India has been cited in support of such a claim, and I doubt whether we could properly apply to a Hindu widow all the restrictions which the English law has imposed on a tenant for life in regard to mines, quarries and the like. I think that, in the facts of the present case, the compensation paid to the widow's lessees should be regarded as profits from the lawful use of the land rather than as the proceeds of the conversion of part of the landed heritage into money. I therefore agree with my learned colleague in holding that the appeal must be allowed and the suit dismissed with costs throughout.

22 M. 131.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

VIBHUDAPRIYA THIRTHASAMI (*Petitioner and Defendant No. 4*), *Appellant v.* VIDIANIDHI THIRTHASAMI (*Counter-petitioner and Plaintiff*), *Respondent.**
[23rd August, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 244—*Application by exonerated defendant.*

A defendant, against whom no decree has been passed, but whose rights are invaded in execution, is entitled to come in under Civil Procedure Code, Section 244, and to appeal against an order made in such proceedings.

[R., 23 A. 346 (350); 23 M. 361 (F.B.); 15 C.P.LR. 110; D., 30 M. 72 (74) = 16 M.L.J. 433 (434) = 2 M.L.T. 34 (36).]

APPEAL against the order of H. G. Joseph, District Judge of South Canara, on civil miscellaneous appeal No. 49 of 1897, affirming the order of J. F. D'Souza, District Munsif of Udipi, on miscellaneous petition No. 98 of 1897.

In original suit No. 277 of 1893, the plaintiff obtained a decree by consent against defendants Nos. 1 and 2 for possession of certain [132] land which he now sought to execute. Part of the land in question in that suit was in the possession of defendant No. 3, who put in the present application under Civil Procedure Code, Section 244, Clause (*c*), praying that possession should not be given to the plaintiff. The material averments in the petition were as follows:—

"2. The plaintiff is not entitled to recover the plaint property under Section 263 of the Civil Procedure Code, on the strength of the decree by consent passed against the first and second defendants.

"3. There is no provision in the appeal decree that the plaintiff should recover possession of the suit property. The provision therein that the first and second defendants should surrender the property to the plaintiff means that they should surrender the property, if any, in their possession. It should not be caused to be surrendered according to Section 263 of the Civil Procedure Code.

"4. The plaintiff's claim against the third and fourth defendants has been dismissed. Against these defendants, the plaintiff cannot get relief in this execution case, as if there is a decree against them."

The District Munsif dismissed the petition observing that the petitioner had at present no *locus standi* and the District Judge affirmed his decision.

The petitioner preferred this appeal.

Pattabhirama Ayyar, for appellant.

K. Narayana Rau, for respondent.

JUDGMENT.

It is contended by the respondent that no appeal lies in this case, and we are referred to *Naghamuthu* v. *Sowerimuthu* (1) and *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (2). We think the present case is

* Appeal against Appellate Orders Nos. 107 to 110 of 1897.

(1) 15 M. 226. (2) 20 M. 407.

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distinguishable from these, inasmuch as the questions for decision in those cases did not relate to the execution of a decree, and could not, under any circumstances, become the subject of investigation under Section 244, Civil Procedure Code. Here, however, the question will really be one relating to the execution of the decree, inasmuch as the property, delivery of which is sought in execution, includes property in the possession of the appellant. Though no decree as against him in respect of this property was passed, yet a decree was given against other defendants for lands which included those in possession of the appellant. *Kuriyali* v. *Mayan* (1) is an authority for holding that a defendant, [133] against whom no decree is given, will be entitled to take proceedings under Section 244, Civil Procedure Code, in the event of his rights being invaded in execution professedly taken against other defendants. If such invasion had taken place in the present case, the appellant would have been entitled to come in under Section 244, and would be entitled to appeal against any order passed in such proceedings; but as yet no such invasion has taken place, and we understand the Lower Courts have dismissed the appellant's application on the ground that it is premature. In this view we concur and dismiss the appeal with costs.

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22 M. 133 = 8 M.L.J. 205.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

NARAYANA REDDI (*Counter-Petitioner*), *Appellant v.* PAPAYYA (*Petitioner*), *Respondent.** [23rd August, 1898.]

Transfer of Property Act—Act IV of 1882, *Section* 87—*Decree for foreclosure—Mortgagor's application for extension of time.*

In a suit on a mortgage a decree for foreclosure was passed, a period of three months being fixed for the discharge of the mortgage-debt. The mortgagor having made default, the decree-holder applied for and was placed in possession of the property. The mortgagor, to whom no notice had been given of the decree-holder's application, then applied for and obtained an extension of time for payment, and he made the payment and recovered possession :

Held, (1) that the mortgagee was entitled to appeal against the order;

(2) that the order was right since no order absolute of foreclosure had been made after notice to the mortgagor.

[**Diss.**, 25 M. 244 (289) (**F.B.**); **F.**, 27 C. 705 (708); 3 C.L.J. 533 (536); **R.**, 32 C, 253 (255) = 9 C.W.N. 81 (82) (**F.B.**); 7 A.L.J. 953 (956) = 7 Ind. Cas. 50; 2 N.L.R. 137 (140); U.B.R. (1897—1901) 582; **D.**, 27 M. 40 (42); 4 C.L.J. 317 (318).]

APPEAL against the order of S. Gopala Chariar, Acting District Judge of cuddapah, on civil miscellaneous appeal No. 331 of 1895, affirming the order of the District Munsif of Proddatur, on civil miscellaneous petition No. 758 of 1895.

On the 1st of February 1895 the following decree was passed in a suit brought by a mortgagee on his mortgage:—"That the defendant do "pay on or before 1st May 1895 to the plaintiff the sum of Rs. 272-10-8 "and also the sum of Rs. 33-7-7 for his taxed [134] costs making together "the sum of Rs. 306-2-3 with interest at 8 per cent. per annum from this "date until satisfaction; that in default of the defendant paying into Court

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* Appeal against Appellate Order No. 100 of 1897.

(1) 7 M. 255.

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APPELLATE CIVIL.

22 M. 133 = 8 M.L.J. 205.

"or to plaintiff such principal, interest and costs as aforesaid by the time "aforesaid, that this Court doth further order and decree that the plaintiff "will become entitled to recover the mortgaged property as absolutely "sold under the decree amount." On the 23rd of June the decree-holder applied to the District Munsif under Civil Procedure Code, Section 235 for delivery of possession of the property under Section 263. The District Munsif without issuing notice to the judgment debtor granted the application and the decree-holder was placed in possession on the 27th of June. On the following day the judgment-debtor presented a petition under Civil Procedure Code, Section 244, praying that the order delivering possession be cancelled, and the time for payment of money extended. This application was opposed by the decree-holder, but the District Munsif made an order on the 1st August 1895, giving two days' further time to the judgment-debtor for payment of the amount due under the decree. The judgment-debtor accordingly paid the amount and obtained an order for possession, and the property was re-delivered to him on the 21st August 1895. On the 6th January 1896, the decree-holder drew the money from Court under protest. The decree-holder preferred an appeal to the District Court which was dismissed on the ground that no appeal lay. A second appeal was then preferred to the High Court on which the following judgment was delivered :—"It is admitted that the District Judge "is wrong. The order is reversed and the District Judge directed to "hear the appeal. Costs to be provided for in the revised order."

The Acting District Judge, before whom the case came for disposal after the remand, affirmed the order appealed against. He said :—"Section "87 of the Transfer of Property Act does not, like Section 89, use the "words 'on the day fixed as aforesaid.' This has, however, been held to "be immaterial—see *Vallabha Valiya Rajah* v. *Vedapuratti* (1). In this "case unlike the case in *Elayadath* v. *Krishna* (2) which arose under "Section 92 of the Transfer of Property Act something of the import of "the last clause of Section 86 has been used, and though the plaintiff did "not make **[135]** a formal application under the first portion of paragraph "2 of Section 87, he yet asked for possession as provided in the second "portion of the said paragraph and obtained it. But before the order "as to possession was passed no notice was given to defendant. It has "been held by the Allahabad High Court—(see *Oudh Behari Lal* v. "*Nageshar Lal* (3)) that an application for execution is a good application "under Section 89 of the Act. That decision may be applied to this case. "The defendant's only opportunity to claim the benefit of the proviso to "Section 87 was not given to him. He came in immediately afterwards "and claimed it. The Court had then, it seems to me, simply to consider "whether a proper cause for extending time was shown or not. Of course, "if no good cause were shown, defendant's prayer need not be granted— "see *Ram Lal* v. *Tulsa Kuar* (4). Here, the facts that the decree inserted "only three months time, while Section 86 required six months' time, "and that defendant came in within the six months were good reasons "for following the procedure prescribed in the proviso to Section 87 ; see "also *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (5), which has "not been dissented from by the Madras High Court as regards Section "87, if the holder of a foreclosure decree should have started the proceed- "ings after decree."

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(1) 19 M. 40. (2) 13 M. 267. (3) 13 A. 278.
(4) 19 A. 180. (5) 16 C. 246.

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22 M. 133 =
8 M.L.J. 205.

The mortgagee preferred this appeal.

Sundara Ayyar, for appellant:— *Vallabha Valiya Rajah* v. *Vedapuratti* (1) limits the case of *Kanara Kurop* v. *Govinda Kurup* (2). [SUBRAMANIA AYYAR, J.—The question is, whether, notice not having been issued, the defendant is bound by it.] Enlargement of time can only be granted where the relation of mortgagor and mortgagee subsists; that relationship had terminated in this case. The defendant should have got the *ex parte* order set aside by review. There were no grounds for extending the time. The defendant cannot apply for extension after the order absolute has been made. The order appealed against is wrong both because the time had expired and the final order had been made before the application for the extension of the time was made.

Ethiraja Mudaliar, for respondent:—No application under Section 87 of the Transfer of Property Act having been made my right to extension of time is not taken away. If there be an application **[136]** under Section 87, I am clearly entitled to receive notice and to apply for extension of time. See *Tara Prosad Roy* v. *Bhobodeb Roy* (3) and *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (4). The decree is to be considered a decree *nisi*, and an order absolute has to be made before property can be sold. An order absolute in this case was necessary; and for such order to be binding, notice should have been issued.

JUDGMENT.

In a case like this a second order or order absolute on application by the mortgagee was imperative under the Transfer of Property Act to enable the plaintiff to obtain possession of the property. On such an application being made by the mortgagee, the mortgagor (defendant) is entitled, under the proviso to Section 87 of the Act, to obtain an extension of time for payment of the money on showing good cause. We cannot agree with the appellant's contention before us that the mortgagor cannot apply for such extension after the expiry of the time fixed for payment in the first order, inasmuch as the mortgagee himself could apply for an order absolute only after the expiry of such time.

It is next contended by the appellant that even if the mortgagor could ask for an extension after the expiry of the time fixed for payment in the first order he could not do so after the passing of the final order, and that such final order was in fact passed in the present case. That order was, however, passed without notice to the mortgagor (defendant) who, therefore, had no opportunity of availing himself of the provision made for his benefit in the latter part of Section 87 by showing cause and obtaining an extension of time before the final order was passed, and we think that as the mortgagor, as soon as he became aware of the *ex parte* order, applied to have it set aside, and the order was thereupon set aside, it was competent to the Court to extend the time for payment.

The order of the District Judge was, therefore, right, and we dismiss this appeal with costs.

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(1) 19 M. 40.
(2) 16 M. 214.
(3) 22 C. 931.
(4) 16 C. 246.

1898
AUG. 26.

APPEL-
LATE
CIVIL.

22 M. 137.

22 M. 137.

[137] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

PERIANNAN CHETTI (*Plaintiff*), *Petitioner v.* SOUTH INDIAN RAILWAY COMPANY (*Defendant*), *Respondent.** [26th August, 1898.]

Railways Act—Act IX of 1890, *Sections* 77, 140—*Notice to Railway administration—Service on Traffic Manager.*

In a suit against the South Indian Railway Company to recover the value of a parcel delivered to the defendant company for carriage, it appeared that the plaintiff had within two months of the delivery given notice of the suit to the Traffic Manager of the defendant company at Trichinopoly.

Held, that the notice was a good notice, if it in fact reached the Agent of the defendant company, within the period of six months.

[Diss., 35 C. 194 (197) = 12 C.W.N. 450 (452); 12 C.L.J. 14 = 14 C.W.N. 888 = 7 Ind. Cas. 241 (242); 14 Ind. Cas. 684 (685) = 8 N.L.R. 34; F., 28 A. 552 (553) = 3 A. L.J. 329 = A.W.N. (1906) 101; 17 Ind. Cas. 419 = 23 M.L.J. 511 (512); R., 21 M.L.J. 1061 (1062) = 10 M.L.T. 332; 76 P.R. 1908 = 139 P.W.R. 1908.]

PETITION under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the proceedings of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in small cause suit No. 1117 of 1897.

The plaintiff sued for the value of a parcel delivered by him to the defendant company of Madras to be carried to Negapatam. The defendant pleaded that the suit was not maintainable for want of notice given under the Railways Act, 1890, Sections 77 and 140. The plaintiff had given notice to the Traffic Manager at Trichinopoly less than five weeks after the consignment of the parcel. The provisions of the Railways Act IX of 1890, Sections 77 and 140, are as follows:—

Notification of claims to refunds of overcharges and to compensation for losses.

"77. A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.

Service of notices on railway administrations.

[138] "140. Any notice or other document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager, and, in the case of a railway administered by a railway company, on the Agent in India of the railway company—

"(*a*) by delivering the notice or other document to the Manager or Agent, or

"(*b*) by leaving it at his office, or

"(*c*) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866."

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* Civil Revision Petition No. 25 of 1898.

1898 Aug. 26. — Appellate Civil. — 22 M. 137.

The Subordinate Judge held that the notice was bad and dismissed the suit.

The plaintiff preferred this petition.

Kumarasami Sastri, for petitioner.

Mr. *J. G. Smith* and Mr. *R. F. Grant*, for respondent.

JUDGMENT.

The question in this case is whether the suit was rightly dismissed on the ground that the notice required by law was not given to the railway company.

The obligation to give notice as a condition precedent to the recovery of compensation is imposed by Section 77 of the Indian Railways Act, 1890, and all that that section requires is that the claim must be preferred in writing and within a limited time to the "railway administration," that is in the present case, to the railway company (Section 3, Clause (6)). In dismissing the suit the Subordinate Judge did not find that, in fact, no notice such as Section 77 requires, was given to the railway company itself or to its Agent in India.

He dismissed the suit on the ground that the notice given by the plaintiff was served on the Traffic Manager at Trichinopoly whereas it ought, under Section 140 of the Act, to have been served on the Agent in India of the company in one of the modes prescribed in that section. In other words, the Subordinate Judge has held that a notice, served in any manner other than that prescribed in Section 140, is invalid. This view, we think, is clearly wrong, for it is impossible to hold that service on the railway company itself at its head office in England would not be in conformity with Section 77.

[139] It seems to us that Section 140 was enacted in order to save parties from the inconvenience of being obliged to serve the company itself, by rendering service on the Agent in India equivalent to service on the principal, and further by providing that service on the Agent, though not personal, would be sufficient if effected in either of the modes pointed out in Clauses (*b*) and (*c*) of the section.

We do not think that Section 140 precludes a claimant from showing that the notice required by Section 77 did, in fact, reach the Agent, within the time limited, though not in one of the modes prescribed in Section 140.

The case of *The Secretary of State for India in Council* v. *Dip Chand Poddar* (1) to which the learned counsel for the company has drawn our attention in connection with another point, supports the view that we have taken as to the construction to be placed on Section 140.

We must, therefore, set aside the decree of the Subordinate Judge, and direct that the suit be restored to his file in order that the plaintiff may show, if he is in a position to do so, that the notice of claim addressed by him to the Traffic Manager did in fact, reach the Agent within the time prescribed by Section 77. If this point is found in favour of plaintiff the Subordinate Judge will then proceed to dispose of the suit on the merits; if it is not so found he will dismiss the suit. Costs in this Court will be costs in the suit.

(1) 24 C. 306.

1898 Nov. 10.

APPEL-LATE CIVIL.

22 M. 139.

22 M. 139.

APPELLATE CIVIL.

Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SABJU SAHIB (*Plaintiff*), *Appellant v.* NOORDIN SAHIB AND OTHERS (*Defendants*), *Respondents.**

[19th and 28th October and 4th and 10th November, 1898.]

Succession Certificate Act—Act VII of 1889, *Section* 4 (1), (*a*)—*Debt—Suit for account of share of deceased partner.*

A Muhammadan, being the son of a deceased member of a firm, brought a suit, as his legal representative, against the surviving partners praying for an [140] account of the partnership assets and for payment to him of the amount which might be found due to the share of the deceased. The plaintiff had neither letters of administration nor a succession certificate :

Held, that the plaintiff's claim, being unliquidated, was not a debt within the meaning of Succession Certificate Act, 1889, Section 4 (1), (*a*).

[R., 32 C. 418 (421); 7 C.L.J. 658 (659) = 12 C.W.N. 145; 10 C.L.J. 180 (183) (F.B.) = 13 C.W.N. 966 (973).]

APPEAL against the decree of Mr. Justice Boddam sitting on the original side of the High Court in civil suit No. 160 of 1895.

The father of the plaintiff carried on business in partnership with defendants Nos. 1 and 2, until his death in June 1895. The plaintiff brought this suit joining the widow and daughters of his deceased father as third to eighth defendants, for an account of the capital and profits of the partnership and for payment of the share of the deceased partner. The plaintiff had not taken out letters of administration or a succession certificate.

An issue was raised "whether the plaintiff is entitled to maintain "this suit without having taken out letters of administration or a succession certificate."

The learned Judge decided this issue against the plaintiff with reference to Succession Certificate Act, 1889, Section 4. But finding that the plaintiff's case was otherwise established (except that the share of the deceased in the partnership assets was held to be less than was claimed) he said :—

"It is so much for the interest of the plaintiff's family and of the "defendants that the business of the firm should be wound up and all "accounts taken that I have made up my mind not to dismiss the suit, "though I am of opinion that until the plaintiff has satisfied the require-"ments of Section 4 of Act VII of 1889 he has no case. I therefore "direct that the first defendant do file an account of the firm's dealings "from the 17th May 1894 to the 30th June 1895 showing the profits or "losses of the firm up to that date, and also an account of the dealings of "the firm from July 1st, 1895, to the date of his appointment as a "receiver within fourteen days and give liberty to the plaintiff, if he shall "have then taken out letters of administration to his father but not "otherwise within seven days from the filing of the accounts to file objec-"tions, and I order the case to be adjourned into Chamber to be heard on "the first Chamber day after the 26th February next."

* Original Side Appeal No. 17 of 1898.

1898 Nov. 10. — Appellate Civil. — 22 M. 139.

The plaintiff preferred this appeal.

[141] Mr. *K. Browm* (with him Hon. *C. A. White*, Advocate-General, for appellant, contended that it was not necessary for the plaintiff to be furnished with letters of administration or a succession certificate.

Mr. *E. Norton*, *Kumarasami Sastri* and *Venkataramayya Chetti*, for respondents.

This appeal came on for hearing before SHEPHARD, OFFG. C.J., and BENSON, J., who delivered the following

JUDGMENTS OF DIVISIONAL BENCH.

SHEPHARD, OFFG. C.J.—This case illustrates the peculiarities of the statutory law relating to succession. The parties are Muhammadans, and therefore no obligation is cast upon the plaintiff to take out letters of administration before he can establish his right to the property of the intestate. Section 190 of the Indian Succession Act has not been embodied in the Probate and Administration Act. So far as that Act is concerned, it remains optional to a Muhammadan to apply for letters of administration. But under another Act a person in the plaintiff's position is precluded from obtaining a decree for a debt due to the intestate, unless he has first obtained letters of administration or one of the certificates there mentioned. So it is provided in Section 4 of the Succession Certificate Act, which, otherwise, does not apply to Presidency towns. The question, then, is whether the claim which the plaintiff is prosecuting is a debt within the meaning of that Act. There is no reason for supposing that the term 'debt' was used in any but the ordinary sense, except perhaps that it may be said that persons chargeable in respect of claims other than debts in the proper sense have no less need of protection than persons who are strictly debtors of the deceased. The present claim, is to have an account taken of the partnership business that was carried on between the deceased and others and to have the share of the deceased partner paid over to the plaintiff as his representative. It is quite clear that this is not a debt, for there was at the time of the death no present obligation to pay a liquidated sum of money. The claim is one about which there is no certainty; it may turn out that there is nothing due to the plaintiff. I think that, in construing the section, regard must be had to the state of things at the time of the intestate's death and not at the time when the decree is passed. On the decree being passed, there is in every case where the claim is for money a judgment debt created. Different language would have been used, if it had been intended [142] to bring all such cases within the operation of Section 4. In so far then as the direction to take out letters was founded on the nature of the plaintiff's claim, I do not think it can be supported. But in his plaint, the plaintiff himself expressed his willingness to take out letters, and it is not improbable that advances may have been made by the intestate to the other members of the firm which would constitute a debt.

Under these circumstances, I think it would be sufficient to modify the decree by providing that, if the plaintiff, when the account has been completely taken, satisfies the Court that there is no debt owing by the the defendants to the deceased, he shall be relieved from the obligation to take out letters of administration.

On the merits the appeal was not argued. The appellant must, therefore, pay the costs of the first and second defendants of this appeal.

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BENSON, J.—Notwithstanding the observations in the case of *Narayan Bhau Bartake* v. *Tatia Ganpatrao Deshmukh* (1) I do not think that the word 'debt' in Section 4 of the Succession Certificate Act, 1889, can be restricted, as the appellant contends, to a liquidated sum of money actually due and payable to the deceased at the time of his death. To so construe it would, I think, frustrate, to a large extent, the policy of the Act, the main purpose of which (apart from its fiscal aspect) is to enable persons claiming to be the representatives of deceased persons, but whose title is disputed, to collect debts due to the estate of the deceased before they become barred, and to afford protection to parties owing money to such estate and willing to pay but uncertain to whom as representative of the deceased payment should be made.

I think the word 'debt' must be understood as including not only debts due to the deceased at the time of his death, but also debts accruing due to his estate or ascertained to be due to his estate after his death up to the day on which the inclusion of the debt in the certificate is applied for, just as the amount of a debt includes interest due thereon, up to that day (note 1, Section 13). The provisions of the Act with regard to securities enable the representative of a deceased person to collect the interest on Government promissory notes, dividends on shares and other sums accruing to the estate of the deceased after his death. Is there any reason [143] why these should be included as within the scope of the Act, while other debts falling due, or ascertained to be due, to the estate, should be excluded? I should say no, yet this is the result if the word 'debt' is used in the restricted sense contended for by the appellant. In the present case, the plaintiff prayed that an account might be taken of what is due to the estate of his late father on account of his partnership with the defendants and he also prayed that the sum so ascertained might be decreed to be paid to him by the defendants on his taking out letters of administration. The learned Judge has ordered the accounts to be taken. When this has been done the Court will have ascertained the sum, if any, due to the estate of the deceased by the defendants, and that sum will, I think, be 'a debt due to the deceased' within the meaning of the Act. Before, however, a final decree for payment of the amount to plaintiff can be made, I think the Court is bound by Section 4 to require the plaintiff to take out letters of administration or a succession certificate with the debt specified therein. I would therefore modify the decree accordingly. The appellant has not argued on the merits, and the modification, I propose in the decree is very slight. He must, therefore, pay the costs of the first and second defendants in this appeal.

In consequence of the difference of opinion between their Lordships, the case was referred to SUBRAMANIA AYYAR, J., and re-argued before him, the parties being represented as before.

JUDGMENT (FINAL).

SUBRAMANIA AYYAR, J.—The point, as to which my learned colleagues did not agree, is whether the amount, which may be found due on taking the accounts connected with the partnership to which this suit relates, is a 'debt' within the meaning of the Succession Certificate Act. Now the obligation, enforced in this case, is the implied one that every

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(1) 15 B. 580.

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partner is accountable to the other partners with reference to the principle that each must share the profits and the losses proportionately. The liability arising from this obligation cannot be held to be a debt in the accepted ordinary legal sense of the term, for the obvious reason that the liability is not in respect of a liquidated sum. If authority were required for this conclusion I would refer to *Johnson* v. *Diamond* (1) where Parke, Platt and Martin, BB., held that the liability arising from a contract by C to pay D such costs as the latter should **[144]** become answerable to J in an action carried on by D at the request of C, was not a liability to pay a liquidated sum and therefore not a 'debt.' It was urged there, as has been urged here, that there was a 'debt' as a judgment would be signed for the amount in question. But that argument was rejected with the observation by Platt, B., that such an argument would be applicable to all cases where a sum of money is ultimately recoverable and Martin, B., added :—"It is an abuse of language to call such liability a debt." As in the Succession Certificate Act there is absolutely nothing to warrant the construction of the term 'debt' in any other than its ordinary legal sense, it follows that any sum which may be found due here when the accounts are taken, is not a debt within the meaning of the said Act. This view is not inconsistent with the decision in *Penta Reddi* v. *Anki Reddi* (2) to which my attention was drawn by Mr. Norton, as the sum, in question there, was a liquidated sum repayable under an agreement implied by law for which even the technical 'action of debt' lay. (Stephen's Pleading, 7th Ed., p. 11). I concur, therefore, in the conclusion **[145]** arrived at by the Officiating Chief Justice and accordingly direct that the decree appealed against be modified by providing that, if the plaintiff, when the account has been completely taken, satisfies the Court that there is no debt, in the proper sense of the term, owing by the defendants to the deceased on account of advances made to them by him

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(1) 11 Exch. Rep 73.

22 M. 144-N.

(2) Civil Revision Petition No. 45 of 1891 (unreported). The judgment of SUBRAMANIA AYYAR, J., on this petition was delivered on 4th January 1892, as follows :—

The question argued before me is whether the dismissal of the suit for want of a certificate under Act VII of 1889 is right. The contention for the plaintiffs is that the suit is one for the recovery of unliquidated damages for breach of contract. If this be correct, no certificate was necessary, as even the amount of a verdict in an action for unliquidated damages was held not to be a debt until judgment (*Jones* v. *Thompson* (27 L.J., (Q.B.), 234)). The claim here, however, is for the refund of the price alleged to have been paid for goods sold but not delivered. To determine the amount of damages in these cases, it is, not doubt, necessary to know what the contract price was ; but the payment of the price has nothing to do with the matter, as a vendee would be entitled to recover damages from the vendor who has broken the contract, whether the price agreed has been paid by the vendee to the vendor or not. When property is sold and the vendor cannot perform his part of the contract, the ground on which the vendee is held entitled to recover the price paid, is that there has been a total failure of consideration (*Want* v. *Stallibrass* (L.R., 8 Ex., 175 at p. 183) and *Hanuman Kamut* v. *Hanuman Mandar* (L.R., 18 I.A., 158)). The payment of the price in such a case is decreed clearly by way of restitution, and not by way of compensation for the breach of contract (see Section 65 of the Indian Contract Act and illustration (*d*)). I cannot, therefore, accept the view that this is a claim for damages as alleged. The suit is for a liquidated sum of money. To constitute such a sum in the hands of a person a debt, it is sufficient that in some way or other he can be compelled to pay it (per COLERIDGE, C J., in *Booth* v. *Trail*, 12 Q.B.D., 8 at p. 10 ; see also the observations of LINDLEY, L.J., in *Webb* v. *Stenton*, 11 Q.B.D., 518 at p. 526). The District Judge's decision is right and the petition must be dismissed with costs.

[This case has been approved in 32 C. 418 ; and explained in 22 M. 139.]

or otherwise, the plaintiff shall be relieved from the obligation to take out letters of administration. The appeal is otherwise dismissed. The appellant must pay the costs of the first and second defendants of this appeal.

Short, attorney for plaintiff.

Branson & Branson, attorneys for defendant No. 1.

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22 M. 145 = 8 M.L.J. 164.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Subramania Ayyar.

HAMMICK (*Appellant*) v. PRESIDENT, MADRAS MUNICIPAL COMMISSION (*Respondent*).* [26th and 28th July, 1898.]

City of Madras Municipal Act (Madras)—Act I of 1884, *Section* 190—*Profession tax.*

The Inspector-General of Police, whose official place of business with the main body of clerks is in Madras, went on tour, and during his absence the Assistant Inspector-General in Madras signed letters for him :

Held, that the Inspector-General was not assessable to profession tax under the City of Madras Municipal Act in respect of the period when he was absent on tour.

CASE stated under the City of Madras Municipal Act, Section 193, by the Presidency Magistrates, Black Town, Madras, in calendar No. 5761 of 1898.

The case was stated as follows :—

"An appeal was preferred by Mr. Murray Hammick, Inspector-General of Police, Madras, under Section 192 of the City of Madras Municipal Act I of 1884, from the decision of the President of the Madras Municipal Commission passed on the 24th February [146] 1898 under Section 190, assessing him to the payment of a tax of Rs. 75 for the second half of the year 1897-98 under Class 2 of Schedule A.

"The appeal was heard by us on the 21st March 1898 and we delivered judgment on the 28th idem confirming the decision of the President. After the adjudication of the appeal, the appellant, on the 2nd April 1898, through Messrs. Wilson & King, intimated his desire in writing that a case should be stated to the High Court, Madras, under Section 193 of the City of Madras Municipal Act.

"We therefore beg to submit, for the decision of the Honourable Judges of the High Court, Madras, the following point which was raised at the hearing of the appeal before us :—Whether the appellant held his office or appointment of Inspector-General of Police within the City of Madras on those days on which he was absent in the districts on tour as Inspector-General of Police, regard being had to the following admitted facts :—

"(*a*) The appellant's office (*i. e.*, his official place of business with the main body of clerks) is in Madras City.

"(*b*) A Gazetted officer, an Assistant Inspector-General of Police, is in charge of the said office and signs 'for Inspector-General of Police' during the appellant's absence on tour.

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* Referred Case No. 15 of 1898.

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"(c) Every letter addressed to the Inspector-General of Police goes first to the office at Madras. Every reply issues from the office at Madras.

"It is admitted by the respondent that the appellant has not held his office or appointment within the city for sixty days, unless the days spent by him on tour are taken into account."

Mr. *K. Brown*, for appellant.

Mr. *E. Norton*, for respondent.

JUDGMENT.

The question referred to us is whether, upon the facts stated, Mr. Hammick did, within the City of Madras, hold the office of the Inspector-General of Police for more than sixty days in the half year. The question is, in our opinion, really concluded by the decision in the Ongole case (*Chairman, Ongole Municipality* v. *Mounsey* (1)), but it was sought to found a distinction on the admission made in this case to the effect that the office of the Inspector-General is a permanent one in Madras, and that there **[147]** is one Assistant Inspector-General in charge, who signs letters for the Inspector-General of Police during the latter's absence on tour. We are of opinion that these circumstances make no difference. The person liable to pay under Section 103 of the Act (I of 1884) is the person who, within the city, exercises an art, profession or trade or holds an office. There are officers inseparably connected with Madras, the duties of which cannot be discharged elsewhere. The office of Inspector-General of Police is not of that character, for it appears to be part of the Inspector-General's duty to make tours. When he is absent from Madras on a tour it is suggested that nevertheless he is still holding an office in Madras because another officer signs letters on his behalf. If this were the correct view, it must follow that Mr. Hammick can be said to hold office at two places at the same time. But the real answer to the argument is that the Assistant Inspector-General does not perform the functions of the Inspector-General. The Assistant Inspector-General discharges his own functions including the duty of signing letters, and presumably he has to pay a tax in respect of the office he holds. So far as the language of the schedule to which we were referred has any bearing on the case, it is against the claim of the municipality, because it shows that the gumastah on the spot and not the absent principal is to be taxed.

Construing the words of the Act according to their ordinary acceptation and following the decision in the Ongole case (*Chairman, Ongole Municipality* v. *Mounsey* (1)), we decide the question referred in the negative.*

Barclay, Orr & David, attorneys for respondent.

*[The following :—" There seems to be no power to give costs "—to be added being a part of the judgment.—ED.]

(1) 17 M. 453.

22 M. 148=2 Weir 150.

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22 M. 148=
2 Weir 150.

[148] APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

QUEEN-EMPRESS *v.* FELIX AND OTHERS.* [4th August, 1898.]

Criminal Procedure Code—Act X of 1882, *Section* 191 (*c*)—*Act V of* 1898, *Sections* 190, 191.

A Magistrate, when a valid objection is taken under Criminal Procedure Code, Section 191, that he cannot try a case, is not bound to transfer it, but may elect to commit the case to a Court of Session.

CASE referred for the orders of the High Court, under Criminal Procedure Code, Section 438, by T.M. Saminadha Ayyar, Acting Sessions Judge of Nellore, in calendar case No. 19 of 1898, on the file of the Head Assistant Magistrate, Nellore.

The case was stated as follows:—

"The complaint, under Sections 327, 330, 342, 347, 348, 384, 385, 226, 376, 509, 511 and 354, Indian Penal Code, against the accused, appears to have been taken up by the Magistrate for enquiry under Section 191 (*c*) of the Criminal Procedure Code.

"The accused moved before the Magistrate for a transfer of the case to some other Magistrate, and the Head Assistant Magistrate, after hearing the arguments of the pleader, seems to have agreed with him and written an endorsement asking the District Magistrate to transfer it to the file of another first-class Magistrate. But he scored out the order subsequently since he thought that, the charge being triable by this Court, there was no necessity to transfer it from his own file, and he held that he had the discretion to refuse the request made by the accused.

"The section does not seem to give any discretion to the Magistrate in the matter, and, if the accused chooses to request a transfer of the case to any other Magistrate's file, the prayer should be complied with—*vide* also the ruling in *Queen-Empress* v. *Hawthorné* (1)."

Counsel were not instructed.

JUDGMENT.

We are inclined to think that, though the Magistrate was at first under the impression that the case came under [149] Clause (*c*) of Section 191, Criminal Procedure Code (Act X of 1882), yet, as suggested in the explanation, the case was in reality taken cognizance of on complaint. Even if it were not so, the right view appears to be, as the Magistrate says, that the accused are only entitled to object to a trial by the Magistrate. On objection being raised to a trial by the particular Magistrate, he is not bound to transfer the case; he may elect to commit the case to the Court of Session.

The order passed by the Head Assistant Magistrate was perfectly legal under Section 191 of the old Criminal Procedure Code as it would be under Sections 190 and 191 of the present Act (Act V of 1898).

We therefore decline to interfere.

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* Criminal Revision Case No. 254 of 1898.

(1) 13 A. 345.

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AUG. 22.

APPELLATE CIVIL.

22 M. 149.

22 M. 149.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

VIRA PILLAI (*Plaintiff*) *v.* RANGASAMI PILLAI (*Defendant*).*
[22nd August, 1898.]

Provincial Small Cause Courts Act—Act IX of 1887, *Schedule II, Article* 7—*Suit for damages for use and occupation of land.*

A suit for damages for use and occupation of land is cognizable by a Court of Small Causes.

[R., 16 C.W.N. 89 (92).]

CASE referred for the opinion of the High Court, under Civil Procedure Code, Section 646B, by F.H. Hamnett, Acting District Judge of Tanjore, in small cause suit No. 1307 of 1896, on the file of the Subordinate Court of Negapatam.

The case was stated as follows :—

"The plaintiff's case is that the defendant obtained on lease certain land belonging to a temple under a lease-deed, dated 20th January 1891, for a period of three years at a monthly rent of Re. 1-2-0; that the defendant continued to hold possession after the expiry of the term fixed; that on the 31st March 1894, plaintiff obtained a lease of the same land for a period of twenty years under [150] a deed registered, dated 31st March 1894; that on the 23rd April 1894, plaintiff gave notice to defendant through the post, informing him of his lease and calling upon him to settle terms with plaintiff as to the rate of rent and to execute a rent deed to him and that in case of failure to comply with this requisition, defendant would be held liable to pay rent at the rate of Rs. 3 a month, and that the defendant refused to accept notice and also failed to quit.

"The plaintiff claims to be entitled to rent at the rate of Rs. 3 per month from the date of his lease, *viz.*, 31st March 1894, and sues to recover Rs. 87.

"The plaint was first presented, on the small cause side, to the Subordinate Judge of Negapatam, who held on the authority of the ruling in *Manisha Eradi* v. *Siyali Koya*(1), that the case was not cognizable by a Court of Small Causes, as no contract existed between the parties. He also held that as plaintiff claims enhanced rate of rent, the suit is exempt from the jurisdiction of a Court of Small Causes under Article 7 of the second Schedule of Act IX of 1887, and returned the plaint for presentation to the Court having jurisdiction to entertain a suit for possession of the property under Section 109 of the Transfer of Property Act.

"The plaint was then presented, on the original side, before the District Munsif of Negapatam, who held that the suit was cognizable by a Court of Small Causes.

"The plaintiff contends that the Subordinate Judge, by reason of erroneously holding that the suit was not cognizable by a Court of Small Causes, failed to exercise a jurisdiction vested in him by law.

"I agree with the view expressed by the District Munsif."

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* Referred Case No. 21 of 1898.

(1) 11 M. 220.

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APPELLATE CIVIL.

22 M. 149.

Srinivasa Ayyangar, for plaintiff.

The defendant was not represented.

JUDGMENT.

We agree with the District Judge and the District Munsif that the suit is cognizable by a Court of Small Causes. It appears to be a suit for damages for use and occupation of land, and such a suit is not excluded from the jurisdiction of the Small Cause Court by any article of Schedule II of the present Provincial Small Cause Courts Act (*Makhan Lall Datta* v. *Goribullah Sardar* (1)).

[151] Article 7 of Schedule II of Act IX of 1887 relied on by the Subordinate Judge has no application to a suit of this kind; and the case (*Manisha Eradi* v. *Siyali Koya* (2)) referred to by him is also inapplicable, as it was decided with reference to the provisions of the former Act which were quite different from those of the present Act.

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22 M. 151=8 M.L.J. 259=1 Weir 424 & 486.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS *v.* OBAYYA AND OTHERS.*
[13th September, 1898.]

Penal Code—Act XLV of 1860, *Sections* 206, 397, 424—*Harvesting crops under attachment.*

A judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force and was convicted of theft:

Held, that the accused was not guilty of theft, but of the offence of dishonestly removing the property under Penal Code, Section 424.

Per BENSON, J.—The offence was also criminal misappropriation within the meaning of Indian Penal Code, Section 403.

APPEAL on behalf of Government under Criminal Procedure Code, Section 417, against the judgment of T. Ranga Rao, Deputy Magistrate of Cuddapah, in criminal appeal No. 10 of 1898, reversing the conviction of three persons by Muhammad Jaffir Hussain, Sub-Magistrate of Kamalapuram, in calendar case No. 21 of 1898.

The accused was charged with theft, and it appeared that, on 19th December 1897 in execution of a money decree against the first accused, his cholam and gram crops were attached by the Court Amin, and an agent of the decree-holder was appointed to watch the field till the harvest. On the night of the 31st of December 1897 the accused cut the cholam. The Sub-Magistrate convicted the accused of theft. On appeal the Deputy Magistrate held that the offence fell under Penal Code, Section 206, and constituted the offence of removing property from being taken in [152] execution of a decree or order which had been made by a Court of Justice in a civil suit, and he discharged the accused, holding that the Magistrate had no jurisdiction to try the case, no sanction having been given under Criminal Procedure Code, Section 195.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

Srinivasa Ayyangar, for accused No. 1.

Accused Nos. 2 and 3 were not represented.

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* Criminal Appeal No. 370 of 1898.

(1) 17 C. 541. (2) 11 M. 220.

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APPELLATE
CRIMINAL.
22 M. 151 = 8 M.L.J. 259 = 1 Weir 424 & 486.

JUDGMENT.

BENSON, J.—The Deputy Magistrate was, in my opinion, right in holding that the alleged act of the accused in cutting and removing the standing crops which had been attached by the Civil Court did not amount to theft. In order to constitute theft there must be a moving of moveable property with the intention of taking it dishonestly out of the possession of another person. Standing crops are, for the purposes of the Indian Penal Code, immoveable property, and when such crops are attached under Section 274 of the Civil Procedure Code, possession of them is not transferred to the Court. Possession remains with the owner, but he is forbidden to alienate or charge the crops.

When the crops are cut they become moveable property, but it would, I think, be difficult to conclude that possession of them is transferred to the Court or its officer by the act of cutting. The cutting, however, cannot put an end to the attachment once properly effected. The crops must be regarded as moveable property under attachment, but in the possession as before of the judgment-debtor. I am not unmindful of the views of this Court in *Queen-Empress* v. *Periyannan* (1) and *Queen-Empress* v. *Dadala Atchigadu* (2), in the former of which it was assumed, and in the latter of which it was held, that theft could be committed by the owner of a crop under attachment removing it. In both of these cases, however, the attachment was by distraint made by a Revenue Court and the mode and effect of attachment by a Civil Court as regards possession was not considered. No doubt, when in the present case, the crop was cut, the Court or its officer had the right to at once take possession of it, but the right to possession is not the same thing as actual possession. The actual possession remained with the judgment-debtor, and when he removed the crop he did not take it out of possession of the Court or its officer **[153]** or any other person. The offence committed was, therefore, not theft, but it was criminal misappropriation within the meaning of Section 403, Indian Penal Code, inasmuch as the judgment-debtor thereby dishonestly converted the property to his own use. The act was also an offence punishable under Section 424, Indian Penal Code, *viz.*, dishonest removal of property even when such property belongs to the person removing it, and the accused might properly have been convicted of these offences by the Sub-Magistrate, or by the Deputy Magistrate, when the case came before him in appeal. I would, therefore, set aside the order of acquittal made by the Deputy Magistrate, and direct the Deputy Magistrate to restore the appeal to his file and dispose of it on the merits and with reference to the above observations.

DAVIES, J.—I agree to the order proposed on the ground that the case was not one of theft, but fell under Section 424 of the Penal Code.

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(1) Weir's Criminal Rulings, 3rd ed. p., 245.
(2) Weir's Criminal Rulings, 3rd ed. p., 240.

22 M. 153=1 Weir 724.

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APPELLATE CRIMINAL.

22 M. 153= 1 Weir 724.

APPELLATE CRIMINAL.

Before Mr. Justice Moore.

QUEEN-EMPRESS *v.* TANGAVELU CHETTI AND ANOTHER.*
[29th September, 1898.]

Criminal Procedure Code—Act X of 1882, *Section* 423 (*d*)—*Court-Fees Act—Act VII of* 1870, *Section* 31.

An Assistant Magistrate having convicted the accused persons sentenced them to pay a fine, out of which Rs. 2 was to be paid to the complainant for his expenses; the Deputy Magistrate, on appeal having confirmed the conviction, passed an order under Court Fees Act, Section 31, directing the accused to pay a further sum to the complainant:

Held, that the order was illegal and should be set aside.

[Diss., 26 M. 188 (189)=3 Cr. L.J. 460; 26 M. 421 (422).]

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by E. A. Elwin, Acting District Magistrate of Bellary, in criminal revision No. 18 of 1898.

The case was stated as follows:—

"Gandla Mattappa Chetti of Bellary complained against (1) Gandla Tangavelu Chetti, (2) Nilgara Siddappa, (3) Chinna [154] Kondayya, and (4) Achamma, all of Bellary, for having caused him hurt, an offence under Section 323, Indian Penal Code, for which the Police cannot arrest without warrant. He cited seven witnesses to prove his case and deposited Rs. 1-10-0 in the shape of Court-Fee stamps being the process fees as under:

"Annas 4 to the first accused, As. 6 to the other three accused at 2 annas each, As. 4 to the first witness, As. 12 to the other six witnesses at 2 annas each—all of them being the residents of Bellary within six miles from the Court house. Besides this he had attached half a rupee stamp to the complaint petition. In the course of the trial he dispensed with one of the witnesses. The Assistant Magistrate convicted the accused Nos. 1 and 2, fining them Rs. 40 and Rs. 20 respectively and discharged the other two accused. He directed further that, out of the fine or fines paid, Rs. 2 should be paid to the complainant after the appeal time, being the amount of expenses incurred by him. As will be seen above the complainant had incurred an expenditure of Rs. 2-2-0, of which Rs. 1-10-0 was for process fees and As. 8 for the complaint petition. The Assistant Magistrate ordered only Rs. 2 to be paid as one of the witnesses, for whom As. 2 was collected towards the process fees, was not examined. He has not quoted the section under which he ordered this payment, but he however states now that it was under Section 31 of the Court-Fees Act. On appeal the Deputy Magistrate confirmed the conviction and sentence and passed, with reference to Section 423 (*d*), Criminal Procedure Code, an order under Section 31 of the Court-Fees Act, directing the accused to pay Rs. 2-2-0 to the complainant and observing that the Assistant Magistrate had failed to pass an order under that Section; the Deputy Magistrate should have ascertained under what section the Assistant Magistrate had ordered the payment of Rs. 2 on account of expense before passing an order under Section 31 of the Court-Fees Act. Now

* Criminal Revision Case No. 332 of 1898.

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the question is whether the amount ordered by the Deputy Magistrate should be collected or not. Section 31 of the Court-Fees Act directs that the repayment of the process fees and stamp should be in addition to the penalty imposed for the offence. But the Assistant Magistrate's order is that it should be out of the fine collected. The Deputy Magistrate's order thus appears indirectly to enhance the sentence.

[155] "Again the Deputy Magistrate is not correct in fixing the amount at Rs. 2-2-0. Since two of the four accused had been discharged, the process fees collected on their account could not be ordered to be repaid. Deducting As. 4 on that account, the correct amount would be only Rs. 1-14-0. It is observed that the Appellate Court's record contains only one appeal petition and only one copy of the order Appealed against, though there are two appellants who were not in jail. It seems to be necessary that there should be separate petitions, each accompanied by a copy of the order appealed against."

Counsel were not instructed.

JUDGMENT.

The Deputy Magistrate has, under Section 31 of the Court-Fees Act, directed the two accused persons (appellants before him) to pay each Rs. 1-1-0 in addition to the fines already imposed on them in the Court of first instance as being the expenses incurred by them and for process fees. An order to pay a fee under Section 31 is an integral part of the sentence and such fee must be treated as a fine imposed by the Court, (Proceedings of the Madras High Court, dated 20th July 1870 (1)). The Deputy Magistrate has therefore enhanced the sentence inflicted by the Assistant Magistrate. Such enhancement is illegal and the order inflicting an additional fine is accordingly set aside and the amount Rs. 2-2-0 ordered to be refunded, if it has been paid.

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22 M. 155 = 8 M.L.J. 304.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

ZAMINDAR OF TUNI (*Plaintiff*), *Appellant v.*
BENNAYYA AND OTHERS (*Defendants*), *Respondents.**
[6th, 7th and 20th October, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 543—*Memorandum of appeal—Scandalous matter therein—Duty of the Appellate Court.*

A memorandum of appeal presented to a District Court alleged, *inter alia*, actual partiality against the Judge whose decree was in question. The **[156]** memorandum was returned for amendment on the ground that it contained language disrespectful to the Court of First Instance. The appellant's pleader presented the appeal memorandum unamended stating that he wished to rely in the appeal on the passages objected to, and asking that the Court would, if necessary, strike them out. The District Judge thereupon rejected the memorandum of appeal under Civil Procedure Code, Section 543. It appeared that the objectionable portions of the memorandum were separable from the rest :

Held, that an appeal lay to the High Court against the order rejecting the appeal to the District Court.

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* Second Appeal No. 1655 of 1897.

(1) 5 M.H.C.R. App. 28.

Per SUBRAMANIA AYYAR, J.—The District Judge should have ordered the objectionable matter to be expunged and then to have admitted the appeal. 1898 OCT. 20.

Per MOORE, J.—(Holding that the statement which accompanied the memorandum of appeal on its re-presentation contained expressions amounting to contempt of Court), the District Judge should have returned the appeal memorandum and have refused to receive it until the objectionable remarks had been expunged. APPELLATE CIVIL.

Per SUBRAMANIA AYYAR, J.—"It is open to an appellant to set up any circumstance showing that a Judge whose decision is appealed against was disqualified from trying and deciding the case . . . When a Judge is shown . . . to stand in such a position that he might be reasonably suspected of being biased he must be held to have been disqualified . . . In cases where any bias can be presumed the party is entitled to show the grounds which raise that presumption . . . But where there is no such presumption the party must not be allowed to question the impartiality of the Judge." 22 M. 155 = 8 M.L.J. 304.

[F., 27 M. 21 (22) = 13 M.L.J. 300 (301)]

SECOND appeal against the order of E. C. Rawson, District Judge of Vizagapatam, dismissing an appeal petition, as it contained language disrespectful to the Lower Court, presented against the decree of the District Munsif of Yellamanchili, in original suit No. 621 of 1895.

The objectionable matter was contained in paragraphs 1, 3 and 12 of the memorandum of appeal, which were as follows :—

"1. The judgment of the Lower Court is based on unwarrantable conclusions drawn on the overwhelming evidence produced for plaintiff, oral and documentary, and the Lower Court's judgment is on its face one-sided and biased against the plaintiff. Your Honourable Court was moved for a transfer of this case from the file of this Munsif with four others on account of personal spite existing between them, but your honour transferred the others and not this, and the Munsif bearing this grudge, decided the case against the plaintiff perverting every point proved as against him.

"3. The Commissioner appointed by the Court actually examined the places and made a report which thoroughly supports the truth of the plaintiff's case, and the Munsif's failure to give due weight to it is, independent of other facts, enough to show [157] that the Munsif's judgment is the production more of spite than a real desire to give sustainable justice.

"12. The Munsif's remarks in paragraph 17 are enough to show his extreme partiality to defendants and against plaintiff. The defendants have not at all rebutted the plaintiff's case."

The plaintiff preferred this second appeal.

Vydianadha Ayyar, for appellant.

The Government Pleader (Mr. *E. B. Powell*), for respondent No. 7.

Respondents Nos. 1 to 6 were not represented.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The appellant before us was the appellant in the Lower Appellate Court also. The memorandum of appeal, presented by him there, was returned to him for amendment on the ground that it contained language disrespectful to the Court of First Instance. It was, however, re-presented without amendment accompanied by a statement or petition to the effect that the imputations made in the paragraphs Nos. 1, 3 and 12 of the memorandum which were objected to, were borne out by the record and therefore they ought to be allowed to remain so as to entitle the appellant to rely upon them at the hearing; but that, if the Court still thought otherwise, the Court itsef may direct them to be scored out.

The Lower Appellate Court thereupon rejected the memorandum under Section 543 of the Code of Civil Procedure.

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The first point for determination is whether an appeal lies against the order of rejection. Now, Section 543 referred to is apparently limited to cases in which the memorandum of appeal is not drawn up in accordance with the second paragraph of Section 541 which runs thus :—" Such " memorandum shall set forth, concisely and under distinct heads, the " grounds of objection to the decree appealed against without any argument " or narrative ; and such grounds shall be numbered consecutively " (see *Gulab Rai* v. *Mangli Lal* (1)). The objection here, however, is that the memorandum contains scandalous matter and as the paragraph just quoted cannot be said to lay down any rule with reference to such a breach of the rules governing the frame of pleadings, Section 543 would seem to be inapplicable to a case like this. However this may be, the order appealed against must, following *Ayyanna* v. *Ñagabhooshanam* (2), be held to be a decree within the meaning [158] of the Civil Procedure Code. The objection, that no appeal lies, therefore, fails.

The next point for decision is whether, assuming that the memorandum of appeal is open to the objection taken by the District Judge, he had power to reject the appeal. No doubt the Code of Civil Procedure does not make any provision as to how Courts should deal with memoranda of appeal containing scandalous matter. But clearly Courts possess inherent power to stop such an abuse of its records. For, as pointed out by Story, " Scandal is calculated to do great and permanent injury to all per- " sons whom it affects, by making the records of the Court the means of " perpetuating libellous and malignant slanders ; and the Court, in aid of " public morals, is bound to interfere to suppress such indecencies " (Equity Pleadings, Section 270). There can be no doubt, therefore, that it was perfectly competent to the Lower Appellate Court to have caused the objectionable passages, if any, in the memorandum to be expunged. But had the Court power to reject the appeal altogether ? No such power is given to the Courts by any statutory provision. And, on general principles, it is not possible to hold that Courts have such power, at all events, in cases in which the objectionable matter is separable from what is unobjectionable. It seems to me that all that a Court is entitled to do in such cases is to cause the portions open to objection to be expunged. For even taking that an appellant, by refusing to comply with an order for amendment such as that passed in the present instance by the District Judge, is guilty of a contempt, still it cannot be said that until the contempt is purged the party cannot be heard and is debarred from claiming that the appeal be proceeded with. *Ricketts* v. *Mornington* (3), *Wilson* v. *Bates* (4) and *Haldane* v. *Eckford* (5), in my opinion support the above view. In the last-mentioned case the defendant was held entitled to take any step required for the purposes of his defence, although the contempts committed by him were of the most flagrant kind. I am, therefore, of opinion that, assuming that the memorandum of appeal in question does contain scandalous matter, still it was not open to the Lower Appellate Court to reject the appeal, the alleged objectionable portions of the memorandum being quite separate from the rest.

[159] The third and last point for consideration is whether the memorandum does contain scandalous matter. In dealing with a question like this two rules have to be borne in mind, *viz.*, that, as urged for the appellant, what is relevant cannot be scandalous and that Courts

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(1) 7 A. 42. (2) 16 M. 285. (3) 7 Sim. 200.
(4) 3 My. & Cr. 197. (5) L R. 7 Eq. 425.

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ought not to dictate to parties how they should frame their cases, provided, of course, the rules of pleading are not contravened in the frame of their cases—the latter a rule, which Bowen, L.J., said, should be kept scared, *Knowles* v. *Roberts* (1). In the light of these rules the only paragraphs which, in my opinion, call for notice in connection with the point under consideration are 1, 3 and 12. In the first of these the District Munsif is charged with having decided the case against the appellant in consequence of a grudge entertained by that officer against the appellant arising from the latter having applied for a transfer of the case from the file of the Munsif's Court. In paragraph 3 the judgment of the District Munsif is stigmatised as given from "more of spite than a "real desire to give substantial justice" and in the twelfth paragraph the Munsif is charged with "extreme partiality to the defendants and "against the plaintiff."

There can be but one opinion as to the character of these imputations. It is no doubt open to an appellant to set up any circumstance showing that the Judge whose decision is appealed against was disqualified from trying and deciding the case. It is also quite true that, when a Judge is shown, in the language of Lord Esher, M.R., to stand in such a position that he might be reasonably suspected of being biased, he must be held to have been disqualified (*Allinson* v. *General Council of Medical Education and Registration* (2)). But is an appellant at liberty to show that in the particular case the Judge was biased in fact? It may seem at first sight that he would *a fortiori* be entitled. No doubt anything which tends to impeach the impartiality of a Judge ought to render him incompetent to decide the case, in order that the administration of justice may not be brought into discredit. And hence in cases where any bias can be presumed, the party is entitled to show the grounds which raise that presumption. These grounds may generally be definable beforehand. But where there is no such presumption the party must not be allowed to question the impartiality of the Judge, for that would mean an enquiry into the [160] motives operating in the mind of the Judge after the cause has been decided—a thing which is well nigh impossible, and even if possible will be too vague to afford a guiding principle. This might have been probably in the mind of the Master of the Rolls when he said in the case referred to "the "question is not whether he (the person whose decision was in question "there) was or was not biased. The Court cannot inquire into that." (*Allinson* v. *General Council of Medical Education and Registration* (2)). If in a case like this it is open to an unsuccessful party to prove actual bias, it is not easy to see why in a case where a decision is pronounced by a person who is disqualified from interest or otherwise from giving such a decision, the successful party should not be entitled to support the decision by showing that the Judge was not biased in fact. That, of course, for obvious reasons, he is not permitted to do, and it seems to be equally reasonable that in a case like the present, averment or proof of the existence of actual bias should be disallowed. The appellant was, therefore, not entitled to make the imputation of actual partiality contained in the paragraphs of the memorandum, referred to above which consequently must of course be held to be scandalous. In reversal of the Lower Appellate Court's order, I would direct that the objectionable passages in question be expunged and the memorandum of appeal be admitted and proceeded with according to law. In the circumstances of the case, I

(1) L.R. 38 Ch. D. 263 (270). (2) [1894] 1 Q.B. 750 (758).

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would make the appellant bear his own costs and those of the seventh respondent up to this date irrespective of the result of the case.

MOORE, J.—I agree with my learned colleague in considering that there is an appeal against the order of the District Judge inasmuch as it amounts to a decree I feel, however, some doubt as to whether it can be held that when the District Judge returned for amendment the appeal petition presented by the vakil on the ground that it contained scandalous imputations against the District Munsif who had tried the case and when the vakil refused to amend, it was not open to the Court to reject the appeal absolutely. The facts of the case were briefly as follows:—The vakil stated in the appeal petition that the judgment of the District Munsif appealed against was a "production more of spite than a real desire to "give substantial justice," and that his remarks [161] in it showed "his "extreme partiality to defendants and against plaintiff." This petition was returned for amendment, as it was couched in language disrespectful to the Court and as the District Judge was of opinion that "such pleadings "could not be entertained under No. 6 of the Civil Rules of Practice relat-"ing to Pleadings" (page 134). The vakil, however, represented the petition in its original form, refused to amend it, and in his further petition stated that if he had not urged the grounds of appeal objected to by the District Judge, *i.e.*, those suggesting personal spite and extreme partiality, he would have been found fault with by the District Court at the hearing of the appeal and also by the High Court in second appeal for not having raised such pleas. In making these observations, the vakil was, in my opinion, guilty of contempt in a most aggravated form. On receiving this petition the District Judge rejected the appeal. He should, in my opinion, have returned the appeal petition and refused to receive it till the objectionable remarks to be found in it had been expunged. This was what was done in *In re Clive Duront* (1), and is, I presume, the course that this Court, by the Rule of Practice above mentioned, intended that Subordinate Courts should adopt in such cases. It is, in my opinion, no part of the duty of a judicial officer to revise petitions presented to it containing scandalous and offensive matter and purge them of such objectionable phrases as may be found in them. Petitioners should be obliged to perform this task themselves, and if they neglect to do so within the time prescribed for the presentation of their appeal or petition, should suffer by the same being rejected as being out of time. I, however, do not object to the order proposed by my learned colleague in the present case being passed; as, if the appeal petition now under consideration was again returned to the vakil, so that the District Judge's order of the 18th February 1897 might be obeyed, he would be prevented by the law of limitation from representing his appeal petition after it had been purged. It would be unjust to allow the client to suffer so severely for the fault of his vakil.

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(1) 15 B. 488.

22 M. 162 | 1898 OCT. 31. — APPELLATE CIVIL. — 22 M. 162.

[162] APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice).

REFERENCE UNDER COURT FEES ACT, SECTION 5.*
[31st October, 1898.]

Court Fees Act—Act VII of 1870—*Appeal under Agency Rules, No.* 22, *under Act XXIV of* 1889—*Court fee.*

An appeal preferred to His Excellency the Governor in Council under Rule No. 22 of the Agency Rules framed under Act XXIV of 1839 against the decision of the Governor's Agent at Vizagapatam and referred by Government to the High Court for disposal is not chargeable under the Court Fees Act.

CASE referred by the Registrar of the High Court under Court Fees Act, 1870, Section 5, in Stamp Register No. 8109 of 1898.

The case was stated as follows :—

"The suit in this case was brought by the Maharajah of Jayapore for the recovery of a village with mesne profits and it was decided against him by the Agent to the Governor at Vizagapatam. He therefore appealed to Government under Rule No. 22 of the Agency Rules framed by Government under Act XXIV of 1839.

"The Government have referred the appeal to the High Court for disposal under the rule above referred to.

"The petition of appeal to Government was engrossed on plain paper, and there is nothing in the Court Fees Act relating to appeals coming up to the High Court under the Agency Rules.

"In a similar case (Appeal No. 103 of 1889) Parker, J., directed that the appeal should be 'filed as a regular appeal and posted for hearing.' Under this order the appellants' Vakil was called upon to state the valuation of the subject-matter of the appeal and pay Court fee thereon. He accordingly valued the appeal at Rs. 4,20,000 and paid without objection a Court fee of Rs. 3,000, being the maximum fee prescribed in Schedule I of the Act for any sum exceeding Rs. 4,10,000.

"In appeal No. 92 of 1898, which was also a similar case, the question whether Court fees should be paid on the appeal memorandum was again raised and under verbal orders of Collins, C.J., it was ordered that the precedent should be followed (*vide* order, dated 15th March 1898 and 30th March 1898, on the said note). The appellants' Vakil was then called upon to state the [163] value of the appeal and pay Court fee thereon. He paid a Court fee of Rs. 815 on the valuation of Rs. 21,383-11-4, but under protest on the grounds :—(1) that no appeal from the Agent's decision lies to the High Court, but only to Government; (2) that the decision of the High Court could not be carried into execution without the order of Government; (3) that the provisions of the Court Fees Act do not apply to appeals to the Government from the Agent's decisions; and (4) that the High Court cannot treat an appeal referred by Government as an appeal presented to itself and levy stamp duty under the provisions of the Court Fees Act (*vide* Vakil's reply of the 17th March 1898 to the Deputy Registrar's endorsement of the 16th idem). The Vakil having stated therein that he expressly reserved his contention that no stamp duty was leviable, the appeal was admitted in the ordinary course.

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* Referred Case No. 26 of 1898.

1898 Oct. 31. — Appellate Civil. — 22 M. 162.

"In the present case which has been registered as appeal No. 179 of 1898 the same Vakil has paid a Court fee of Rs. 335 on the valuation of Rs. 6,000 in accordance with the Deputy Registrar's endorsement of the 11th August 1898, but he protests on the same grounds as were urged in the former appeal (No. 92 of 1898). He further asks for a reference to the Chief Justice under Section 5 of the Court Fees Act as the question has arisen more than once and is one of general importance.

"Another appeal has since been received and as in other cases no Court fee has yet been paid.

"The question is therefore referred for decision of the Chief Justice. The only provision of the Court Fees Act, which seems to have a bearing on the matter, is Section 4, paragraph 5. If the High Court be regarded as a Court of Reference it is submitted that the appeal is chargeable with an *ad valorem* fee under Article 1, Schedule I."

The Officiating Chief Justice directed that a notice should be given to the Government Solicitor intimating that, unless an appearance is entered on behalf of Government on or before the 13th September 1898, the matter will be disposed of in his absence.

The reference having come on for consideration and no appearance having been entered on behalf of Government, the Officiating Chief Justice delivered the following opinion :—

JUDGMENT.

No Court fees is necessary.

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22 M. 164 (F.B.).

[164] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice). Mr. Justice Subramania Ayyar and Mr. Justice Moore.

REFERENCE UNDER STAMP ACT, SECTION 46.*
[13th September and 4th November, 1898.]

Stamp Act—Act I of 1879, *Schedule I, Article* 44 (*a*)—*Mortgage—Consideration.*

A kanom deed is liable to a stamp duty as a mortgage only, and in calculating the consideration, the ascertained amount of compensation for improvements paid at the landlord's request by the incoming to the outgoing tenant must be included.

CASE referred by the Board of Revenue for the opinion of the High Court, Madras, under Stamp Act, Section 46.

Paragraphs Nos. 2 and 3 of the letter of reference were as follows :—

"2. The documents in question are kanom deeds of jenmam land; rent is stated as well as the kanom amount; and in the first there is an acknowledgment of the receipt by the lessor from the lessee of the value of the improvements, and in the second a statement that the lessee had deposited that value in Court, repayment being promised to the lessee in both. The Board held that the documents were to be construed as mortgages with possession and as sales, and should pay the aggregate of the duties on the two transactions.

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* Referred Case No. 20 of 1898.

"3. The District Judge of Malabar takes exception to this ruling and requests re-consideration as the matter is of most serious importance to the district. His view is that the provision in the documents relating to the receipt of the sum found due by the Civil Courts as compensation for improvements does not amount to a sale, because the tenant in Malabar is not the legal owner of the improvements made by him, but is bound on the termination of his holding to transfer them to his lessor for compensation paid and that transfer is effected by the decree of the Court and not by the documents under consideration."

1898 Nov. 4.

FULL BENCH.

22 M. 164 (F.B.).

The documents were as follows:—

Document A:—"Kanom deed executed by Nilakantan Nambudri . . . . in favour of Chekkunni Haji. . . Whereas I have this day demised to you on kanom tenure for a consideration [165] of Rs. 175 kanom and on a rental of 55 cheppan paras of paddy, the para being equivalent to 12½ seers and of Rs. 9 deducting natukur and 25 pairs of cadjan leaves worth As. 2, which rental, after deducting interest on the kanom amount becomes 43 paras of paddy, Rs. 4 and 25 pairs of cadjan leaves, the six items of property which are my jenmam, which I have come into possession of under decree of the Chernad District Munsif's Court No. 486 of 1895 and which are described in the schedule below, you will from this date possess and enjoy the said items of property on kanom lease, and deducting interest on the said kanom of Rs. 175 pay me in Kanni and Makaram from and after the year 1072, 43 paras of paddy worth As. 12 a para as also annually Rs. 4, 25 couples of cadjan leaves, 4 cocoanuts worth one anna and one rupee for the onam gift of plantains and take receipt from me for the same; if you allow the rent to fall in arrears you will pay interest for it at the usual rate; and you will also pay me along with the rent, any enhancement made in the assessment or other dues on the property. As I have received from you Rs. 224-9-3, the amount paid into the Court as price of the improvements as estimated by the Commissioner in the suit above mentioned, I shall pay you for the said improvements as also for the improvements other than wild trees that you may duly raise in future at the rates obtaining in the country."

Document B:—"Deed executed by H. H. Manavikrama Zamorin Maharajah Bahadur of Calicut in favour of Kallingal Peroo, son of Choyi, Nagarom amshom, Calicut taluk. Whereas the two items of property, jenmam of our Tali devasom, described in the schedule attached below, obtained possession of on the execution of decree No. 634 of 1884 of the Chernad District Munsif's Court and yielding an annual rental of 18 fanams, are leased out to you; you are required to hold and cultivate the same and remit to the devasom 11 fanams annually (deducting from the gross rental, the interest of 2 fanams and 12 visams on 55 fanams amounting to Rs. 13-12-0, being the original kanom amount in lieu of the value of improvements according to the above decree and municipal assessment) along with 1 fanam for lamp-oil, 6 cocoanuts for Ganapati worship and 25 twisted cocoa leaves and assessments, &c., that may be levied in future. As you have been made to deposit in Court Rs. 1,048-8-11, the value of improvements according to the above decree, you will be paid the value of such [166] improvements and of those that may be effected in future, at the rates then current, at the time of eviction."

The Government Pleader (Mr. *E. B. Powell*), for the Crown.

The parties to the documents were not represented.

1898 Nov. 4. — Full Bench. — 22 M. 164 (F.B.).

JUDGMENT:—In our opinion the instrument is simply a mortgage and must be stamped under Article 44 (*a*) of Schedule I of the Indian Stamp Act.

The matter came on again for consideration on the 4th November 1898.

The Advocate-General (Hon. *C. A. White*), for the Crown.

The parties to the documents were not represented.

JUDGMENT.

In calculating the consideration, the ascertained amount of compensation for improvements which is expressly named in the instrument and has been paid at the landlord's request by the incoming to the outgoing tenant must be included.

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22 M. 166=9 M.L.J. 3.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

CHALAMAYYA (*Plaintiff*), *Appellant v.* VARADAYYA AND OTHERS (*Defendants Nos.* 1, 2, 4 *to* 7), *Respondents.**
[11th and 23rd November, 1898.]

Hindu Law—Debt incurred by managing members of a joint family—Personal liability of other members.

Three brothers, being the managing members of their joint Hindu family, borrowed money from the plaintiff for a family purpose. The plaintiff now sued the survivor of the brothers and the sons of all three to recover the amount of the debt, and he obtained a decree that the debt was recoverable from the family estate and also personally from the survivor of the three borrowers:

Held, on appeal, that the plaintiff was not entitled to a personal decree against the other defendants.

[F., 29 A. 176 (183)=4 A.L.J. 94=A.W.N. (1907) 13 (16); R., 9 C.W.N. 923 (927); Doubted, 9 Bom.L.R. 1289 (1292).]

SECOND appeal against the decree of A. Butterworth, Acting District Judge of Godavari, in appeal suit No. 246 of 1896, affirming the decree of S. Pereira, District Munsif of Ellore, in original suit No. 306 of 1895.

[167] The plaintiff sued to recover a sum of money lent by him to defendant No. 3 and his two undivided brothers since deceased. The loan was contracted for the purposes of the family trade carried on by the brothers. The plaintiff sought a decree which should bind the family estate and be otherwise enforceable personally against defendant No. 3 and also the other defendants who were his son and nephews.

The District Munsif held that the family property was liable, but that none of the defendants, with the exception of the third, was liable personally for the debt, and he passed a decree accordingly. The District Judge affirmed that decree and the plaintiff preferred this second appeal.

Kuppusami Ayyar, for appellant.

Ramachandra Rao Sahib, for respondents Nos. 3 to 6.

Respondent Nos. 1 and 2 were not represented.

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* Second Appeal No. 2002 of 1897.

JUDGMENT.

1898 Nov. 23. — APPELLATE CIVIL. — 22 M. 166 = 9 M.L.J. 3.

SUBRAMANIA AYYAR, J.—The plaintiff (appellant) sues for a sum of money borrowed from him by three undivided brothers, two of whom are now dead. The first and the second defendants are the sons of the eldest of the brothers. The third is the surviving brother and the fourth, the fifth and the sixth defendants are his sons and the seventh defendant is the son of the third brother. All but the first, the third, the fourth and the seventh are minors. The District Judge found that the debt (which was contracted originally in 1876 when even the first and the fourth and the seventh defendants were minors) was incurred for a family purpose, and therefore recoverable from the whole of the family estate; but he declined to grant a decree making the defendants other than the third personally liable so as to entitle the plaintiff to proceed against the self-acquired or other separate property, if any, which they possess.

The question for determination is whether the Judge is right in refusing to make such a decree. Upon the facts appearing in this case there can be no question that the Judge is right. No doubt, where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual contracting parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, having subsequently duly ratified and adopted it, in that case unquestionably [168] every such coparcener is absolutely responsible. Equally he would be responsible though he did not assent to the particular contract if there had been such acquiescence on his part in the course of dealings, in which the particular contract was entered, as to warrant his being treated in the matter as a contracting party. When however such is not the case, but the contract is of a charater such as, under the law, to entitle the manager to enter into, independently of the consent of the other members of the family, so as to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property. As regards the other property in the hands of a coparcener no other coparcener, whether he be the manager or not, has any title whatsoever. The legal individuality of a coparcener is not merged in the manager, so far as the coparcener's self-acquired or other separate property is concerned. Even when, under the Hindu Law according to the smritis, the family was paramount, it did not entirely absorb the legal individuality of the members of whom it consisted. This will be clear if we turn to the rules laid down with regard to sureties. While prohibiting coparceners from entering into transactions with each other or becoming sureties for each other in respect of their undivided property, the law permitted them to enter into contracts with each other in respect of their self-acquired property even before partition, thereby indicating that outside the family property the coparceners were in the position of strangers (see Narada quoted in Colebrooke's Jagannadha's Digest, Volume I, page 163, Higginbotham's edition). It follows, therefore, that the liability of the other coparceners must be limited to their interest in the joint estate. This conclusion is strengthened by the law laid down in the analogous case of a son's liability to pay his father's personal debts. When notwithstanding the pious duty of a son, so strongly inculcated, to pay his father's debts independently of assets, the son's liability has been restricted to the joint assets, it would be inconsistent to hold that a coparcener's liability which never stood on an equal—much less a higher—

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footing, should be extended beyond the joint property. As in the one case joint property is the limit of the son's liability, so also in the other it marks the limit of the coparcener's liability.

As under a decree for money lent to a manager alone for a family purpose "the creditor," in the words of the Officiating [169] Chief Justice in the recent Full Bench case of *Ramasami Nadan* v. *Ulaganatha Goundan* (1)" is "seeking to do through the Court what the manager who has incurred the "debt could lawfully do for himself," it follows that Courts have no authority to seize and sell in execution of such a decree the self-acquired or other separate property of coparceners other than the manager. To hold otherwise would involve the unsustainable admission that a manager can be allowed to bring about indirectly what he cannot do directly.

The authorities to some of which our attention was drawn may now be noticed briefly. In *Ramlal Thakursidas* v. *Lakhmichand Muniram* (2) it was no doubt held that a minor member of a family, interested in ancestral trade carried on on behalf of the family in copartnership with a stranger, is bound by the acts of the manager necessary with reference to carrying on such trade. But nothing more was decided there. The observations in paragraph 3 in page 72 of the report as well as the tenor of other parts of the judgment of Sausse, C.J., show that the rule laid down in the case is treated as an exceptional rule not to be pushed beyond its strict limits. This case was no doubt relied on in *Johurra Bibee* v. *Sreegopal Misser* (3) by Pontifex, J., but only as warranting the proposition "that debts honestly incurred in carrying on such (family) business "must override the rights of all the members of the joint family in "property acquired with funds derived from the joint business." The same case was cited in *Bemola Dossee* v. *Mohun Dossee* (4) also by Garth, C.J., and Pontifex, J. But it was cited as supporting the conclusion that a manager can, in connection with joint family business, make an equitable pledge of the joint family property. And in *Miller* v. *Runga Nath Moulick* (5), the main proposition which Mitter, J., after reviewing a number of cases including the Bombay decision referred to above, laid down is "an alienation by a managing member of a joint family cannot "be binding upon his adult co-sharers, unless it is shown that it is made "with their consent, either express or implied." Great stress was laid by the appellant's Vakil upon an observation in two of the cases considered above, *i.e., Ram Lal Thakursidas* v. *Lakshmchand Muniram* (2) and *Johurra Bibee* v. *Sreegopal Misser* (3) to the effect that persons carrying on a family [170] business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family credit. But clearly that refers to the credit of the family in its *puasi* corporate character, not to the credit of each member in his individual and separate capacity. Be this as it may, in all the cases, noticed above, the transaction impeached had reference to joint property only. And no question was raised or considered in any of them as to the liability of the separate property of the coparceners who sought to repudiate their liability in regard to such transactions. *Samalbhai Nathubhai* v. *Someshvar* (6) and *In the matter of Haroon Mahomed* (7) are distinguishable from the present case on the ground that the persons, who were held liable there, were considered to have by their conduct constituted themselves partners, which is not so here. These cases do not decide that every member of a trading

(1) 22 M. 49. (2) 1 B.H.C.R. app. 51. (3) 1 C. 470 (475).
(4) 5 C. 792 (806). (5) 12 C. 389 (399). (6) 5 B. 38 (40).
(7) 14 B. 189 (194).

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family is necessarily liable as a partner. In the former of the two cases Melvill, J., guarded himself with the observation "whether a Hindu, who "becomes entitled by inheritance, to a share in a trading business, is "*ipso facto*, and without his consent, involved in all the liabilities of a "partner, it is not necessary for us to determine," and in the latter case Sargent, C.J., admitted that it was open to the party there held liable to show that he did not become a partner. It is thus evident that none of the abovementioned cases lends support to the appellant's contention. And the decision of Garth, C.J., and Markby and Mitter, JJ., in *Joykisto Cowar* v. *Nittyanund Nundy* (1) is, so far as it goes, a decisive authority against the contention, inasmuch as that decision necessarily implies that as regards minors, whose guardian continues on their behalf an ancestral trade, their liability does not extend to their separate property.

Manu, Chapter VIII, Section 166, was also much relied on on behalf of the appellant. What, however, was intended to be emphasized by that text is merely that members, who are united at the time a loan for a family purpose is incurred, are not absolved from their liability by the fact that they subsequently became divided. This will be seen from pages 283—4 of volume XXV, Sacred Books of the East, where Dr. Buhler says:—"The meaning **[171]** (of the text in question) is, as Nand points "out, that if a debt was contracted for the benefit of a united family, it "must be repaid by the members of the family, though they may have "separated afterwards." The term swathaha in the original text which is rendered by the translators "their own property," is no doubt interpreted in that way by all the commentators including Kullaka. But none of them suggests that the term includes property which has vested in the divided members otherwise than by partition. In Dr. Burnell and Hopkins' Ordinances of Manu, the concluding part of the text in question is rendered "out of their own (property) even if they (have lived with property) "divided" and in a note it is added 'divided' means having a divided property (page 205).

The tenor of the texts on the point in other Smritis, *e.g.*, Vishnu (Sacred Books of the East, volume VII, paragraph 39, page 45), Yagnyavalkaya (Mandlik's Hindu Law, paragraph 45, page 205) and Narada (Sacred Books of the East, volume XXXIII, paragraph 13, page 45), is such as to make one hesitate to interpret the term swathaha in the text in question to include property in the hands of a member which did not form part of the joint family property and to take the law laid down by Manu to be in reality different from, and in advance of, that laid down by the later Smritis. And considering that in the dharma sutras the law regarding separate acquisitions is seen in its first germs only (Jolly's Hindu Law, page 94) it is highly probable that the writer of the text under consideration had, in using the term swathaha, in contemplation what becomes the divided parcener's own property under a division but not any other property. It must therefore be taken that the appellant's contention is, as already explained, not only opposed to principle but is also unsupported by authority.

The second appeal fails and must be dismissed except to the extent that the decree, which is at variance with the judgment of the Lower Appellate Court, will be brought into conformity with it. The appellant must pay the respondents' costs of this appeal.

BENSON, J.—I concur.

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(1) 3 C. 738.

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[172] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.

Krishnan Chetti (*Plaintiff No. 5*), *Appellant v.* Muthu Palandi Vacha Makali Tevar (*Defendant*), *Respondent*.*
[25th November, 1898.]

Civil Procedure Code--Act XIV of 1882, Sections 522, 562—"Preliminary point"—Order determining validity of an award—Decree in accordance with an award—Appeal.

Objection was unsuccessfully taken before a District Munsif to the validity of an award on the ground of the arbitrator being interested, and a decree was passed in accordance with the award. The defendant appealed and the Subordinate Judge held that the objection was well founded and should prevail; and, setting aside the award, he remanded the case for trial. The plaintiff appealed to the High Court:

Held, (1) that the appeal to the High Court was maintainable;

(2) that no appeal lay to the Subordinate Court as to the validity of the award and that the decree of the District Munsif should be restored.

[R., 14 M.L.J. 356 (358) (F.B.); 2 P.R. 1908=12 P.W.R. 1908=96 P.L.R. 1908.]

Appeal against the order of V. Srinivasa Charlu, Subordinate Judge of Madura (West), in appeal suit No. 344 of 1897 presented against the decree of N. Sambasiva Ayyar, District Munsif of Sivaganga, in original suit No. 394 of 1896.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court.

Hon. *Bhashyam Ayyangar. V. Krishnasami Ayyar*, *Ranga Ramanujachariar* and *Subbayya Mudaliar*, for appellant.

Desikachariar and *Sundara Ayyar*, for respondent.

JUDGMENT.

In this case the matter in dispute was referred to an arbitrator who gave an award. Objection to the award was taken before the District Munsif on the ground that the arbitrator was interested in the matter referred for his decision. The District Munsif decided that he had no such interest as disqualified him from being an arbitrator. On appeal to the Subordinate Judge the latter decided that the arbitrator had such an interest, and, [173] setting aside the award, remanded the suit to the District Munsif for trial by him on the merits. Against this order of remand the appellant now appeals.

The respondent urges, as a preliminary objection, that no appeal lies to this Court, inasmuch as the District Munsif did not dispose of the case on a preliminary point, but in accordance with an award which was before him, and that, therefore, the remand order was not made under Section 562, Civil Procedure Code.

We do not think that this objection is valid. "Preliminary point" in Section 562 means a matter preliminary to the general determination of the suit which the parties bring before the Court for decision. In this case the preliminary point which the District Munsif had to decide was whether there was a valid award which decided the matter in dispute. He found

* Appeal against Order No. 50 of 1898.

that there was such award and that he could not, therefore, go into the merits of the dispute. That finding by the District Munsif was a decision on a preliminary point within the meaning of Section 562 (*Ramachandra Joishi* v. *Hazi Kassim* (1)), and if the Court of appeal had jurisdiction to entertain an appeal on the matter and found that the decision on the point was wrong, it was open to it to remand the suit for determination on the merits, and this it did. The preliminary objection, therefore, fails.

As to the appeal, the appellant urges that the Lower Appellate Court had no jurisdiction to entertain the appeal, the last clause of Section 522, Civil Procedure Code, forbidding any appeal, except in so far as the decree is in excess of, or is not in accordance with, the award.

It is urged that this objection was not taken in the Lower Appellate Court, but as it is an objection to the jurisdiction of the Court the appellant is not precluded from now for the first time urging it (*Minakshi* v. *Subramanya* (2)). The objection itself is, we think, well founded. The recent case of *Kombi Achen* v. *Pangi Achen* (3) is exactly on all fours with the present case and expressly decides the point in favour of the appellant. We are bound by that decision unless it is in conflict with other decisions of this Court. It is urged that it is in conflict with the decision in *Venkayya* v. *Venkatappayya* (4), but we do not think that it is. [174] The point now before us was not decided, or even discussed, in that case, and we cannot take it as an authority in conflict with the decision in *Kombi Achen* v. *Pangi Achen* (3). Nor is this latter decision in any way opposed to the grounds of the decision of the Full Bench in *Husananna* v. *Linganna* (5). The question there was whether an appeal lay against a decree based on an award, when the objection was that there was no submission to arbitration, or when the genuineness of the award was denied. The Court held that in such a case an appeal would lie, because such an objection went to the very root of the jurisdiction of the Court to proceed under Sections 525 and 526 of the Court. The Court, however, in that case held that an objection like the present, which is based on one of the matters enumerated in Sections 520 and 521, Civil Procedure Code, would not form the basis of an appeal, and that the last clause of Section 522 was expressly intended to exclude such grounds of appeal. After reviewing the authorities, Mr. Justice Subramania Ayyar puts the matter clearly, in these words :—

"The principle on which these cases proceed seems to be that the "finality contemplated by Section 522 is confined to a determination by "the Court of certain specific matters, such as are enumerated in Sections "520 and 521, which do not include denial of submission or the genuine-"ness of the award or other like circumstances. That there is an "undoubted distinction between an adjudication on these latter questions "and an adjudication upon the other matters referred to above cannot be "denied. The distinction is that, whereas a decision as to the truth of "the submission or the genuineness of the award is a determination which "goes to the very root of the jurisdiction of the Court to proceed under "Sections 525 and 526, the orders of the Court passed under Sections "520 and 521 are merely more or less ancillary to the enforcement of an "award given under a reference made through the intervention of a Court "about the *factum* of which reference or award there can generally be "little ground for dispute. This distinction was lost sight of in *Micharaya*

(1) 16 M. 207. (2) 11 M. 26. (3) 21 M. 405.
(4) 15 M. 348. (5) 18 M. 423

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"*Guruvu* v. *Sadasiva Parama Guruvu* (1)," which was, in my opinion, "consequently wrongly decided."

No doubt the Calcutta case to which the Subordinate Judge refers is in conflict with the decision in *Kombi Achen* v. *Pangi* [175] *Achen* (2) but it should not be followed in this Presidency when there is a direct authority of this Court in support of the contrary view. Following the decision in *Kombi Achen* v. *Pangi Achen* (2), we must hold that no appeal lay to the Subordinate Judge as regards the validity of the award.

The respondent, however, took a minor objection to the District Munsif's decree on the ground that it was in excess of the award and that to correct it the words "the said amount of Rs. 136-4-4 and" should be struck out. The Subordinate Judge did not deal with this objection, but the appellant before us agrees that the decree should be corrected accordingly. The result is that we set aside the order of the Subordinate Judge and we modify the decree of the District Munsif by striking these words out.

The appellant must have his costs in this Court. Each party will bear his own costs in the Lower Appellate Court.

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22 M. 175.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

BANGARU AMMAL (*Plaintiff*), *Appellant v.* VIJAYAMACHI REDDIAR (*Defendant*), *Respondent.** [28th November, 1898 and 5th January, 1899.]

Hindu law—Widow's second suit for maintenance—Enhancement of rate of maintenance—Res judicata.

A Hindu widow in 1867 obtained a decree for maintenance against her husband's coparceners, but the decree created no charge on the land. The family estate having passed to a collateral relative the widow now sued him for maintenance at an increased rate with arrears, and asked for a charge on the estate alleging that prices had risen and that in other respects also circumstances had changed:

Held, that the decree in the suit of 1867 was not a bar to the present suit.

[R., 13 C.P.L.R. 156 (157)].

APPEAL against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in original suit No. 36 of 1895.

[176] The plaintiff's husband died without issue leaving him surviving his father and one brother. In 1867 the plaintiff brought a suit against them for maintenance and obtained a decree (which created no charge on the estate) for maintenance at the rate of Rs. 39 per annum. The father died next and then the brother died leaving a widow and no issue. On the death of the widow the estate, worth Rs. 25,000, passed to the present defendant as reversionary heir.

The plaintiff, alleging that the rate of maintenance was insufficient and stating that, at the time of the previous suit, she had failed to adduce

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* Appeal No. 106 of 1898.

(1) 4 M. 319. (2) 21 M. 405.

evidence in respect of the status and property of the family, now sued for maintenance at the rate of Rs. 188 per annum with three years arrears, and she asked that the maintenance should be charged on the estate.

The defendant pleaded, *inter alia*, that the suit was barred by the previous suit.

The District Judge upheld this plea and dismissed the suit, and the plaintiff preferred this appeal.

Mr. *J. G. Smith*, for appellant.

Hon. *Sankaran Nayar*, for respondent.

JUDGMENT.

In this case the plaintiff (appellant) is a Hindu widow. In original suit No. 93 of 1867 she obtained a decree against her father-in-law and brother-in-law for maintenance at the rate of Rs. 3 per mensem and Rs. 3 per annum for a cloth. The decree in that suit has not been filed, but the parties are agreed that it may be taken to have been a personal decree only against the then defendants, and that the maintenance was not charged on the family property.

Both the then defendants have since died and the property has passed to the present defendant as reversioner.

The plaintiff brought the present suit for an increased rate of maintenance, alleging that prices have risen and that in other respects also circumstances have changed. She also claimed arrears at the increased rate and asked to have her maintenance charged on the property. The District Judge dismissed the suit on the ground that there was no authority for such a suit and that it was barred by the decree in original suit No. 93 of 1867. The plaintiff therefore appeals. We think that the view of the District Judge is erroneous.

[177] In the case of *Ruka Bai* v. *Ganda Bai* (1), the Allahabad High Court held that a diminution of the estate of the person who was liable to pay the maintenance was a sufficient cause for an action to reduce the maintenance formerly decreed, the Court very properly observing that "it would be unreasonable to hold that even if the income "of the estate should come to an end altogether, that allowance should "still continue." The same view was taken by this Court in the case of *Venkanna* v. *Aitamma* (2), where this Court observed:—"It is true that "the decree in a maintenance suit is not final in the sense, that the rate "fixed can never be altered. If there is a change in the circumstances of "the family and the persons obliged by the decree, it may be that they "are entitled to have the rate of maintenance reduced." We do not doubt that these cases enunciate a correct principle, and if altered circumstances may justify a suit for reduction of maintenance they may equally justify a suit for its increase. Indeed there is direct authority for this proposition in the case of *Sreeram Buttacharjee* v. *Puddomookhee Debia* (3), where the Court held that "there is nothing in the law to prevent an "increase of the amount as there is nothing to prevent a decrease, should "sufficient cause be shown." The same view was assumed to be correct by the Bombay High Court in the case of *Sidlingapa* v. *Sidava* (4), where Sir M. R. Westropp, C.J., while declaring that suits brought on continuing decrees for maintenance merely for the purpose of enforcing

(1) 1 A. 594.
(2) 12 M. 183.
(3) 9 W.R. C.R. 152.
(4) 2 B. 624 (630).

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such decrees, were "not only unnecessary but unsustainable," yet observed that either party might by suit or otherwise bring to the notice of the Court that circumstances rendered it equitable that the rate should be enhanced or reduced, and he enumerated some of the circumstances that would justify such a suit.

We think, then, that such a suit as the present may be justified both on principle and authority. No doubt the Courts would require clear proof of materially altered circumstances and would not allow the rule which prohibits the re-agitation of *res judicata* to be disregarded by a mere allegation of altered circumstances, but where the maintenance is fixed in money and is very small as in this case, compared with the property from which it is to be paid, and where, as in this case also, the interval between the two [178] suits is great, it may well be that the circumstances have altered sufficiently to justify a change in the rate.

In this connection we would point out that it is not necessary, as the District Judge seems to think, that the plaint should allege that the income has increased in order to justify an increase of rate. It is only one of many elements to be considered, (Mayne's Hindu Law, Section 417, 5th edition). A material increase in the cost of living which renders the money allowance insufficient to give the widow the means of maintenance suitable to her degree and the circumstances of the family may well be sufficient to justify an increase of the money allowance.

We must hold, then, that the District Judge was wrong in his view that the decree in the former suit is a necessary bar to the present suit, so far as it is a suit for an increased rate of maintenance. If it is found on trial that circumstances have altered so as to justify this suit, then there is no legal obligation * to making the maintenance a charge on the property inherited by the defendant as reversioner. If, however, the fresh suit is not justified by altered circumstances, the plaintiff can only recover maintenance from the defendant by executing the decree in original suit No. 93 of 1867 against the defendant as the legal representative of the defendants in the suit to the extent of the assets which he has inherited, (*Karpakambal* v. *Subbayyan* (1)), but it cannot be charged on the property by a fresh suit, (*Rangamma* v. *Vohalayya* (2)). With these remarks we set aside the decree of the District Judge and remand the suit for disposal in accordance with law.

Appellant must have her costs in this appeal. Costs in the Lower Court already incurred will be provided for in the fresh decree.

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* "Obligation" seems to be a misprint for "objection."—ED.

(1) 5 M. 234. (2) 11 M. 127.

22 M. 179=8 M.L.J. 265.

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22 M. 179= 8 M.L.J. 265.

[179] APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

SAMBASIVA CHARI (*Plaintiff*), *Appellant v.* RAMASAMI REDDI (*Defendant*), *Respondent**. [27th September, 1898.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections* 15, 18, 51—*Summary suit to set aside distraint—" Within thirty days"—Sunday—General Clauses Act—Act X of* 1897, *Section* 10 (1)—*General Clauses Act (Madras)—Act 1 of* 1891, *Section* 11.

Suits to set aside a distraint under Section 15 of the Rent Recovery Act (Madras), 1865, were filed on the thirty-first day after the distraint complained of, the thirtieth day being a Sunday, and the Court closed. On objection being taken that the suits were barred under Sections 18 and 51 of the Act:

Held, (1) that the suits were filed in time;

(2) that the provisions of the Limitation Act do not extend the period of thirty days limited by Sections 18 and 51 of the Rent Recovery Act (Madras), 1865, for bringing a summary suit to set aside a distraint; neither does Section 10 of the General Clauses Act, nor Section 11 of the General Clauses Act (Madras), inasmuch as the latter Acts are not retrospective; and

(3) that there is a generally recognised principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunity.

[F., 3 C.L.J. 339 (343)=10 C.W.N. 535 (539); R., 36 B. 268 (269)=13 Bom. L.R. 1153; 34 M. 505 (510)=5 Ind. Cas. 884=20 M.L.J. 283=7 M.L.T. 132; 16 C.W.N. 721 (723); 14 Ind. Cas. 579=23 M.L.J. 221 (222)=12 M.L.T. 169; 7 N.L.R. 176 (178); 13 O.C. 103 (107).]

SECOND appeal against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 241 of 1896, reversing the decision of E. L. R. Thornton, Acting Head Assistant Collector of North Arcot, in summary suit No. 194 of 1895.

Suits to set aside a distraint under Section 15 of the Rent Recovery Act (Madras), 1865, on the ground that no proper patta had been tendered by defendant. Defendant set up, among other defences, that the suits were barred by limitation. The suits were in fact filed on the thirty-first day after the distraint, the reason being that the thirtieth day was a Sunday, when the Court was closed in accordance with the Rules of the Court. In the Acting Head Assistant Collector's Court the objection was overruled and the suits admitted, the distrained property being ordered to be released. Defendant appealed on the ground, among others, that the Lower Court " erred in finding that the plaintiff's suit was not "barred by limitation,—the suit not having been filed within the thirty "days allowed by the Rent Recovery Act, and there being [180] no "provision in the General Clauses Act for excluding holidays from the "period of limitation." The District Judge, holding that the suit was barred, delivered the following judgment:—

"These were suits under Section 18 of Act VIII of 1865 to set aside "a distraint. It was urged, among other things, that they were barred "because the suits were filed on the thirty-first day after the distraint "(the thirtieth being Sunday).

"The Head Assistant Collector found that the suits were not barred "because of Section 7 of the General Clauses Act. But the General

* Second Appeals Nos. 1399 to 1403 of 1897.

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"Clauses Act (Act I of 1887) was passed in January 1887 and by Section "2 only applies to acts made by the Governor-General in Council and "after the passing of that Act. Act VIII of 1865 is not an Act made by the "Governor-General in Council nor is it subsequent to 1887.

"The first Madras Act (Act I of 1867) is also not retrospective (in "any future Act' Section 1), and contains no provision corresponding to "Section 7 of Act I of 1887. Act I of 1891 is not retrospective (Sections "1 (*b*) and 4).

"The Rent Recovery Act being an Act dealing exhaustively with "a branch of legislation, the Limitation Act cannot be held to be applica-"ble to it.

"I am of opinion that as the suits were not filed 'within thirty "'days of the distraint' they were barred by Sections 18 and 51 of Act "VIII of 1865."

The plaintiff preferred this second appeal on the ground that the District Judge was in error in holding that the appeal was barred by the law of limitation, in view of the fact that the last day for filing the appeal was a holiday, and the appeal was filed the next day.

Krishnamachariar, for appellant.—This suit under the Rent Recovery Act (Madras), 1865, was brought on the thirty-first day after the cause of action arose, the thirtieth day being a Sunday. The Head Assistant Collector admitted the case; but the District Judge threw it out as barred under Sections 18 and 51 of the Act referred to. Inasmuch as the Court was not open to receive the plaint on the Sunday, the thirtieth day, plaintiff was entitled to file it the day following. The effect of the Court's refusal is to give twenty-nine days only. The Court has no power to curtail the period allowed by statute. [DAVIES, J.—If a bill falls due on Sunday, it has to be paid the day before.] Yes, because there is **[181]** a special provision to that effect in the Negotiable Instruments Act. [DAVIES, J.—The Limitation Act will not help you. Act VIII of 1865 prescribes a definite period, and is an Act complete in itself. The General Clauses Act I of 1887, Section 7 (2) does not apply, because it is not retrospective.] I rely on general principles. If the delay is caused, not through any act of the party, but by some act of the Court itself, such as the closing of the Court I am entitled to file the plaint on the first open day (*Shooshee Bhusan Rudro* v. *Gobind Chunder Roy* (1)). That was a very similar case under the Bengal Tenancy Act. I also rely on *Peary Mohun Aich* v. *Anunda Charan Biswas* (2), and *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (3).

Desikachariar, for respondent.—If appellant is entitled to exemption of the thirtieth day because it is a Sunday, then he is entitled to deduct all the four Sundays within the thirty days. The matter is already concluded by authority, (*Veeramma* v. *Abbiah* (4)). *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu* (5) was a case in point under the Rent Recovery Act. [BENSON, J.—In that case appellant claimed deduction of time required for obtaining copies of the judgment of the Head Assistant Collector; it was held that it was not necessary to file the judgment with the appeal.] *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (6) is strongly in my favour. Time expired on a day when the Court was closed, and a suit was filed on the day it opened, but it was held to be barred. The

(1) 18 C. 231. (2) 18 C. 631 (634). (3) 22 C. 176.
(4) 18 M. 99. (5) 20 M. 476. (6) 20 M. 249.

Registration Act is an Act complete in itself and so is Act VIII of 1865 (Madras). [DAVIES, J.—We have no control over Registration officers, but we have over officers adjudicating in rent recovery suits. According to High Court rules of 1887, Sunday is a *dies non*, and no judicial act can be done on that day and the Sheristadar could not have received the plaint.]

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JUDGMENT.

We are clearly of opinion that the provisions of the Limitation Act do not apply to extend the time of thirty days limited by Sections 18 and 51 of Act VIII of 1865 for bringing a summary suit to set aside a distraint. The cases (*Veeramma* v. *Abbiah* (1), *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (2) and **[182]** *Kumara Akkapa Nayanim Bahadur* v. *Sithala Naidu* (3)), place the matter beyond all doubt. Nor is Section 10 of the General Clauses Act nor Section 11 of the Madras General Clauses Act applicable inasmuch as they do not refer back to Acts of the year 1865. But there is a General principle of law which has been recognized in two recent cases by the High Court of Calcutta (*Shoshee Bhusan Rudro* v. *Gobind Chunder Roy* (4) and *Peary Mohun Aich* v. *Anunda Charn Biswas* (5)) that "where parties are prevented from doing a thing in Court "on a particular day not by any act of their own, but by the act of the "Court itself they are entitled to do it at the first subsequent opportunity" (*Peary Mohun Aich* v. *Anunda Charn Biswas*(5)). We see no reason why this principle should not be followed in cases like the present when it has been adopted as a rule of law in cases to which the Limitation Act and General Clauses Act apply. We, therefore, rule that the plaint in this case, which was filed on the thirty-first day after the distraint, was filed in time, the thirtieth day being a Sunday on which the Court was closed in accordance with the Rules of this Court. The decree of the Lower Appellate Court is accordingly reversed, and the appeal remanded for disposal on the merits. The plaintiff's costs in this Court will be paid by the defendant and the costs incurred in the Lower Courts will abide and follow the result of the further trial ordered.

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22 M. 182 = 8 M.L.J. 175.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

SANKARAN NAMBIAR (*Petitioner*), *Appellant* v. KANARA KURUP (*Counter-petitioner*), *Respondents*.*
[22nd April and 14th May, 1898.]

Civil Procedure Code—Act XIV of 1882, *Sections* 244, 258—*Execution of decrees—Money decree—Limitation Act—Act XV of* 1877, *Schedule II, Article* 173-*A*.

Section 258, Civil Procedure Code, refers only to the execution of decrees under which money is payable, and is not applicable to decrees for possession of immoveable property.

[Diss., 44 P.R. 1906 = 82 P.R. 1907 ; R., 24 M. 412 (414) ; 9 Bom. L.R. 1381 (1383).]

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* Appeal against Appellate Order No. 98 of 1897.

(1) 18 M. 99. (2) 20 M. 249. (3) 20 M. 476.
(4) 18 C. 231. (5) 18 C. 631 (634).

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[183] APPEAL against the order of A. Thompson, District Judge of North Malabar, in civil miscellaneous appeal No. 21 of 1897, affirming the decree of V. Kelu Eradi, District Munsif of Tellicherry, in miscellaneous petition No. 1189 of 1896, in the matter of original suit No. 168 of 1893.

A decree was obtained for the surrender of land by the plaintiff in original suit No. 168 of 1893. On 3rd September 1896, defendant No. 2 in the suit presented an application under Section 244 of the Civil Procedure Code (miscellaneous petition No. 1189 of 1896), asking the Court to pass an order that the lands ordered to be surrendered under the decree were surrendered by defendant to plaintiff in March 1894. The District Munsif found on the evidence that the petitioner had surrendered the lands to the decree-holder and duly recorded that finding. The decree-holder appealed and the District Judge, observing that the application was made under Section 258 of the Civil Procedure Code, held, following *Baba Mohamed* v. *Webb* (1), that Section 258 applies to the adjustment of any decree, and not merely of a money decree, and that by the Limitation Act, Schedule II, Article 173-A, the application should, in consequence, have been made within ninety days. He therefore set aside the order and dismissed the petition.

The petitioner preferred this appeal.

Mr. *C. Krishnan*, for appellant.

Ryru Nambiar, for respondent.

JUDGMENT.

The plaintiff obtained a decree for the surrender of land in original suit No. 168 of 1893.

On the 3rd September 1896 the second defendant, alleging that defendants had surrendered the land to plaintiff in March 1894, asked the District Munsif to record an order stating that the decree-holder had obtained possession of the land.

The District Munsif after enquiry recorded a finding that the lands had been surrendered. The District Judge on appeal observed that the application was one made under Section 258, Code of Civil Procedure, and that under Article 173-A of Schedule II of the Limitation Act such an application must be made within ninety days of the delivery of possession. He, therefore, dismissed the application as barred by limitation.

[184] The second defendant appeals on the ground that Section 258 applies only to cases in which the decree is for money, not for land as in the present case; and the questions for decision are whether Section 258, Code of Civil Procedure, refers only to decrees for money, or is applicable also to decrees for possession of immoveable property, and if the former, whether the District Munsif had any power in execution to hold the enquiry and make the order which he did on the second defendant's petition.

It seems to us that the language of Section 258 and its position in the Code indicate that it refers only to the execution of decrees for money. Under the general heading "of the mode of executing "decrees" the Code deals separately with the various kinds of decrees that have to be executed. It begins with decrees for money and deals with them in Sections 254 to 258. It then deals (Section 259) with decrees for specific moveables and recovery of wives, then (Section 260) with decrees for specific performance

(1) 6 C. 786.

and restitution of conjugal rights, then (Sections 261-2) with decrees for execution of conveyances and endorsement of negotiable instruments, and lastly (Section 263-5) with decrees for immoveable property. 1898 MAY 14. — APPELLATE CIVIL. — 22 M. 182= 8 M.L.J. 175.

Section 257 enacts that "All money payable under a decree shall be "paid as follows, namely:—

"(*a*) into the Court whose duty it is to execute the decree; or

"(*b*) out of Court to the decree-holder; or

"(*c*) otherwise as the Court which made the decree directs."

Then Section 257-A lays down that an agreement to give time for the satisfaction of a judgment-debt shall be void, unless made for consideration, &c.

Then follows Section 258 which runs thus:—

"If any money payable under a decree is paid out of Court, or the "decree is otherwise adjusted in whole or in part to the satisfaction of "the decree-holder, or if any payment is made in pursuance of an agree-"ment of the nature mentioned in Section 257-A, the decree-holder shall "certify such payment or adjustment to the Court whose duty it is to "execute the decree.

"The judgment-debtor also may inform the Court of such payment "or adjustment, and apply to the Court to issue a notice to the decree-holder "to show cause, on a day to be fixed by the Court, why such payment or "adjustment, should not be recorded as certified; and if, after due "service of such notice, the decree-holder [185] fails to appear on the "day fixed, or, having appeared, fails to show cause why the payment or "adjustment shall not be recorded as certified, the Court shall record the "same accordingly.

"Unless such a payment or adjustment has been certified as aforesaid "it shall not be recognized as a payment or adjustment of the decree by "any Court executing the decree."

The opening words of the section, "If any money payable under "a decree is paid out of Court," evidently refer back to Section 257, Clause (*b*); and the next words of Section 258 or the decree is otherwise adjusted in whole or in part," &c., refer back to the other clauses of Section 257 and to 257-A. But Sections 257 and 257-A deal only with the decrees for money. Moreover in the second line of Section 258 the words "the decree" clearly refer to the decree mentioned in the preceding line which is a decree under which money is payable.

Thus the language of the section appears to us to be applicable only to decrees under which money is payable and the position of the section in the Code supports the same view.

The District Judge held that Section 258 was applicable to the present application and relied on *Baba Mohamed* v. *Webb* (1), but the decision in that case was based on the words of Section 258 of Act X of 1877 which the learned Judges considered to correspond in all material respects with and to convey the same meaning as Section 206 of the prior Civil Procedure Code (Act VIII of 1859) which, in their opinion, manifestly dealt with the adjusment of any decree.

No doubt the words in Section 206 of Act VIII of 1859 are very wide. They are "no adjustment of a decree in part or in whole shall "be recognised by the Court unless," &c.

(1) 6 C. 786.

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In the Act of 1877 however the chapter on the execution of decrees was greatly expanded and in some respects altered, and the language of Section 258 was again altered when the present Code was passed; and we do not think that any decision as to the meaning of Section 206 of the Code of 1859 can give much guidance in construing the very different words of Section 258 of the present Code.

It is suggested that Section 258 must apply to cases like the present, since there is no other section of the Code which lays down [186] any corresponding procedure for certifying the satisfaction of decree for immoveable property, specific moveables, and so forth. We do not think that this argument is conclusive. Immoveable property is so different in its nature from money, and the difficulty of tracing, and of proving or disproving an alleged payment of money is so much greater than the difficulty of proving an alleged delivery of immoveable property, that the Legislature may well have made a special provision in the case of money which was thought unnecessary in the case of immoveable property. If it was intended that Section 258 should apply to decrees of all kinds, we should certainly have expected its language to be general instead of being so strictly limited as it is. We think, then, that Section 258 was inapplicable to the present case, and therefore the limitation of ninety days prescribed in Article 173-A of the Limitation Act in regard to that section had no application.

It is, however, admitted that if Section 258 is inapplicable, there is no other Section which expressly authorizes the Court to deal with such an application as that made by the defendant in this case. We do not, however, think that the absence of express authority in the Code is any proof that the District Munsif had no jurisdiction to deal with the application. The Code does not contain an exhaustive statement of every act which may be done by the Courts. No doubt where the Code provides a specified procedure in any matter, the Courts are bound to follow the code, but in matters not dealt with by special provisions of the Code, the Court may act under the general provisions of the Code. Under Section 244 the Court has a general authority to make orders determining any questions which arise between the parties to the suit and relating to the satisfaction of the decree. We think that the District Munsif had authority under that Section to deal with the question raised by the defendant.

We must therefore set aside the order of the District Judge with costs in this and in the Lower Appellate Court, and remand the appeal to the District Judge for decision on the merits.

22 M. 187.

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[187] APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

VENKATA CHANDRASEKHARA RAZ AND OTHERS (*Defendants Nos.* 2 *to* 4), *Appellants v.* ALAKARAJAMBA MAHARANI AND OTHERS (*Plaintiff and her Legal Representatives*), *Respondents*.* [4th October, 1898.]

Minors—Guardian ad litem *—Civil Procedure Code—Act XIV of* 1882, *Section* 582—*Appeal by a person other than guardian.*

Two defendants in a suit, being minors, were represented by a properly appointed guardian *ad litem.* Upon a decree being passed in favour of the plaintiff, an appeal was filed on behalf of the minors, by their mother, without any order obtained by her, constituting her guardian, and without any previous removal of the properly appointed guardian *ad litem* :

Held, (1) that the appeal could not be heard ; and

(2) that the appointment of guardian in a Court of first instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal.

[F., A.W.N. (1899) 203 ; 6 Ind. Cas. 663=35 P.R. 1910=43 P.L.R. 1910=55 P.W.R. 1910 ; 1 N.L.R. 128 (129) ; R., 2 A.L.J. 489 (490) ; 5 C.L.J. 434 (439).]

APPEAL against the decree of E. C. Rawson, District Judge of Vizagapatam, in original suit No. 34 of 1894.

In a suit to recover certain villages with mesne profits, two of the defendants, being minors, were represented by the sheristadar, who was appointed guardian *ad litem.* The District Judge having passed a decree in favour of the plaintiff, this appeal was now filed on behalf of the minors by their mother without any order obtained by her constituting her guardian, and without any previous removal of the former guardian.

Sankaran Nayar and *Tiruvenkatachariar*, for appellants.

Mr. *J. G. Smith*, Hon. *Bhashyam Ayyangar* and *Rangachariar*, for respondents.

JUDGMENT.

In this case the two minor defendants were represented in the Court below by the sheristadar who was appointed guardian *ad litem.* A decree was passed against them and the present appeal is now filed on their behalf by their mother without any order obtained by her constituting her guardian and without [188] any previous removal of the former guardian. It is objected on behalf of the respondent that the appeal cannot be heard inasmuch as it is not presented by the properly constituted guardian of the defendants. In support of the appeal it is contended that a minor defendant when he appeals is in the position of a plaintiff and no longer in that of a defendant and that accordingly no order appointing a guardian is required for the purpose of an appeal. The language of the Code does not support this view. Chapter XXXI of the Code of Civil Procedure, which is the chapter relating to the appointment of guardian *ad litem* and next friend, is not one of the chapters mentioned in Section 582 of the Code, and the omission is a strong argument against the view that defendant and plaintiff when appearing in an appeal are to be taken to mean

* Appeal No. 239 of 1897.

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appellant and respondent. To justify the procedure adopted the appellants are bound to contend that the appointment of guardian in the Court of First Instance comes to an end when the decree is passed by that Court or at any rate does not continue for the purpose of an appeal. The case cited (*Jwala Dei* v. *Pirbhu* (1)) is an authority against that view and the inconveniences and absurdities attending it are manifest. Conceivably the guardian *ad litem* properly appointed might be applying for execution of the decree whilst another self-constituted guardian, calling himself next friend, was appealing against some part of the decree. If the guardian *ad litem* continues as such through the subsequent stages of the litigation the absence of any special provision regarding minors in connection with appeals is explained. In the case of a minor plaintiff succeeding in the first Court, but having his suit dismissed in the Court of appeal, there can be no doubt that the next friend would be personally liable for the costs and this can be so only on the supposition that he retains the position of next friend. It must be the same in the case of a defendant's guardian *ad litem*.

We are asked to adjourn the case in order to allow an application to be made to discharge the old guardian and appoint a new one. But any such adjournment would be useless unless the appellants were in a position to explain and justify the mistake which has been made. In the absence of any explanation the inference which we are disposed to draw is that the guardian [189] *ad litem* did not think it advisable in the interests of the minor to carry on the litigation any further. We must therefore dismiss the appeal as regards the minor defendants.

[The remainder of the judgment dealt with the appeal in relation to the fourth defendant only.]

The appellant, that is to say, the minors, must therefore pay the respondents' costs of this appeal.

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22 M. 189.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

SRI SADAGOPA RAMANUJA PEDDA JIYANGARLU (*Defendant*), *Appellant* v. SRI MAHANT RAMA KISORE DOSSJEE (*Plaintiff*), *Respondent*.* [19th April and 4th May, 1898.]

Injunction—Specific Relief Act—Act 1 of 1877, Sections 42, 54—Property in word—Use of word to which special meaning has become attached—Dharmakarta.

The vicharanakarta of a number of temples held a sanad from Government in which two of such temples were named and the others included in the word "vagaira"—(meaning literally "et cetera," or "and others"). The dharmakarta of the said two temples and of three minor ones only, having limited rights and duties, and being in many respects subordinate to the vicharanakarta, had, in pursuance of immemorial custom, used a seal in connection with his office, which had never borne more than a single figure, without legend. He had now made and used in the conduct of temple affairs a new seal, bearing the same figure, but with the legend "Tirumalai, Tirupati vagaira devastanam dharmakarta"

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* Second Appeals Nos. 416 and 742 of 1897.

(1) 14 A. 35.

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added to it. On the vicharanakarta suing for a declaration and for a perpetual injunction to restrain the use of a seal containing such words:

Held, that although the legend might in a sense be accurate in representing what the defendant actually was, and the vicharanakarta had no property in the word "vagaira," yet the defendant should be restrained from using it upon the seal, since, from the manner in which that word had been used in the sanad of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, a special meaning had become attached thereto when used in connection with the two principal temples; and since the object of the dharmakarta in using it was to assert an extension of his rights and to claim a position co-extensive with that of the vicharanakarta, which, in fact, he did not possess.

[R., 11 Ind. Cas. 175 (177) = 21 M.L.J. 730 = 10 M.L.T. 133 = (1911) 2 M.W.N. 202 (205).]

[190] SECOND appeal against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 66 of 1896, affirming the decree of V. Subramanyam, District Munsif of Tirupati, in original suit No. 485 of 1894.

Plaintiff held a sanad commencing in the following terms: "You "have been appointed vicharanakarta for the purpose of managing the "affairs of Tirumalai . . . . Tirupati . . . . vagaira devastanams as per Minutes of Consultation of Governor, dated 21st April 1843 . . . ." The temples so entrusted were some thirty in number. Defendant was the dharmakarta of the Tirumalai and Tirupati temples and of three minor temples attached thereto; and by virtue of such office and in order to indicate his status used, in pursuance of immemorial custom, a seal, with the figure of Hanuman and no more, engraved upon it. In July 1891 this seal had been replaced by a new one, upon which was engraved not only the figure of Hanuman, but also the words "Tirumalai, Tirupati "vagaira devastanam dharmakarta." Plaintiff claimed that defendant was not a trustee of the said temples within the meaning of Act XX of 1863 and that to engrave a title as dharmakarta on the seal was therefore prejudicial to plaintiff's rights as trustee or vicharanakarta; and that the new seal had been fraudulently prepared with a view to exaggerate defendant's new and assumed titles, and to prejudice plaintiff's title; and he prayed for a declaration that defendant was not entitled to the status of "Tirumalai, Tirupati vagaira devastanam dharmakarta" or to use a seal with an inscription to that effect; and for a perpetual injunction restraining defendant from using the new seal in his capacity as a servant of Tirumalai and Tirupati temples. Defendant claimed the right to change the seal, and to use one bearing the words complained of. The District Munsif declared that the defendant was not dharmakarta of any other devastanams under the management of the plaintiff than the Tirumalai, Tirupati and three minor temples, and that "plaintiff being generally known by the title of 'vichara-"'nakarta of Tirumalai vagaira devastanams,' whereas defendant is styled "only 'Tirumalai, Tirupati devastanam dharmakarta,' the insertion of the "word "et cetera" in the engraving of defendant's title on his seal recently "is prejudicial to plaintiff's right and is evidently intended to invade or "threaten to invade plaintiff's powers over the temples, and to exaggerate "defendant's rights," and he directed "that the defendant do drop "**[191]** the said word in the said engraving on his seal and be restrained "perpetually from inserting it again" thereon. But he further decided that plaintiff had no right to restrain defendant from having his usual title, omitting the word "vagaria" engraved on his seal. He cited *Karyan*

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v. *Doddali* (1), where it was said:—"The obvious effect of the defendants' acts was to make evidence to support a right in the defendants "adverse to the plaintiff's title, which would be seriously prejudicial to "the plaintiff's recovery of the property if the defendants at any time got "possession of it, or chose to set up a false case of possession," and it was held "that the plaintiff was clearly entitled to bring the suit" for a declaration of title. He also referred to *Kali Kishen Tagore* v. *Golam Ali* (2), and to the Specific Relief Act, Section 42.

The District Judge, on appeal, found that the conduct of defendant showed that he intended to claim plaintiff's office and to indicate his claim by the addition of the word "vagaira" (or "et cetera"), and inasmuch as he was found not to be entitled to the same offices as plaintiff, he might well be restrained from using on his seal the very same title as the plaintiff used to indicate the offices which he held; and that the declaration and injunction were proper remedies to grant.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

Hon. *Bhashyam Ayyangar*, *Sadagopachariar* and *Gopalasami Ayyangar*, for respondent.

JUDGMENT.

The plaintiff is the vicharanakarta of the Tirumalai and Tirupati temples and of some thirty other temples connected therewith, and he holds a sanad from Government in which the two former temples are named and the thirty other temples are included in the word "vagaira," which literally means "et cetera" or "and others." The defendant is the dharmakarta of the Tirumalai and Tirupati temples and of three minor temples attached to them. His rights and duties as such dharmakarta are not so wide as those which often appertain to the office of dharmakarta in other temples, and which appertain to the defendant himself as dharmakarta of the temple of Tinnanore. His rights and duties are of a limited character, and he is, in many respects, subordinate to the plaintiff, but by immemorial practice he [192] has the title of dharmakarta of the Tirumalai and Tirupati devastanams. By immemorial custom he has also the right, as dharmakarta, to use a seal in making remittances and doing certain other acts as dharmakarta of those temples. The seal has from time immemorial been one with a figure of the monkey god (Hanuman) on it, but without any legend or other figures. In 1891 the defendant alleged that this seal was lost, and he then made and used, in the conduct of temple affairs, another seal with the figure of Hanuman, and with the legend "Tirumalai, Tirupati vagaira devastanam dharmakarta" also on it. The plaintiff objected to this change and the Courts below found that it was prejudicial to the interests of the plaintiff and was intended to invade and threaten the plaintiff's rights and authority in the temples of which he was vicharanakarta, and to exaggerate the defendant's rights. They, therefore, gave the plaintiff a declaration that the defendant was not dharmakarta of any of the devastanams of which plaintiff was vicharanakarta, save the five temples above stated, and that defendant should erase the word "vagaira" from the new seal, but might use the legend "Tirumalai, Tirupati devastanam dharmakarta," since those words were a correct description of his position and did not invade or threaten the plaintiff's rights.

(1) 6 M.H.C.R. 307 (309). (2) 13 C. 3.

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Against this decree the plaintiff appeals on the ground that any change in the seal is unauthorized since defendant's right to use the seal rests on custom alone, and therefore the right must be exercised strictly in accordance with custom.

The defendant also appeals against the decree on the ground that he is entitled to use the word "vagaira" in the legend on the seal since the plaintiff has no property in the word or legend, and it correctly describes the defendant's position.

We think that the decision of the Courts below is right. No doubt the seal is found to be the private seal of the defendant, and in the ordinary literal sense the legend "Tirumalai, Tirupati vagaira devastanam dharmakarta" means no more than "dharmakarta of Tirumalai, Tirupati and other temples" which, in a certain sense, the defendant actually is. But owing to the manner in which the word "vagaira" is used in the sanad of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, the temple servants and others connected therewith attach a special meaning to it when used in connection with the Tirumalai and Tirupati devastanams. That the matter is of real, **[193]** not merely fanciful, importance, is shown by the fact, that when the defendant's predecessor in 1834 attempted to use the word in describing his position, the attempt was at once forbidden by the then Collector (Exhibits L1 and L2), and again when an attempt was made in 1884 to use the word on the belts and badges of the defendant's peons, the Magistrate at once took objection to it. The defendant's object in using the word is to indicate and assert that his position as dharmakarta is co-extensive with the plaintiff's position as vicharanakarta; in other words that the defendant is dharmakarta of all the thirty minor temples, whereas, in fact, he is dharmakarta of only three of them, and the use of the word, if permitted, unchecked, would, it has been found, and in our opinion rightly found, go far in future litigation to show that the defendant's claim was well founded. The defendant attempts even to go further (Exhibit VIII) and to claim that by the use of the word he includes his position as dharmakarta of Tinnanore temple, a temple in which his position as dharmakarta is of a different and more independent character than it is in the temples of which plaintiff is vicharanakarta. This is important merely as indicating the real purpose for which the defendant seeks to add the words to the seal. It is, of course, true that the plaintiff has no property in the word "vagaira", and the word would not necessarily convey a false impression to persons unconnected with the Tirumalai and Tirupati temples and the respective positions of the plaintiff and defendant therein, and there can, of course, be no objection to the defendant using the words on his private seal in matters unconnected with the temples, but we think that the case is different when the defendant uses it in connection with his duties in the temple. There it undoubtedly connotes an extension of the defendant's rights as dharmakarta to which he has no title, and it, in an equal degree, invades, or threatens to invade, the plaintiff's rights as dharmakarta of these minor temples of which the defendant claims to be, but is not, dharmakarta.

There is no standard by which we might ascertain the damage likely to be caused by the threatened invasion of the plaintiff's rights, and the case is therefore one in which the Court may, in the exercise of its discretion, properly grant a perpetual injunction. No real injury or inconvenience is caused to the defendant by the injunction granted. We had some doubt at first whether we ought to allow the defendant to use any seal

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save one as nearly as [194] possible the same as that which has been used from time immemorial, *i. e.*, one with the figure of the god Hanuman alone on it, but we observe that there is no evidence that that seal was prescribed by the plaintiff or by any other authority. The original seal having been, it is alleged, lost, it may well be desirable to make some change in the new seal in order to check the facilities for fraud which might arise if the original seal should fall into unscrupulous hands, and the legend which the Courts below have allowed the defendant to use does not invade or threaten to invade the plaintiff's rights, nor is it open to any other reasonable objection. There is, therefore, no reason why we should restrain the defendant from using it if he desires to do so. The result is that we confirm the decrees of the Lower Appellate Court and dismiss both the appeals with costs.

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22 M. 194.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

VENKATARANGAYAN CHETTI (*Petitioner*), *Appellant v.* KRISHNASAMI AYYANGAR AND ANOTHER (*Counter-Petitioners*), *Respondents.** [28th October, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 234—*Execution of decree against deceased judgment-debtor—Probate and Administration Act—Act V of* 1881, *Section* 104—*Equal and rateable distribution.*

The right of a decree-holder, under Section 234 of the Civil Procedure Code, to have his decree executed against the legal representative of a deceased judgment-debtor, is not affected by Section 104 of the Probate and Administration Act, which directs debts to be paid equally and rateably out of the assets.

[F., 6 L.B.R. 158 (159).]

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 209 of 1897, affirming the order of A. David Pillai, District Munsif of Srirangam, in execution petition No. 113 of 1897, in the matter of original suit No. 194 of 1895, on the file of the District Munsif of Trichinopoly.

[195] The creditor of a deceased person applied under Section 234 of the Civil Procedure Code, to have a decree held by him executed against the moveables of the deceased in the hands of an executor. The application was dismissed by both the Lower Courts, the Acting District Judge holding that it would in effect be giving to one creditor the priority prohibited by Section 104 of the Probate and Administration Act, 1881, if the decree-holder were to be allowed to execute his decree without reference to the debts due to others. The decree-holder appealed on the ground, among others, that the Probate and Administration Act does not affect the execution of decrees.

Rangachariar, for appellant.

Mr. *N. Subramanyam*, for respondents.

JUDGMENT.

We understand that this is an application under Section 234, Civil Procedure Code, and that the intention was to proceed against the executor

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* Appeal against Appellate Order No. 49 of 1898.

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as the legal representative of the deceased. The application is wrong in form, for it never refers to the executor at all, and on the contrary names the sons as defendants. The executor, however, happens to be guardian, and appears to have treated the proceeding as against himself in the capacity of executor. No objection having been taken in either of the Courts below, we do not think the appellant ought to suffer for the blunder of his Vakil now. But the application must be amended by striking out the sons and leaving the executor only as representative.

The manner in which the District Judge has disposed of the case is unsatisfactory. The executor does not say that there are no assets. Practically what he does is to ask for time, not for the purpose of paying just debts, but in order to make other dispositions of the estate, which clearly could not be justified.

Although there are certainly difficulties in construing Section 104 of the Probate and Administration Act, we think that the language of the section is so far similar to that of the corresponding section in the Indian Succession Act, that we must follow the ruling in *Nilkomul Shaw* v. *Reed* (1).

Under Section 234 of the Code of Civil Procedure, the decree-holder is entitled to have his debt paid out of the assets of the deceased in the hands of the legal representative which have not **[196]** yet been duly disposed of. This right is not affected by the provisions of Section 104 of the Probate and Administration Act.

We must reverse the orders of the Lower Courts and direct the District Munsif to proceed according to law.

Owing to the mistake made by the appellant which has helped to confuse matters, we direct each party to bear his own costs.

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22 M. 196.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

SESHAGIRI AYYAR (*Plaintiff*), *Appellant v.* MARAKATHAMMAL (*Defendant*), *Respondent.** [6th September, 1898.]

Provincial Small Cause Courts' Act —Act IX of 1887, *Schedule II*, *Article* 31—*Jurisdiction—Suit for mesne profits under Rs.* 500—*Civil Procedure Code—Act XIV of* 1882, *Section* 586—*Second appeal.*

A suit for mesne profits is cognizable in Courts of Small Causes where the value of the subject-matter in dispute is less than Rs. 500, and Article 31 of Schedule II of the Provincial Small Cause Courts' Act does not apply thereto. Such a suit falls within the provisions of Section 586 of the Civil Procedure Code, and no second appeal lies from a decision in it.

[**N.F.**, 16 C.P.L.R. 1 (2) ; **F.**, 35 P.R. 1902=84 P.L.R. 1902 ; **R.**, 24 M. 118 ; 94 P.R. 1900=39 P.L.R. 1901.]

SECOND appeal against the decree of W. J. Tate, District Judge of Salem, in appeal suit No. 44 of 1896, reversing the decree of J. M. Nallasami Pillai, District Munsif of Tirupatur, in original suit No. 990 of 1895.

In a suit for mesne profits amounting to Rs. 106-3-6, the District Munsif gave judgment for the plaintiff for Rs. 13-8-0. On appeal by

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* Second Appeal No. 1287 of 1897.

(1) 12 B.L.R. 287.

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plaintiff to the District Judge, a memorandum of cross-appeal was filed, the appeal being allowed and the judgment of the Lower Court reversed.

The plaintiff preferred this second appeal.

Sivasami Ayyar, for appellant.

Sundara Ayyar, for respondent.

JUDGMENT.

[197] No second appeal lies in this suit for mesne profits. See *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (1), which has been followed in *Lingayya Ayyavaru* v. *Mallikarjuna Ayyavaru* (2). The second appeal is dismissed with costs. The memorandum of objections is also dismissed.

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22 M. 197.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

MOYI (*Legal Representative of Defendant No.* 1), *Appellant v.* AVUTHRAMAN AND OTHERS (*Plaintiff and remaining Legal Representatives of Defendant No.* 1), *Respondents.**
[13th September, 1898.]

Civil Procedure Code—Act XIV of 1882, *Sections* 3, 43, 144—Res judicata—*Trespass on land—Conversion of moveables lying on land—Grounds of attack.*

Defendants having forcibly taken possession of plaintiff's land upon which was (1) standing timber and (2) logs of timber lying stored on the ground, plaintiff had, in a prior suit, recovered possession and damages. Subsequently to the institution of such prior suit defendants (1) cut and removed certain standing [198] trees and (2) removed the logs which lay stored on the ground. Upon plaintiff bringing a second suit to recover damages on both grounds, objection was raised (1) as to the standing timber, that plaintiff's remedy was under Section 244 of the Civil Procedure Code, and (2) as to the logs, that a claim for their value might have been included in the former suit, since their conversion was effected when the plaintiff was dispossessed of the land upon which they lay and that, under Section 43, no claim could now be made in respect of them :

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* Second Appeal No. 1065 of 1897.

(1) 23 C. 884.

22 M. 197-N.

(2) Civil Revision Petition No. 271 of 1897 (unreported). This was a Small Cause suit to recover the sum of Rs. 486-3-6 as damages for defendants' obstruction to plaintiff's possession of the plaint land. Defendants objected that the suit fell under Article 31 of Schedule II of the Provincial Small Cause Courts' Act, and was therefore not maintainable. The Subordinate Judge overruled the objections, the suit being not for an account, but to recover the amount which plaintiff would have obtained if he had been in possession; and he followed *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I.L.R., 23 Calc., 884), and awarded the plaintiff Rs. 252. The sixth defendant presented this Civil Revision Petition, under Section 25 of the Provincial Small Cause Courts' Act, against the said judgment and decree on the ground, among others, that the suit was not maintainable in a Small Cause Court. The Court (COLLINS, C.J., and BENSON, J.) delivered the following

JUDGMENT.

"We agree with the majority of the Judges in the Full Bench case of *Kunjo* "*Behary Singh* v. *Madhub Chundra Ghose* (I.L.R., 23 Calc., 884). For the reasons "there stated, Article 31 of Schedule II of the Provincial Small Cause Courts' Act "does not apply to a suit such as this, and it is therefore cognizable by a Court "of Small Causes. We dismiss the petition with costs.

[This case has been followed in 22 M. 196.—ED.]

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Held, (1) that the proceeds obtained from cutting and removing saleable timber on the land were in the nature of mesne profits, and these having been taken since the institution of the previous suit, plaintiff could recover;

(2) that a trespass on a piece of land is by itself no proof of any conversion of moveables lying upon the land at the time that the trespass takes place; that, notwithstanding plaintiff's eviction from the land, possession of the timber lying stored upon it should be presumed to have continued in him in the absence of proof of any act on the part of the defendant with special reference to such timber and showing unequivocally that the plaintiff was entirely deprived of the use of them; and that conversion of the logs was not effected by the trespass, but only by their removal subsequently to the institution of the previous suit; and

(3) that the causes of action now relied on were therefore different from those relied on before, and the previous suit did not operate as a bar to the present claim under Section 43 of the Civil Procedure Code.

[R., 14 C.L.J. 507 = 16 C.W.N. 137 (142) = 11 Ind. Cas. 713; 78 P.R. 1902 = 137 P.L.R. 1902]

SECOND appeal against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 659 of 1896, reversing the decree of J. A. deRozario, Acting Principal District Munsif of Calicut, in original suit No. 205 of 1895.

Suit to recover damages sustained by reason of timber having been unlawfully felled and removed by defendants from plaintiff's land. Plaintiff alleged that defendants had trespassed on a certain hill, in consequence of which he had instituted original suit No. 507 of 1893 against them for the recovery of the property with damages; that he had obtained a decree in that suit and had taken delivery of the property; but that defendants had felled and removed trees to the value now sued for since the date of the institution of the said suit. The first defendant denied having felled or removed any trees since original suit No. 507 of 1893, and denied having committed any damage; he further set up that the present suit was barred by Section 43 of the Civil Procedure Code; that it was *res judicata* by the decree in original suit No. 507 of 1893; and that it was barred by Section 244 of the Civil Procedure Code. The plaintiff's claim consisted of two portions, *viz.*, (1) for the value of trees felled and removed by defendants since the trespass and (2) for the value of certain logs of timber lying stored on the hill at the date of the trespass **[199]** and since appropriated by defendants. The District Munsiff held that the first portion of the claim was barred by Section 244 of the Civil Procedure Code, the decree for surrender of the hill, in his opinion, having included the surrender of the trees alleged to have been cut, and plaintiff's remedy being by execution of that decree. As to the second portion of the claim, he held that it was barred by Sections 13 and 43 of the Civil Procedure Code, inasmuch as the original trespass by defendant, which resulted in the institution of original suit No. 507 of 1893, was a trespass in respect of the forest land, or hill, and everything upon it, and inasmuch as the logs were lying on the hill at the time, the taking forcible possession of the hill included a taking forcible possession of the logs as well. Plaintiff should, therefore, have included the value of the logs in the previous suit, and hence the matter was one which might and ought to have been made ground of attack in it under Explanation II to Section 13 of the Code of Civil Procedure; and he held that the omission to do so, whether intentional or not, was a bar under Section 43 to the present suit in respect of the claim so omitted or relinquished; he referred to *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1). The District Judge, on appeal,

(1) 11 M.I.A. 551.

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reversed this decision holding that plaintiff was suing in respect of fresh acts of trespass committed after his former suit had been filed, and that such fresh acts gave rise to distinct causes of action.

The first defendant's legal representative preferred this second appeal.

Subramania Sastri, for appellant.

Sankaran Nayar and *Govindan Nambiar*, for respondents.

JUDGMENT.

SUBRAMANIA, AYYAR, J.—The question in the case is whether the suit is wholly or to any extent barred because the items of damages claimed here had not been included by the respondent in original suit No. 507 of 1893 instituted by him against the appellant (defendant). In that suit the respondent asked for and obtained a decree for the possession of a hill from which he had been evicted and for the damages caused by the appellants having cut and removed certain trees from the said hill. The damages now claimed are in respect of trees alleged to have been cut and removed subsequent to the institution of the previous suit and in respect of a quantity of timber which it is said had been stored on [200] the hill by the respondent, and which also the appellant took away after the institution of that suit. First, as to the item of the present claim relating to the trees cut and removed. Now it is scarcely necessary to say that in the case of property such as the hill, which was in question in the earlier suit, cutting saleable timber is the mode of cultivation (*Honywood* v. *Honywood* (1)) and resembles, to borrow the words of Sir Frederick Pollock, " taking a crop off arable land." Consequently the profits made by the appellant with reference to the trees cut by him while in possession were really mesne profits. *Buneead Singh* v. *Sudaseeb Dutt* (2) cited for the respondent directly supports that conclusion, and the finding is that the said mesne profits were received by the appellant since the commencement of the previous litigation. Next, in regard to the damages claimed with reference to the timber said to have been stored on the hill but taken away by the appellant, the argument on his behalf was this: in evicting the respondent from the hill, the appellant necessarily dispossessed him of the timber also and in effect converted the same to his own use. Consequently the value thereof should have been claimed in the previous suit along with the damages therein claimed on account of trees which had been cut and removed before the institution of that suit; but a trespass on a piece of land is by itself no proof of any conversion of any moveables to be found on the land at the time the trespass took place. *Non constat* the person committing the trespass either claimed or otherwise interfered with the owner's right to the moveables. Strictly speaking, notwithstanding the respondent's eviction from the hill, the possession of the timber in question should be presumed to continue in the respondent in the absence of proof of any act or acts on the part of the appellant with special reference to such goods showing unequivocally that the respondent was entirely deprived of the use of those goods. Though the facts in the present instance are dissimilar to the facts of the cases to be presently referred to, yet the drift of the decisions in those cases seems to indicate that the view just stated is correct. In *Hartley* v. *Moxham*(3) the defendant claimed a sum of money as

(1) L.R. 18 Eq. 310. (2) 2 W.R. (Mis. App.) 50. (3) 3 A. & E. (N.S.), 701.

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due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which plaintiff held of the defendant and in which the plaintiff had put them, kept the key and refused the plaintiff access to them, saying that nothing [201] should be removed till the defendant's bill was paid. Cresswell, J., being of opinion "that no taking was proved which would "support an action of trespass" directed a non-suit, and on a motion for a new trial Lord Denman, C.J., Williams, Coleridge and Wightman, JJ., upheld the non-suit. In *Thorogood* v. *Robinson* (1) the plaintiff's goods and servants were on the land which the defendants recovered in ejectment and the defendant on entering under the writ of possession turned the plaintiff's servants off the land and would not let them remain for the purpose of removing the goods. There was no subsequent demand or refusal. It was held that the jury might find that there was no conversion. Lord Denman, C.J., said:—"The plaintiff certainly had a "right to the goods; but he should have sent some one with a proper "authority to demand and receive them. If the defendant had then "refused to deliver them or to permit the plaintiff or his servants to "remove them, there would have been a clear conversion; but it "does not necessarily result from the facts proved in this case that "the defendant was guilty of conversion." Lastly in *England* v. *Cowley* (2) the plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession and afterwards went to M's house to remove them. Upon his arrival at the house he was met by the defendant, M's landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It being too late for the defendant that day to distrain, he prevented the removal of the goods with a view to distrain them the next day. Kelly, C.B., Bramwell and Pollock, BB. (Martin, B, dissenting) held that there was no evidence of conversion, and Bramwell, B., went the length of holding that assuming that there was an actual prevention still the action was not maintainable, and after putting several cases by way of illustration, the learned Baron added:—"The truth is that, in order to maintain trover, a plaintiff who is "left in possession of the goods must prove that his dominion over his pro-"perty has been interfered with, not in some particular way, but alto-"gether; that he has been entirely deprived of the use of it. It is not "enough that a man should say that something shall not be done by the "plaintiff; he must say that [202] nothing shall" (*England* v. *Cowley* (2)). The present case, in one view, is much weaker than any of the cases above cited since in them there was proof of something positive, some words said or some acts done by the party charged, with reference in particular to the goods said to have been converted, whereas here, nothing of the kind was even alleged to have occurred with reference to the timber in question at the time the respondent was evicted from the hill. It follows, therefore, that there was no conversion of the timber by the appellant, but that it was converted, as found by the Lower Appellate Court, only when, after the suit of 1893 was filed, he actually removed and appropriated it. The Lower Appellate Court is therefore right in holding that the causes of action relied on now are different from those relied on in the previous suit, and therefore it does not operate, as contended for the appellant, as

(1) 6 A. & E. (N.S.) 769 at p. 772.

(2) L.R. 8 Ex. 126.

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a bar to the present claim under Section 43, Civil Procedure Code, I would dismiss the second appeal with costs.

BENSON, J.—I agree, though not without hesitation as regards the trees cut and lying on the land at the time of the trespass.

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22 M. 202.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Moore.

GEORGE (*Defendant*), *Appellant v.* VASTIAN SOURY (*Plaintiff*), *Respondent.** [1st September, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 521—*Legality of order remitting award for reconsideration—Appeal.*

An award, submitted by arbitrators to whom all matters in dispute had been referred, stated that "defendant has not produced any witness in support of his "contention raised in issues Nos. 1, 2, 5 and 6; hence we have only to deal with "issues Nos. 3, 4 and 7," and dealing with those issues the arbitrators gave their finding. The award was remitted, on the ground that the arbitrators had not determined the issues Nos. 1, 2, 5 and 6.

Held, (1) that the legality of an order remitting an award for the reconsideration of the arbitrators may be challenged on appeal against the decree ultimately passed; and

[203] (2) that the award ought not to have been remitted: there was no illegality on the face of it, and there was a decision on the whole matter in issue between the parties.

[F., 31 M. 345=3 M.L.T. 315=18 M.L.J. 228; R., 5 A.L.J. 644=A.W.N. (1908) 242 =4 M.L.T. 400; 66 P.R. 1907=159 P.L.R. 1908=148 P.W.R. 1907; 236 P.L.R. 1912=4 P.W.R. (N.W.F.P.) (C. Rul.) 1913; D., 31 M. 479=18 M.L.J. 485=4 M.L.T. 328.]

SECOND appeal against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 722 of 1896, reversing the decree of M. Srinivasa Rao, Subordinate Judge of South Malabar at Cochin, in original suit No. 1 of 1895.

Suit for partition. All matters in dispute between the parties were, by consent, referred to four arbitrators, who submitted an award. That award dealt with all the issues, as framed by the Subordinate Judge except Nos. 1, 2, 5 and 6, as to which the arbitrators said:—"Defendant has not "produced any witness in support of his contention raised in issues Nos. 1, "2, 5 and 6, hence we have only to deal with issues Nos. 3, 4 and 7." And they proceeded to deal with those issues, and finally made an award containing the following terms:—"For the foregoing grounds we, being of "opinion that the plaintiff is entitled to recover the whole amount claim-"ed by him, therefore award to him . . . . . . or its equivalent one "half share of the property described in the plaint, as also proportionate "income of . . . . . each party bearing his own costs. The defendant "has tacitly admitted the above amount of income as he has not taken any "exception to it in his written statement." The defendant applied to have the award set aside on the ground of the misconduct of the arbitrators. The misconduct was alleged, *inter alia*, to consist in not having adjudicated on issues Nos. 1 and 2. The Subordinate Judge found that there had

* Second Appeal No. 1109 of 1897.

been no misconduct, but as in his opinion the arbitrators had not determined issues Nos. 1, 2, 5 and 6, he, under Section 520 of the Civil Procedure Code, remitted the award to the arbitrators for reconsideration on those issues. They having refused to reconsider the award, the Subordinate Judge proceeded with the suit and finally passed a decree dismissing it with costs.

On appeal, the plaintiff contended that the Subordinate Judge had improperly remitted the award. The question was then raised whether the District Judge could entertain an appeal on that ground, inasmuch as there is no appeal against an order passed under Section 520, Civil Procedure Code. The District Judge accepted *Abdul Rahman* v. *Yar Muhammad* (1) as supporting plaintiff's **[204]** contention that such a question may be considered by an Appellate Court in an appeal against the decree ultimately passed, and he held that the order of the Subordinate Judge remitting the award was one which he could not properly pass under Section 520 of the Civil Procedure Code, inasmuch as the issues in question had not been left undetermined, but were clearly intended to be found against the defendant.

The defendant preferred this second appeal.

Sundara Ayyar, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

We think the Disirict Judge is right.

That the award ought not to have been remitted there is, in our opinion, no doubt. There was no illegality on the face of it. There was a decision on the whole matter in issue between the parties.

The other question is whether the legality of the order remitting the award can be challenged on the appeal against the decree. On that question the authorities are distinctly in favour of the respondent; see *Mothooranath Tewaree* v. *Brindabun Tewaree* (2), *Ambica Dasia* v. *Nadyar Chand Pal* (3), *Nanak Chand* v. *Ram Narayan* (4), and *Bikramajit Singh* v. *Husaini Begam* (5).

Moreover Section 591 of the Code of Civil Procedure provides that any such interlocutory order as the one now in question may be impeached on an appeal against the ultimate decree.

The appeal is dismissed with costs.

(1) 3 A. 636. (2) 14 W.R. (C.R.) 327. (3) 11 C. 172.
(4) 2 A. 181. (5) 3 A. 643.

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APPELLATE CIVIL.

22 M. 204.

22 M. 204.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

TARIYA GOWDU (*Defendant*), *Appellant v.* VONAMO GOWDU AND OTHERS (*Plaintiffs*), *Respondents.**
[3rd October, 1898.]

Inam Commissioner's grant—Hereditary office-holder—Enfranchisement.

A grant of a portion of inam lands by Government, on enfranchisement, is not illegal because the grantee, though a member of the family of hereditary office-holders, was not himself actually in office at the time of enfranchisement.

[R., 26 M. 359.]

[205] SECOND appeal against the decree of G. Campbell, Acting District Judge of Ganjam, in appeal suit No. 47 of 1896, affirming the decree of V. Ranga Rao Pantulu, District Munsif of Berhampore, in original suit No. 253 of 1895.

Suit to recover possession of land with mesne profits. The plaint set forth that of the plaintiffs, who constituted a joint Hindu family, the second was the karji of Lakshmipuram, his father and grandfather having also been karjis before him; that at first the karji inam held by plaintiffs' family was enfranchised in plaintiffs' favour; that afterwards defendant's name was also entered in the patta by a false representation to the Revenue authorities; that defendant was neither a karji at the time nor did he enjoy the karji's inam; and that defendant had taken wrongful possession of the inam lands. Defendant denied having taken wrongful possession and stated that he had been enjoying the plaint land for twenty years; that his name had been entered in the revenue patta by the Circar, as his father (second plaintiffs' great grandfather) was a karji, and owing to other circumstances; that prior to the enfranchisement the Government had every control over the karji inam and as such it could issue a patta at its pleasure, and that plaintiffs had no right to question its action. The District Munsif framed the issue among others, whether, at the said grant, plaintiffs or defendant held possession of the plaint land. In the course of the hearing, defendant admitted that he had never himself served as karji at any time. The District Munsif found that the grant in question of the entire karji lands was made in 1893, and that, up till then, plaintiffs were in possession of all those lands including the plaint land, and not the defendant. He held, as a consequence of this finding, that the possession of defendant was a trespass. He further said :—

"*Venkata* v. *Rama* (1) collects all the authorities on the subject and "I would hold that I have the jurisdiction to consider plaintiffs' conten-"tion, if only on the ground that the second plaintiff was at the grant in "question the karji in office. The prevailing judgment of the Chief Jus-"tice concludes thus :—'On the ground that the respondent was not the "'holder of the office when the lands were enfranchised, I must hold "'that he has failed to show a title to the lands and that his claim is "'unfounded. If he had established a [206] title, if he had shown that "'at the time of the enfranchisement of the inam he had been appointed

* Second Appeal No. 850 of 1897.

(1) 8 M. 249.

"'to the office, the Court would have had the jurisdiction to determine "'whether the enfranchisement in favour of the appellant could be sup-"'ported.' This also appears to be the test applied by the majority of "Judges, and, judged by that test, I would hold that this Court has the "jurisdiction to question the grant in question."

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And he decreed for plaintiffs. This decision was upheld on appeal by the Acting District Judge.

The defendant preferred this second appeal.

Ramachandra Ayyar and *Sundara Ayyar*, for appellant.

Pattabhirama Ayyar, for respondents.

JUDGMENT.

All that was decided in the case of *Venkata* v. *Rama*(1) was that when Government had enfranchised the lands in favour of the office-holder, a person who was one of the family of the hereditary office holders, but who was not actually in office at the time of the enfranchisement, had no right to question the grant of the lands by Government to the office-holder. This is not the question at issue in the present case. Here the Inam Commissioner on enfranchisement granted the land to five men, all of whom were members of the family of the hereditary office-holders, although only one of them was the actual office-holder. There is nothing in the several decisions of this Court to which reference has been made (*Venkata* v. *Rama*(1), *Venkatarayadu* v. *Venkataramayya*(2), *Sankara Subbayyar* v. *Ramasami Ayyangar* (3), and *Dharanipragadu Durgamma* v. *Kadambari Virrazu* (4)) which can be held to support the contention that such a grant on the part of Government was illegal. We cannot find any legal foundation for the view which appears to be held by the two Lower Courts that if on enfranchisement the Government grants a portion of the inam lands to a man who, although a member of the family of hereditary office-holders, was not himself actually in office at the time of enfranchisement, such a grant is illegal, and must be set aside by a Civil Court. We set aside the decrees of both Courts and direct that the suit of the plaintiff be dismissed with costs throughout.

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22 M. 207.

[207] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

PALANI GOUNDAN AND ANOTHER (*Plaintiffs Nos.* 1 *and* 5), *Appellants v.* RANGAYYA GOUNDAN AND OTHERS (*Defendants*), *Respondents*.* [10th October, 1898.]

Transfer of Property Act—Act IV of 1882, *Sections* 85, 88—*Decree for sale on mortgage in suit against Hindu father—Suit by son for declaration that decree not binding on his share.*

A decree having been obtained against a Hindu father in a suit on a bond hypothecating family property, the sons sued for a declaration that the decree was not binding on their share on the grounds that they had not been made parties to the suit, and that the debt had been contracted by the father for immoral purposes:

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* Second Appeal No. 1594 of 1897.

(1) 8 M. 249. (2) 15 M. 284. (3) 20 M. 454. (4) 21 M. 47.

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Appellate Civil.

22 M. 207.

Held, (not following the decision of the majority of the Full Bench in *Bhawani Prasad* v. *Kallu* (17 A. 537)), that the true rule as to the effect of Section 85 of the Transfer of Property Act, in cases in which a decree is obtained against a Hindu father without making his sons parties to such a suit, is laid down in *Ramasamayyan* v. *Virasami Ayyar* (21 M. 222)).

[R., 34 A. 549=9 A.L.J. 819=15 Ind.Cas. 126 (133) ; 27 C. 724 ; 28 C. 517 ; 27 M. 326 =14 M.L.J. 181 ; 12 Bom.L.R. 811 (815) ; 12 Bom. L.R. 940 (943) ; 5 C.W.N. 640 ; 2 N.L.R. 90 ; 5 N.L.R. 117 ; 9 N.L R. 1 (7).]

Second appeal against the decree of G. T. Mackenzie, District Judge of Coimbatore, in appeal suit No. 261 of 1896, affirming the decree of T. A. Ramakrishna Ayyar, District Munsif of Udamalpet, in original suit No. 758 of 1895.

Suit to declare that a decree for the sale of family property obtained on a hypothecation bond executed by plaintiffs' father was not binding on the plaintiffs' share in the family property. The first defendant, who was the undivided father of the plaintiffs (five in number), had executed a bond hypothecating certain land, being ancestral property of the family. A suit having been brought, on the bond, against the first defendant alone, a decree was obtained for the sale of the property. Plaintiffs contended that the said decree was not binding upon them since they had not been made parties to the suit ; and they further alleged that the debt itself had been contracted for immoral purposes and not for family necessity ; and that their interest in the property could [208] not be sold in satisfaction of it. They relied upon the Full Bench ruling in *Bhawani Prasad* v. *Kallu* (1). The defence was that the debt was contracted for family purposes by plaintiffs' father, who was fully competent to hypothecate family lands therefor and that the plaintiffs had no right to impeach the validity of the bond. The District Munsif found that the plaintiffs had failed to prove that the debt in question had been contracted by the father for illegal or immoral purposes. On the issue whether the decree bound the plaintiffs or their share in the property, he also decided against the plaintiffs, holding that a decree for sale obtained under Section 88 of the Transfer of Property Act was only voidable by the sons and not void ; inasmuch as Section 85 of that Act as to the joinder of all persons interested lays down a rule only of procedure and not of substantive law. The District Judge, on appeal, confirmed the decree, the plaintiffs having failed to prove that the debt was illegal or immoral.

Plaintiffs Nos. 1 and 5 preferred this second appeal.

Kasturiranga Ayyangar, for appellants.

Sivasami Ayyar, for respondent No. 3.

JUDGMENT.

We agree in the view taken by Shephard, J., in *Ramasamayyan* v. *Virasami Ayyar* (2), as to the effect of Section 85 of the Transfer of Property Act in cases in which a decree is obtained against a Hindu father without making his son or sons parties to the suit brought on a mortgage made by the father. We are not prepared to follow the decision of the majority in *Bhawani Prasad* v. *Kallu* (1).

The second appeal fails and is dismissed with costs.

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1) 17 A. 537. (2) 21 M. 222.

22 M. 209.

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APPELLATE CIVIL.

22 M. 209.

[209] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

HUTHASANAN NAMBUDRI (*Plaintiff's Representative*), *Appellant* v. PARAMESWARAN NAMBUDRI AND OTHERS (*Defendants*), *Respondents*.* [11th and 20th October, 1898.]

Transfer of Property Act—Act IV of 1882, *Section* 60—*Suit to redeem entire mortgage by purchaser of equity of redemption of a portion—Indivisibility of mortgage.*

The mortgagors of four items of property originally mortgaged for an entire sum sold the equity of redemption of one item to the plaintiff who now sued the mortgagee to redeem the whole of the four items :

Held, that he was entitled so to do.

A mortgage for an entire sum is from its very purpose indivisible ; and that character of indivisibility exists with reference not only to the mortgagee, but also to the mortgagor ; save by special arrangement between all the parties interested, neither mortgagor nor mortgagee, nor persons acquiring a partial interest through either, can obtain relief under the mortgage except in consonance with that principle of indivisibility.

[Diss., 17 Ind. Cas. 837 (839) = 23 M.L.J. 576 (579) = 12 M.L.T. 484 = (1912) M.W.N. 1168 (1170) ; R., 15 Ind. Cas. 605 (606) = 23 M.L.J. 475 ; 2 N.L.R. 116 ; 6 O.C. 223 (227).]

SECOND appeal against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar at Palghat, in appeal suit No. 290 of 1896, reversing the decree of P. P. Raman Menon, Acting District Munsif of Nedunganad, in original suit No. 77 of 1895.

Suit to redeem a mortgage. Four items of property were held by the first defendant under a mortgage granted for an entire sum by the fourth and fifth defendants. Subsequently to the mortgage plaintiff purchased the equity of redemption in respect of item No. 1 from the mortgagors. He now sued to redeem the entire mortgage and recover the whole of the mortgaged property on payment of the whole of the mortgage money. Both the first defendant, as mortgagee, and defendants Nos. 4 and 5, as mortgagors, opposed his claim to redeem the whole, and asserted that he was entitled to redeem only the item No. 1 purchased by him on payment of the proportionate mortgage amount. The District Munsif held that, under Section 60 of the Transfer of Property Act, plaintiff was entitled to redeem the entire mortgage and he [210] so decreed. The Subordinate Judge in reversing the decree and dismissing the suit said :—

"I am of opinion that the plaintiff is not entitled to redeem the whole "mortgage against the will of the mortgagee and the mortgagors. The "provisions of Section 60 of the Transfer of Property Act, 1882, enable the "owners of a part of the mortgaged property to redeem the whole mortgage, "but this is so only in case the mortgagee in possession insists upon his "right to treat the mortgage as one and indivisible. In other words this "is an equity in favour of the mortgagee who may claim it or not as he "pleases. No authority is cited in support of the contention that the "part owner of the mortgaged property can compel the mortgagee to give "up more than the share of the former. In the present case there is the

* Second Appeal No. 1672 of 1897.

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"additional reason that the owners of the remaining portion of the mortgaged property (defendants Nos. 4 and 5) also oppose the plaintiff's claim to recover their share of the property."

The plaintiff appealed, on the grounds, among others, that a person who has any right to redeem at all has a right to redeem the whole of the mortgaged property, and that a mortgagee cannot compel him to redeem only the part in which he may be interested. And further, that the right to treat the mortgage as one and indivisible is an equity which may be claimed by either mortgagor or mortgagee.

Hon. *Bhashyam Ayyangar* and *Govinda Menon*, for appellant.

Sundara Ayyar, for respondent No. 1.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The question for determination in this case is whether the appellant who owns the equity of redemption in the land, plaint item No. 1, which forms part of the property originally mortgaged to the defendants Nos. 1 to 3 for an entire sum, is entitled to redeem the whole of the land mortgaged or the said item only.

The District Munsif held that the appellant was entitled to redeem the whole and gave a decree to him accordingly. But the Subordinate Judge reversed the decree and dismissed the suit being of opinion that the appellant was not entitled to redeem the whole.

The view taken by the District Munsif seems to be clearly right. *Hall* v. *Heward*(1) cited for the appellant is a direct and [211] clear authority in favour of that view. The Court of Appeal consisting of Cotton, Lindley and Lopes, L, JJ., there held following the decision of Lord Hatherly in *Pearce* v. *Morris*(2), that as the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, so he cannot be compelled to redeem it separately, his right being to redeem the whole subject to the equities of the other persons interested. This decision and that which it followed were referred to by the learned Chief Justice and Handley, J., in *Konna Panikar* v. *Karunakara* (3) with approval apparently; for the plaintiff there was refused relief not because he was not entitled to claim a redemption of the whole, but on the unquestionable ground that he could not do so without making the other person interested in the equity of redemption a party to the suit, which he had however failed to do, though that other person was known and could have been impleaded. Reference may also be made to *Norender Narain Singh* v. *Dwarka Lal Mundur* (4) where the Judicial Committee lay down that in the case of a mortgage for an entire sum each and every one of the mortgagors was interested in the payment of the mortgage money and the redemption of the mortgaged estate and each and every one of them had a right by payment of the money to redeem the estate seeking his contribution from others. In the face of these authorities it is not necessary to notice the other cases cited in favour of the above view. *Ariyaputri* v. *Alamelu* (5) and *Kudhai* v. *Sheo Dayal* (6), which were relied on on behalf of the respondent, are not in point since in those cases the mortgagees had themselves become entitled to the equity of redemption in part of the property mortgaged, which is not so here. The pleader for the respondent urged strongly that the rule entitling a person to redeem the whole in circumstances like the present is opposed to

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(1) L.R. 32 Ch. D. 430. (2) L.R. 5 Ch. 227. (3) 16 M. 328 (332).
(4) 5 I.A. 18 (27). (5) 11 M. 304. (6) 10 A. 570.

principle inasmuch as a mortgagee for whose benefit the rule that a mortgage is indivisible has been introduced may waive it. But a mortgage for an entire sum is from its very purpose indivisible; a division of such a mortgage, borrowing the language of a text writer, is conceivable in theory and may be carried out in practice. But in order that a mortgage [212] may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the parties determined, it is essential that it should not suffer any disintegration (Keelleber on Mortgage in Civil Law, pages 11 and 12).

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This character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can, under the mortgage, get relief except in consonance with the principle of indivisibility referred to. It is upon this principle, as pointed out by Mr. Bhashyam Ayyangar for the appellant, that the rule in question rests.

The appeal must therefore be allowed. The decree of the Subordinate Judge is reversed and that of the District Munsif restored, with the modification that the sum payable by the appellant for the redemption will be increased by Rs. 400 as admitted on his behalf before us.

The respondent must pay the appellant's costs in this Court. In the Lower Courts each party will bear his own costs.

MOORE, J.—I concur.

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22 M. 212.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Moore.

VASUDEVAN NAMBUDRI (*Plaintiff*), *Appellant v.* MAMMOD (*Defendant*), *Respondent.** [1st September, 1898.]

Penal Code—Act XLV of 1860, *Section* 294 *A—Companies Act—Act VI of* 1882, *Section* 4—*Illegal contract—Bond to secure payments under a kuri.*

An agreement is not illegal whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to [213] be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of their contributions, the common fund being lent to each subscriber in turn. Nor is such an agreement rendered illegal by Section 294 A of the Indian Penal Code.

[R., 11 Cr. L.J. 382=6 Ind. Cas. 620=17 P.R. 1910 (Cr.)=92 P.L.R. 1910=14 P.W. R. 1910 Cr.; 1 M.L.T. 106.]

SECOND appeal, against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 645 of 1896, affirming the decree of K. Govindan Nambiar, in original suit No. 124 of 1896.

Suit to recover a sum of money due under a hypothecation bond, executed by defendant in favour of plaintiff. The consideration for the bond was as follows:—Plaintiff had organized a kuri, or transaction by

* Second Appeal No. 1084 of 1897.

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which a number of persons agree that each shall subscribe a certain sum of money by periodical instalments and that each in his turn, as determined by lot, shall take the whole of the subscription for each instalment; all being returned the amount of their contributions, the common fund being lent to each subscriber in turn. The defendant became a subscriber to the kuri; his ticket was drawn and he was paid the amount due. The defendant then executed the bond to secure the regular payment by him of his future subscriptions. The plaintiff sued for a balance still remaining unpaid under the bond.

The defence set up was, *inter alia*, that the suit was not maintainable, it being admitted that (1) there were more subscribers to the kuri than twenty, and (2) the kuri had not been registered under the Indian Companies Act. The District Munsif held that the subscribers formed "a "company or association for the purpose of carrying on a business that " has for its object the acquisition of gain by the company or association, or " by the individual members thereof," within the meaning of Section 4 of the Companies Act, and that the kuri ought to have been registered under the provisions of that Act as there were admittedly more than twenty subscribers; and that the fact that the suit was based on a bond did not change the character of the transaction so as to enable plaintiff to recover as on a mortgage-deed, the special provisions of the Companies Act not being neutralized by the Transfer of Property Act. He also held that plaintiff was not entitled under Section 65 of the Contract Act to a refund of the money received by defendant in excess of subscriptions paid, as if under a contract that had become void; since the contract between the parties was a valid one, but merely non-enforceable owing to the non-observance of formalities prescribed by law.

[214] The District Judge, on appeal, left that question undecided, but dismissed the appeal on the ground that a kuri, where the fund is distributed by lot, is a lottery. The fact that the total monthly subscriptions were given to each subscriber in turn, the order being decided by lot, was sufficient, in his opinion, to constitute a lottery within the meaning of Section 294-A of the Penal Code.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

The respondent was not represented.

JUDGMENT.

The law as laid down in *Kamakshi Achari* v. *Appavu Pillai* (1) has been followed without question for thirty-five years. The introduction of Section 294-A into the Indian Penal Code makes no difference.

We must reverse the decrees of both Courts and remand the suit for trial.

We must observe that the question, with reference to the Companies Act, cannot possibly be answered until evidence has been taken. Costs of this appeal must be paid by respondent. Other costs will be provided for in the revised decree.

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(1) 1 M.H.C.R. 448.

22 M. 214.

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APPELLATE CIVIL.

22 M. 214.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

MUTHU VIJAYA RAGHUNATHA UDAYANA TEVAR AND ANOTHER (*Plaintiff and his Representative*), *Appellants v.* THANDAVARAYA TAMBIRAN (*Defendant No.* 1), *Respondent.**
[1st September, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 375—*Razinamah not in terms of plaint—Dismissal of suit.*

A decree should not be passed in terms of a compromise where the latter does not give to the plaintiff any of the reliefs claimed in the suit, and deals with matter not forming the subject-matter of the suit. Upon such a compromise being presented, the Court should inform the parties that its terms cannot be embodied in a decree, and if it appear that the compromise was arrived at conditionally upon its being incorporated in the decree, the suit should be proceeded with.

[F., 77 P.R. 1903=140 P.W.R. 1903; 30 M. 421=17 M.L.J. 255; 30 M. 478=16 M.L.J. 354; R., 33 M. 103 (105)=3 Ind. Cas. 701=20 M.L.J. 201=6 M.L.T. 313; 1 C.L.J. 388.]

[215] APPEAL against the decree of C. G. Kuppusami Ayyar, Subordinate Judge of Madura (East), in original suit No. 53 of 1895.

Suit for the removal of defendants from wrongful possession and management of Anjukovil devastanams and their endownments and for putting plaintiff in possession thereof or for appointing some fit person to manage their affairs efficiently. Plaintiff, the Zemindar of Sivaganga, alleged in his plaint that the former Rajahs of Sivaganga and Ramnad to whom he succeeded had possessed and exercised superintending authority over the religious and other institutions within their territories, including the suit devastanams, and had by custom employed and entrusted a tambiran or mendicant with the management of them; that for the purposes of the present suit he conceded that since the beginning of the century the direct management had been appointed by tambirans appointed one after the death of another by the head of the Tiruvannamalai mutt for the time being; that the last manager, who was also head of the Tiruvannamalai mutt, had died without appointing a successor; and that defendant No. 1 was in wrongful possession of the said devastanams and their endowments on the pretence of having been duly appointed by the deceased to the said management. The reliefs prayed for were: that defendant No. 1 might be removed; that the plaintiff or a person appointed by him or by the Court might be put in possession; that defendant No. 1 be directed to render an account. Defendant No. 1 denied most of the allegations in the plaint and claimed that he had been duly appointed manager and trustee of the devastanams and their endowments.

After nineteen witnesses had been examined for the plaintiff and thirty-six for defendant No. 1, a razinamah was entered into by them, by which they agreed as follows:—That defendant No. 1, as proper successor, should continue as trustee in the management of the devastanams; that he should appoint one of the tambirans to succeed him and communicate such appointment to plaintiff or his successor; that the successors of both parties should act similarly for all time; that defendant No. 1 and his

* Appeal No. 222 of 1897.

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successors should send certain offerings at festivals; and that in the event of defendant No. 1 or any successor to him dying without appointing a successor, the Zemindar of Sivaganga for the time being should appoint one of the tambirans as trustee.

Upon this being presented, the Subordinate Judge held that the prayer in the plaint had not been given effect to in any [216] manner whatever, and that matters were dealt with therein which were not embodied in the plaint. He therefore recorded the razinamah but dismissed the suit.

The plaintiff appealed on the grounds, among others, (1) that a decree should have been passed in terms of the razinamah; (2) that notice should have been given to the parties of the course to be adopted when the Court found that it could not pass a decree in terms of the razinamah; and (3) that the suit should have been proceeded with and not dismissed.

Ramasubba Ayyar, for appellants.

Sundara Ayyar and *Srinivasa Ayyangar*, for respondent.

JUDGMENT.

We are clearly of opinion that the Lower Court was right in holding that a decree could not be passed in the terms of the compromise, inasmuch as the compromise did not give to the plaintiff any of the reliefs claimed in the suit but dealt with various matters not the subject-matter of the suit.

It is however contended for the respondent that the Subordinate Judge was right in dismissing the suit as a necessary result of the compromise between the parties. But this contention assumes that the compromise was an absolute one, independent of the question whether the Court could pass a decree in its terms. We do not think it at all clear that such was the intention of the parties. The request that a decree should be passed in the terms of the compromise is contained in the document of compromise itself and would therefore appear to be one of its terms. If so, it would be a condition precedent to the compromise being effectual that it should be included in the decree.

The intention of the parties on this point as we have observed is not clear, and we think that the Subordinate Judge before dismissing the suit should have informed the parties that the terms of the compromise could not be embodied in a decree and should have ascertained from them or upon further evidence, if necessary, whether the compromise was absolute or conditional on its being incorporated in a decree. In the latter case he would of course have proceeded with the suit. We shall therefore reverse his decree dismissing the suit and direct him to dispose of the suit afresh in accordance with the above observations. Costs already incurred in both Courts will be provided for in the revised decree.

22 M. 217=8 M.L.J. 256.

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22 M. 217=8 M.L.J. 256.

[217] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

OBAI GOUNDAN (*Defendant*), *Appellant* v. RAMALINGA AYYAR (*Plaintiff*), *Respondent*.* [2nd September, 1898.]

Registration Act—Act III of 1877, *Sections* 17, 18—*Rent Recovery Act* (*Madras*)—*Act VIII of* 1865, *Section* 11—*Reduction of rent.*

A document given by the owner of land to his tenant, varying the terms of tenancy with reference to the amount of rent to be paid, is not an instrument relating to an interest in immoveable property and does not require registration.

Where a landholder has granted a reduction of rent otherwise properly payable in respect of land, the mere fact that the tenant has made some improvements subsequent to the grant does not bring the case within the exception to the proviso of Section 11 of the Rent Recovery Act (Madras), 1865, so as to be binding on the landholder's successor.

[F., 11 C.L.J. 22 (25)=2 Ind. Cas. 89; R., 24 B. 609.]

SECOND appeal against the decree of W. J. Tate, District Judge of Salem, in appeal suit No. 19 of 1896, reversing the decision of R. H. Campbell, Acting Sub-Collector of Salem, in summary suit No. 18 of 1895.

Suit under Section 9 of the Rent Recovery Act (Madras), 1865, by the manager of the Berikai estate, against one of the tenants of the estate, to enforce acceptance of a patta and execution of a muchalka.

The defendant (who was admittedly a tenant under the estate and liable to pay rent) claimed a permanent remission under an order given to him by the late zemindar of Berikai, the plaintiff's predecessor. The material portion of the order (filed as Exhibit II in the case) was as follows:—

"You having asked me to grant you a cowle remission of half "assessment on the ground that out of the wet lands under the tank held "on patta formerly by your father and now by you—those near the tank "contain much 'chowdu' soil, while those far from the tank are sandy "and some of them within the water-spread, with the result that there "is loss of crops, the said lands have been inspected with the result that "the above defects have been found to really exist, it also appears that "the custom has been for you to pay assessment in the year in which "crops are raised and to obtain remission in years in which the lands "**[218]** are left waste. Considering all these facts a permanent cowle "remission of half the above assessment is granted from fasli 1297, and "you shall pay the balance every year whether the lands are cultivated or "left waste."

The Acting Sub-Collector accepted the document as genuine, and held it to imply that the remission was granted by the late zemindar for the purpose of effecting permanent improvements, though there was no express proviso to that effect; that it complied substantially with the first proviso to Section 11 of the Rent Recovery Act, and that the defendant had substantially performed the conditions upon which the remission had been granted. It was contended on behalf of the plaintiff, that the said order was inadmissible in evidence on the ground that it was a permanent

* Second Appeal No. 1284 of 1897.

1898 SEP. 2. — APPELLATE CIVIL. — 22 M. 217 = 8 M.L.J. 256.

lease, and as such required registration under Section 17 of the Registration Act. The Acting Sub-Collector overruled the objection and permitted the document to be put in as an admission by plaintiff's predecessor in title of the conditions on which the remission was granted,—such a remission in 1888 being admitted by the plaintiff. He found that the plaintiff was entitled to claim only a reduced rent, and order the plaintiff to tender and the defendant to accept patta accordingly and to execute a muchalka in the same terms.

The District Judge, on appeal, held that the order was one that required registration. He said :—

"Exhibit II is unregistered. It is conceded that if it contains a "'grant' or 'present demise' this is fatal to its admission in evidence. "And the patta which followed it is unregistered likewise, and equally "inadmissible to prove the terms of the tenancy, though, no doubt, the "tenancy itself may be proved *aliunde* (*Venkatagiri Zemindar* v. *Raghava* "(1)). But it is argued that the present plaintiff cannot take advantage "of the fraud of his predecessor in title in not having the document regis-"tered (*Nagappa* v. *Devu* (2)). Now there was in this case no refusal to "register. Defendant could also have applied for registration under "Section 32 of the Registration Act inasmuch as he claimed under the "document. The then Poligar, who at the time (as appears from the "evidence), owed defendant money, would hardly have refused registration "had it been asked of him. [219] And it is in fact probable that the "need for registration was presented to the mind of neither party. The "argument fails, there having been no fraud. I must hold that neither "Exhibit II nor the patta can be used to prove the grant; that one or "other of them does contain the grant, and that the grant being con-"tained in a document, cannot be proved otherwise (*Purmananddas* "*Jivandas* v. *Dharsey Virji* (3)).

On the question of improvements he said :—" I also think that the "Sub-Collector has somewhat misconceived the scope of the last proviso "to Section 11 of the Act. That provision applies to the clearing and "bringing waste land into cultivation and the 'making of any permanent "'improvement thereon.' Now the evidence in this case shows that the "land was not waste, nor newly brought under cultivation. It had been "in the defendant's family for years (see here Exhibit VII and the oral "evidence). It had been, as the evidence of defendant's own tenant "shows, cultivated from time to time with a 'moderate' or 'partial' yield. "The proviso to Section 11 does not therefore apply. *Qua* contract the "grant also appears bad, as argued, for want of consideration. The evidence "of defendant's third witness, the karnam who wrote Exhibit II, shows "that the concession was 'granted as a favour' on account of the Poligar's "friendship with the defendant. The Poligar was not legally bound to "grant remissions so that the consideration was on the face of the takid, "*nil*. There was, it is true, no proved coercion or undue influence within "the meaning of the Contract Act. But the parties not being relations "and the grant not being registered, the contract, it appears to me, cannot "be enforced for want of consideration (Contract Act, Section 25). It is "probable that the defendant improved the land, though I am inclined to "think the evidence on this head somewhat exaggerated, and even suspi-"cious from the absence of any written agreement with the wudders. But "it is doubtful if the concession was necessary. The evidence is that the

(1) 9 M. 142. (2) 14 M. 55. (3) 10 B. 101.

"neighbouring lands all pay full rates with one exception and this is in "the case of a piece of genuine 'waste' land." 1898 SEP. 2.

For these reasons he reversed the decree, and directed the defendant to accept the plaint patta and execute a muchalka in accordance therewith. APPELLATE CIVIL.

[220] The defendant preferred this second appeal.

Hon. *Bhashyam Ayyangar* and *Tiruvenkatachariar*, for appellant.

Ramasubba Ayyar, for respondent.

22 M. 217 = 8 M.L.J. 256.

JUDGMENT.

We think the Judge was in error in holding that Exhibit II required to be registered. The document only evidences an agreement to vary the terms of tenancy with reference to the amount of rent to be paid. As such it cannot be held to relate to an interest in immoveable property, and therefore did not require registration (*Satyesh Chunder Sircar* v. *Dhunput Singh* (1)). It was next contended that this document Exhibit II should be held to be binding on the plaintiff inasmuch as rent which up to then was payable only in respect of such lands as were cultivated was thereby made payable in respect of the entire holding whether cultivated or not. If up to the date of this document the defendant was not bound to pay for other than cultivated lands, the agreement on the part of the defendant to pay for lands whether cultivated or not would have made the agreement binding not only on the late zemindar but also upon the plaintiff, his successor, and no question would have arisen under the proviso to Section 11, Rent Recovery Act, but in the Lower Courts the defendant did not allege that prior to this document he was entitled to remission as a matter of right. We cannot, therefore, say that the Judge was wrong in holding that the remissions prior to it were mere concessions. Exhibit VII to which our attention has been drawn is not consistent with the contention that the remissions were a matter of right, nor does the language of Exhibit II itself support that view. That Exhibit II does grant reduction of rent otherwise properly payable in respect of the land is quite clear and unless such reduction is granted for any of the purposes set out in the proviso to Section 11 already referred to the arrangement must be held not to be binding upon the plaintiff. The finding of the Judge is that the reduction was not agreed to for any such purposes.

The mere fact that the defendant has made some improvement since the execution of Exhibit II cannot bring the case within the exception to the proviso.

For these reasons we must hold that the decree of the Lower Appellate Court is right and dismiss the second appeal with costs.

(1) 24 C. 20.

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APPELLATE CIVIL.

22 M. 221 = 8 M.L.J. 287.

22 M. 221 = 8 M.L.J. 287.

[221] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

GILKINSON AND ANOTHER (*Plaintiffs*), *Appellants v.* SUBRAMANIA AYYAR (*Defendant*), *Respondent.**
[10th and 20th October, 1898.]

Civil Procedure Code—Act XIV of 1882, *Sections* 96, 102, 103—*Order dismissing suit for default of appearance—Appeal.*

The decision of a Court passed under Section 102 of the Civil Procedure Code, dismissing a suit in default of appearance by a plaintiff, is an order and not a decree, and there is no first or second appeal therefrom.

[**Diss.**, 13 C.L.J. 153 (155) = 14 C.W.N. 573 = 5 Ind. Cas. 493 ; **F.**, 12 M.L.J. 473 ; 4 L.B.R. 17 (**F.B.**); **App.**, 31 M. 157 = 3 M.L.T. 366 ; **R.**, 29 C. 60 (61) ; 16 M.L.J. 30 ; 5 O.C. 294 (296) ; 121 P.R. 1907 (**F.B.**) = 51 P.W.R. 1907.]

SECOND appeal against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 786 of 1896, affirming the order of J. H. Munro, Subordinate Judge of South Malabar at Calicut, in orignal suit No. 15 of 1896.

Upon a suit to recover money coming on for hearing, the Subordinate Judge passed the following order :—"The plaintiffs do not appear "though it is now 11-25. The suit is dismissed with costs under Section "102 of the Civil Procedure Code." Plaintiffs applied under Section 103 to have the order of dismissal set aside, and the application being rejected, appealed against the order of rejection under Section 588, Clause (8). Upon this being dismissed, they preferred a regular appeal from the order of dismissal under Section 102, as if it were a decree. They further contended that Section 102 of the Civil Procedure Code is governed by the provisions of Section 96, and that the power to dismiss a suit given by Section 102 only relates to non-appearance on the day "fixed in the summons for the defendant to appear and "answer," as stated in Section 96. Though the day upon which default had taken place was a day so fixed in the summons, it was urged that it had lost that character in consequence of a further order which had been issued by the Court, that the plaintiffs should show cause why the plaint should not be amended. The District Judge dismissed the appeal.

The plaintiffs preferred this second appeal.

Mr. *A. G. Gover*, for appellants.

Sundara Ayyar, for respondent.

JUDGMENT.

[222] MOORE, J.—The Subordinate Judge of Calicut dismissed a suit under Section 102 of the Code of Civil Procedure. The plaintiff applied under Section 103 to have the order of dismissal set aside, but his application was rejected and an appeal preferred by him against this rejection under Section 588, Clause (8), was dismissed by the District Judge. He then preferred a regular appeal from the order of dismissal under Section 102, as if it were a decree, to the District Judge who heard the appeal and disposed of it on the merits. Against his judgment a second appeal has been preferred here. It is now urged on behalf of the respondent that

* Second Appeal No. 1661 of 1897.

there was no appeal to the District Judge from the order passed under Section 102 and that consequently there is no second appeal here.

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22 M. 221 = 8 M.L.J. 287.

This contention is in my opinion a valid one. It must be held that an order passed under Section 102 is not a decree (*vide Mansab Ali* v. *Nihal Chand* (1)). Reference should also be made to the decision of their Lordships of the Privy Council in *Chand Kour* v. *Partab Singh* (2), where it was held "that the dismissal of a suit in terms of Section 102 was "plainly not intended to operate in favour of the defendant as *res judicata*," and to an unreported decision of this Court (*Muniappa Chetti* v. *Venkatarama Chetti* (3)), where the ruling in *Mansab Ali* v. *Nihal Chand* (1) is approved and followed.

It is further urged that although it is the case that the 23rd September 1896 (the day on which the suit was dismissed for default) had been fixed for settlement of issues yet that it should be held that this arrangement was superseded by a further order of the Court directing that an application on the part of the defendant praying that the plaintiffs should be directed to amend the plaint should be heard on the same day. There does not appear to be any thing in this argument. On the 4th September the defendant put in the petition just mentioned and the order passed on it by the Subordinate Judge was that the question raised would be considered at the first hearing and that notice should be sent to the plaintiffs for the 23rd. It is impossible to hold that by this order the Subordinate Judge "superseded" the order fixing the 23rd September for the first hearing; on that the plaintiffs could reasonably have supposed that he had done so.

[223] On the ground that the order passed under Section 102 of the Code of Civil Procedure was not a decree, it must be held that there was no regular appeal to the District Judge, and that consequently there is no second appeal here. This second appeal must be dismissed with costs.

SUBRAMANIA AYYAR, J.—I concur.

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22 M. 223.

APPELLATE CIVIL.

Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SIVAYYA AND OTHERS (*Defendants Nos.* 3 to 6), *Appellants* v. RAMI REDDI AND OTHERS (*Plaintiff and Defendants Nos.* 1 *and* 2), *Respondents.** [1st, 2nd and 21st February, 1899.]

Religious Endowments Act—Act XX of 1863, *Sections* 2, 13, 14, 16—*Regulation VII of* 1817 (*Madras*)—*Joinder of purchasers in a suit against trustee.*

A temple having been endowed with immoveable property after the passing of Regulation VII of 1817 (Madras), and before the Religious Endowments Act (XX of 1863), and the trustee having without authority sold the same, a suit was instituted under Act XX of 1863 against the trustee and the purchasers of the property, to annul the sales and to declare the right of the temple thereto:

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* Appeal No. 122 of 1898.

(1) 15 A. 359. (2) 16 C. 98.
(3) Appeal against Order No. 140 of 1892 (unreported).

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APPELLATE CIVIL.

22 M. 223.

Held, (1) that a transferee of trust property, under a transaction which amounts to a breach of trust on the part of the trustee of the institution, cannot be proceeded against under the provisions of the Religious Endowments Act, 1863; and

(2) that the trustee of a public religious institution can be sued under the provisions of the Religious Endowments Act, 1863, notwithstanding the fact that the institution came into existence after Regulation VII of 1817 was passed.

[R., 24 M. 243 (245) ; 26 M. 166 (167; 31 M. 212 (214) = 18 M.L.J. 205; 34 M. 375 (383) = 10 Ind. Cas. 301 = 21 M.L.J. 305 = (1911) 1 M.W.N. 304.]

APPEAL against the decree of the District Judge of Bellary in original suit No. 13 of 1897.

Suit under Sections 14 and 15 of the Religious Endowments Act, 1863, to annul the sales by the second defendant of the plaint houses to defendants Nos. 3 to 6, and to declare the right of the Sri Lakshm Narasimhasami's temple to the said houses.

The plaint set forth that the first defendant's husband was the dharmakarta of Sri Lakshmi Narasimhasami's temple in Kollegal [224] village, Bellary taluk, and had died seven years before the date of the plaint, leaving no male issue; that first defendant was his heir; that second defendant was a bandhu of the late dharmakarta, and in order to assist the first defendant, undertook to manage the affairs of the dharmakarta of the said temple; and that the second defendant, without right, authority or justifiable necessity, had sold the plaint immoveable properties, which belonged to the temple, and the revenue of which was allotted for the expenses of worship therein to defendants Nos. 3 to 6, and executed and registered sale-deeds therefor. This suit was brought to annul the sales, and to declare the right of the temple to the said property.

Defendants Nos. 3 to 6 claimed, *inter alia*, that, if a decree should be given in favour of the plaintiff, the second defendant should be directed to repay the purchase money handed over by them on behalf of the temple, with interest. The third and the eleventh issues were as follows:—

"3. Does the plaintiff's suit lie under Act XX of 1863?

"11. Are the sales to the third, fourth, fifth and sixth defendants "binding on the parties to this suit? If so are the said defendants "entitled to any relief in this suit?"

The District Judge held that the suit did lie under Act XX of 1863. He found it to have been proved that the houses in question had been set apart as an endowment for the said temple about fifty years ago; and though the exact date of the endowment could not now be ascertained, it had been clearly shown to have been made after the passing of Regulation VII of 1817 and before Act XX of 1863 came into force. He also held that the temple came under the provisions of Regulation VII of 1817, and consequently under Act XX of 1863; and he referred to *Jan Ali* v. *Ram Nath Mundul* (1) and *Muthu* v. *Gangathara* (2). On the eleventh issue he held that as it was impossible to hold that the sales were made for the benefit of the temple, or that the second defendant had any authority to dispose of the property in such a manner, the said sales were not binding on the temple or its trustees. And he declared them to be null and void in so far as the temple and its trustees were concerned, and further declared the said houses to be the property of the temple and its dharmakartas [225] as trustees for the performance of the requisite religious ceremonies in the same.

(1) 8 C. 32. (2) 17 M. 95.

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Defendants Nos. 3 to 6 preferred this appeal.

The Advocate-General (Hon. *C. Arnold White*), for appellants :—Act XX of 1863 is restricted to endowments existing at the time of the passing of Regulation VII of 1817. It only substitutes new machinery. Regulation VII of 1817, as shown by its preamble, only applied to institutions existing in 1817, and Act XX of 1863 applies to the same. [SUBRAMANIA AYYAR, J., referred to *Ganes Singh* v. *Ramgopal Singh* (1) and *Jan Ali* v. *Ram Nath Mundul* (2), and *Sheoratan Kunwari* v. *Ram Pargash* (3). The regulation recognized the duty of Government to look after charities at large.] Unless the institution came within the Regulation of 1817, it would not be governed by the Act of 1863 (*Muthu* v. *Gangathara* (4)). [SHEPHARD, J.—There, the Court was considering, not the date of endowment but its nature. Why limit Act XX of 1863, Section 14, so inconveniently ?] The Government wished to relieve itself from the duties assumed in 1817. The thirteenth and succeeding sections give the right to institute suits only in cases where such rights existed before. [SUBRAMANIA AYYAR, J.—Government had those duties before 1817, as is shown by public records and the preamble.] Those duties were defined by Regulation VII of 1817. The object of the Act is that which is stated in the preamble, namely, to relieve the Boards of Revenue. The question now under consideration is merely as to the right to sue given by the Act. I cannot distinguish *Sheoratan Kunwari* v. *Ram Pargash* (3) referred to in *Jan Ali* v. *Ram Nath Mundul* (2), but the general proposition in the latter case helps me. Moreover, as to the decision in this latter case the temple was built before 1817, though the endowment in question was later. The term "granted" in the Regulation of 1817 must apply only to endowments then already existing ; not to endowments that might thereafter be granted. See preamble and Section 2. [SHEPHARD, J.—See Section 5, the word is not there used in your sense.] The word must be taken in the same sense throughout ; see also reference to former Governments. The words "is hereby vested" in Section 2 of Regulation VII of 1817, and the phraseology of Section 3 of **[226]** Act XX of 1863, and Section 15 and other sections must be read in the past tense. The weight of authority supports this view : see *Narasimha* v. *Ayyan Chetti* (5) and *Jan Ali* v. *Ram Nath Mundul* (2).

Assuming that the suit does fall within the scope of Act XX of 1863 it is misconceived. If Section 14 of Act XX of 1863 gives a right independent of Regulation VII of 1817, it must be construed strictly, and the plaintiff must, under it, proceed against the individual mentioned there and ask for relief of the kind therein mentioned. This plaint does not conform to the section nor does the decree, which is merely declaratory. If a plaintiff wishes to sue (*a*) under the Act, (*b*) in the District Court, he must conform strictly to the section. He cannot obtain a decree for an injunction or possession ; if he wishes for such relief he must adopt the ordinary procedure. Defendants Nos. 3, 4, 5 and 6 are purchasers from trustees ; and they should not have been joined. (In addition to the cases cited above the following cases were referred to in the course of the argument :—*Mahalinga Rau* v. *Vencoba Ghosami* (6), and *Ittuni Panikkar* v. *Irani Nambudripad* (7)).

Ramachandra Rau Saheb, for respondent No. 1.

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(1) 5 B.L.R. Appx. 55. (2) 8 C. 32. (3) 18 A. 227 (232).
(4) 17 M. 95. (5) 12 M. 157. (6) 4 M 157.
(7) 3 M. 401.

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JUDGMENT.

SHEPHARD, J.—This is an appeal on behalf of some defendants who have been joined as parties in a suit brought under the provisions of Section 14 of the Religious Endowments Act against a trustee.

It appears that the temple in the interests of which the suit is brought was established after the year 1817 and it is accordingly argued that, inasmuch as the Regulation VII of 1817 applies only to institutions founded before that Regulation came into force and the Act applies only to institutions coming within the scope of the Regulation, the provisions of Act XX of 1863 have no reference to the Kollegal temple. Of the two propositions necessary to establish this conclusion, I think that the latter, at any rate, that relating to the operation of the Act of 1863, is not well founded.

There is, in my opinion, no reason to suppose that Section 14 of that Act was intended to be restricted to such institutions as [227] came within the purview of the Regulation or even to institutions founded before the Act itself came into force.

But there is another ground on which I think this appeal must be allowed. On further consideration of the provisions of the Act, I do not think it can have been intended that persons in the position of purchasers from a trustee should be rendered answerable in a suit brought under Section 14 of the Act. In the case of an ordinary suit against a defaulting trustee, it would undoubtedly be right to join as defendants persons in whose favour a conveyance of trust property had been made. With the view to obviating further litigation it is clearly expedient that they should be joined and that the property should be recovered from them in the same suit. But there are indications in this Act that the suit was not intended to be the ordinary suit against a trustee. Section 14 taken with Section 2 gives jurisdiction to a Court which ordinarily does not possess jurisdiction in the matter of such suits and Section 16 provides for a compulsory reference to arbitration.

With reference to trustees there may well have been reasons for these special provisions, but it would be difficult to explain why as regards persons other than trustees a special jurisdiction should have been created, or power conferred on the Court to insist on reference to arbitration.

There is another difficulty in the construction of the section for which the plaintiff would contend and that is that he clearly cannot be entitled to recover in his own name the trust property and that no provision is made in the Act for the appointment of a new trustee and bringing him on the record as the plaintiff. Perhaps it might have been convenient to give the Court the jurisdiction exercised by the Allahabad High Court in the case of *Sheoratan Kunwari* v. *Ram Pargash* (1), but I cannot agree in holding with that Court that the jurisdiction has been given. It may be said that the damages recoverable against a trustee must include damages recoverable in the interest of the trust. That seems to have been the view held by this Court in one case (*Srinivasa* v. *Venkata* (2)). I doubt if this view is correct, but assuming that it is correct, I do not think it follows that trust property can be [228] recovered against third parties in a suit brought under the section. The suit for that purpose or for the purposes mentioned in the plaint, so far as they affect the appellants ought, in my judgment, to be brought by the trustee, either the original or the newly appointed trustee, and in the ordinary Court.

(1) 18 A. 227 (232). (9) 11 M. 148.

I am of opinion that the appeal should be allowed and the suit dismissed as against the appellants with costs. As against the trustee the declaration ought, I think, to stand.

SUBRAMANIA AYYAR, J.—I have never entertained any doubt that a manager of a public religious institution such as the present can be sued under the provisions of the Religious Endowments Act, XX of 1863, even though the institution itself came into existence after Regulation VII of 1817 was passed. It is not, however, necessary to deal with the contention to the contrary, urged on behalf of the appellants by the learned Advocate-General, inasmuch as I agree that the appeal must be allowed on the ground that a person who is but a transferee of trust property under a transaction which amounts to a breach of trust on the part of the manager of the institution, cannot be proceeded against under the provisions of the Act in question. As to this latter point I first took a different view. But I am now satisfied that the present conclusion is the correct one. The case of *Sabapathi* v. *Subraya* (1) clearly warrants the proposition that the suits contemplated by Act XX of 1863 are suits against a trustee, manager or superintendent or member of committee and against no other persons. See too *Virasami Nayudu* v. *Subba* (2). The clearest indication in the Act itself in favour of the view taken above is furnished by the provisions relating to the tribunal competent to entertain a suit brought under the enactment. Now suppose that the property of a temple alienated by the trustee is land situated outside the ordinary territorial jurisdiction of the Court empowered to entertain a suit against the trustee, can it be said that that Court can try a question affecting such land as against the alienee in possession and pass a decree against him with reference to the land as was apparently held in *Sheoratan Kunwari* v. *Ram Pargash* (3)? There is nothing in any part of the enactment that can be referred to as expreessing an intention to confer such absolutely unprecedented [229] and extraordinary jurisdiction on the Courtsacting under the enactment. Nor can I see adequate reasons for holding that such an intention is necessarily implied by any of the provisions to be found therein. If this argument is right, it follows that a Court acting under this enactment has no power to determine any question as against the alienee, although the land he is concerned with is situated within the Court's territorial jurisdiction under the ordinary law as in this case. I therefore concur in the order proposed by my learned colleague Shephard, J.

DAVIES, J.—The view taken by my learned colleagues is the view that I have entertained throughout. Looking to the terms of Section 14 of the Act limiting the operation of the special jurisdiction thereby conferred to a certain class of the persons and to certain forms of relief as against those persons only, it seems to me that no other conclusion is possible. I therefore concur in allowing the appeal, and directing that the suit as against the appellants be dismissed with costs throughout.

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(1) 2 M. 58 (60, 61) (2) 6 M. 54. (3) 18 A. 227 (232).

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APPELLATE CIVIL.

22 M. 229.

22 M. 229.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

VEDACHALA MUDALI (*Defendant*), *Appellant v.* RAMASAMI RAJA (*Plaintiff*), *Respondent.** [8th and 21st March, 1899.]

Provincial Small Cause Courts Act—Act IX of 1887, *Section* 15, *Schedule II, Article* 8—*Suits for rent*—" *Suits of the nature cognizable in Courts of Small Causes*"—*Second appeal—Civil Procedure Code—Act XIV of* 1882, *Section* 586.

A suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of Section 586 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the Local Government with authority to exercise jurisdiction with respect thereto under Section 15 and Schedule II, Article 8, of the Provincial Small Cause Courts Act, 1887.

A second appeal will lie in such a suit, though the amount or value of the subject-matter of the original suit does not exceed Rs. 500.

[Overruled, 23 M. 547, 554 (F.B.).]

[230] SECOND appeal against the decree of J. Hewetson, District Judge of Chingleput, in appeal suit No. 826 of 1897, affirming the decree of S. Saminatha Sastri, District Munsif of Chingleput, in original suit No. 226 of 1896.

Suit for rent for Rs. 238-4-2. The District Munsif gave a decree for the plaintiff for Rs. 178-11-9, which was affirmed on appeal by the District Judge.

The defendant preferred this second appeal (second appeals Nos. 1161 to 1164, 1166, 1167 and 1169 to 1173 of 1898 following the result in this case).

Pattabhirama Ayyar, for respondent, took the preliminary objection that as the original suits now appealed against were for rent not exceeding Rs. 500 in amount, no second appeals lay (Civil Procedure Code, Section 586). Article 8 of the Second Schedule to the Provincial Small Cause Courts Act, 1887, enables Judges of Small Cause Courts to try such suits if they have been expressly invested with authority by the Local Government. Such authority has been conferred on all Subordinate Judges and District Munsifs within the Presidency, and the effect is to render all suits for rent preferred throughout the Presidency and falling within the pecuniary limits of jurisdiction of such Courts, " suits of the nature "cognizable in a Court of Small Causes."

Sundara Ayyar and *Ramachandra Ayyar*, for appellant.—By Section 586 of the Civil Procedure Code, no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed Rs. 500. Section 15 of the Provincial Small Cause Courts Act, 1887, provides that a Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes; and Article 8 of that schedule excepts a suit for the recovery of rent other than house-rent. The remainder of the article consists of a proviso relating to Courts in which the Judges have been expressly vested by the local Government with authority to exercise jurisdiction with respect to such suits. The fact that the jurisdiction of a particular Judge,

* Second Appeal No. 1160 of 1898.

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or of particular Judges, has been, or may be, so extended by Government, does not change the character of a suit which is thus permitted to be tried. Nor is a suit by such an extension of powers, on the part of a Judge or of Judges, converted **[231]** into one that is "of the nature cognizable in Courts of Small Causes." The terms of Section 586 of the Civil Procedure Code are express in their prohibition as regards "suits of the nature cognizable" in this particular class of Court; and Article 8 of the second schedule to the Provincial Small Cause Courts Act is equally clear in its exception of suits "for the recovery of rent other than house-rent" from the cognizance of Small Cause Courts. The prohibition of Section 586 of the Civil Procedure Code is aimed at the nature of the suit, and not at the powers of a Judge who may happen to try it. District Judges exercising Small Cause Court jurisdiction cannot try rent suits on the Small Cause side, notwithstanding the notification of the local Government by which the extended powers referred to have been conferred. If the power to try such suits had been conferred upon one Judge alone, it could not be said that such an authority would convert all such suits into suits of a nature cognizable in Courts of Small Causes throughout the Presidency. A suit for rent other than house-rent, therefore, being excepted from the cognizance of a Court of Small Causes, is not a "suit of the "nature cognizable in Courts of Small Causes" and is not within the prohibition of Section 586 of the Civil Procedure Code. A second appeal therefore lies.

JUDGMENT.

MOORE, J.—A preliminary objection is taken to these second appeals that as the original suits were for rent not execeeding Rs. 500 in amount, no second appeals lie (Section 586, Civil Procedure Code).

Section 586 of the Civil Procedure Code provides that no second appeal shall lie in any suit of the nature cognizable in a Court of Small Causes when the amount or value of the original suit does not exceed Rs. 500. Section 15 of the Provincial Small Cause Courts Act (IX of 1887) directs that a Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits excepted from the cognizance of a Court of Small Causes. Among the suits to be found in this second schedule are suits for the recovery of rent other than house-rent (Clause 8). The following proviso is, however, added to this clause :—"Unless the Judge of "the Court of Small Causes has been expressly invested by the Local "Government with authority to exercise jurisdiction with respect thereto." The Madras Government has by a notification of the 24th January 1888 invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their **[232]** Small Cause side all suits for rent falling within the pecuniary limits of their special jurisdiction.

On behalf of the respondents it is urged that the effect of this notification is to render all suits for rent preferred throughout the Presidency "suits of the nature cognizable in a Court of Small Causes." For the appellants it is argued that this notification cannot be held to operate so as to convert rent suits into suits of the nature cognizable in a Court of Small Causes, and that all it does is to empower certain Judges named in the notification to try such suits on the Small Cause side of their Courts. It is pleaded that the fact that certain Judges throughout the Presidency have been authorized to try such suits on the Small Cause side cannot alter the nature of the suits, and it is pointed out that, notwithstanding the notification, such District Judges as have been

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invested with Small Cause jurisdiction cannot try rent suits on the Small Cause side. Suppose, it is urged, that Government had invested the Subordinate Judge of Ootacamund (*e.g.*), and no other Judge with the power to try rent suits as Small Causes, would this fact convert such suits into suits of the nature cognizable in a Court of Small Causes throughout the Presidency? This question is not, it must be admitted, void of difficulty, but the answer to it must, in my opinion, be in the negative.

It does not appear to me that it can possibly be held that as soon as Government by a notification empowers any Judge to try rent suits on the Small Cause side all such suits throughout the Presidency cease to be suits excepted from the cognizance of Courts of Small Causes and become suits of the nature cognizable in such Courts (Section 586, Civil Procedure Code).

This question does not appear to have ever been formally decided by this Court. In *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau* (1), it was no doubt held that as the suit there under consideration was a suit for rent and as such triable by a Court of Small Causes, it followed that it was a suit of the nature cognizable by a Court of Small Causes and that consequently under Section 586, Civil Procedure Code, no second appeal lay, but what was there discussed was the question as to whether a suit for kattubadi and karnam's emoluments was a suit for rent and the point now raised does not appear to have been argued or considered. On the other [233] hand in *Ramchandra Raghunath* v. *Abaji Rastya* (2) it was held that the expression "suits of the nature cognizable "by Courts of Small Causes" must mean suits which are so cognizable in general without reference to Clause 4 of Section 6 of Act XI of 1865, which provides that certain suits shall not be cognizable by Courts of Small Causes unless the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over them.

I am consequently of opinion that the fact that certain Judges have been empowered by Government to hear suits for rent on the Small Cause side, does not render such suits generally suits of the nature cognizable in Small Cause Courts and that these second appeals do lie.

The several questions raised in these appeals have been already disposed of by us in the judgments in second appeals Nos. 1165 and 1168 of 1898.

These second appeals are accordingly dismissed with costs.

SUBRAMANIA AYYAR, J.—In *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau* (1), as also in certain cases not reported, in the decision whereof I took part, I proceeded, I must admit, on the assumption that suits for rent other than house-rent, not exceeding Rs. 500, were suits of the class mentioned in Section 586 of the Code of Civil Procedure. In making that assumption, which I now find to be erroneous, I overlooked the fact that suits for rent described above are cognizable by certain Judges exercising the powers of a Small Cause Judge, not by virtue of the provisions of the Provincial Small Cause Courts Act IX of 1887 themselves, but by virtue of the authority conferred on such Judges by the Local Government under the latter part of Article 8 of the second schedule to the said Act. Now suits for rent other than house-rent are, by Section 15 of the Act and the former part of the article referred to,

(1) 19 M. 329. (2) 6 B.H.C.R. A.C.J., 12 (15, 16).

expressly excluded from the cognizance of Small Cause Courts as a rule. The latter part of the article, no doubt, contains a qualification. But by it the Local Government is empowered, not to bring such suits within the category of suits generally cognizable by a Court of Small Causes, but only to vest a Judge exercising powers of a Judge of a Small Cause Court with authority to try that class of suits. Suits capable of being taken [234] cognizance of by virtue of such special authority cannot properly be treated as suits of the nature cognizable by a Court of Small Causes within the meaning of Section 586 of the Civil Procedure Code. The decision of Couch, C.J., and Gibbs, J., in *Ramchandra Raghunath* v. *Abaji Rastya* (1) is a distinct authority in favour of the above conclusion. I would only add that in the circumstances I see no objection to our acting upon that conclusion in the present instance, notwithstanding the decisions of this Court alluded to above.

I therefore concur in holding that second appeals lie in all these cases. But as they fail on the merits they must be dismissed with costs.

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22 M. 234.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

THOYI AMMAL (*Plaintiff*), *Appellant* v. SUBBAROYA MUDALI (*Defendant*), *Respondent*.* [3rd and 8th March, 1899.]

Oaths Act—Act X of 1873, *Sections* 9 *to* 11—*Offer by party to be bound—Conclusive proof of the matter stated.*

Defendant in a suit, before trial, filed a petition under Section 9 of the Indian Oaths Act, 1873, to the effect that if the plaintiff should make an oath according to law regarding certain facts, "this defendant will forfeit his right of contesting "this suit." He subsequently desired to withdraw the petition on insufficient grounds, but the plaintiff took the oath, and on the strength thereof all the issues were decided, and a decree passed, in plaintiff's favour. The suit was, however, remanded, on appeal, for disposal after recording evidence on both sides. On appeal by plaintiff against this order of remand:

Held, (1) that there is nothing in Sections 9 to 11 of the Indian Oaths Act, 1873, which allows a party who has agreed to the administration of an oath under those sections to retract after the opponent has accepted the proposal;

(2) that the Act gives the Court a discretion to administer the oath or not, and though it should not administer it if good grounds be shown for retracting, it is justified in so doing, notwithstanding the retractation, if the grounds are frivolous;

[235] (3) that if "the matter stated," as referred to in Section 11 of the Act, affords sufficient material for the decision of the suit, a decree may be passed on the facts so proved. But if the facts so proved are not sufficient for the decision of the case, such further facts as are necessary should be proved by evidence adduced on both sides. The Act provides, not for the adjustment of a suit in an arbitrary way, but merely for the conclusive proof of facts; such facts, if not sufficient for the decision of the suit, should be supplemented by facts duly proved by evidence; and

(4) that the facts proved by the special oath are conclusively proved, and any further evidence that may be taken should be limited to matters not proved by the oath.

[F., 15 M.C.C.R. 141; Rel., 16 Ind. Cas. 733 (734); R., 1 Bom. L.R. 531 (533); 15 Ind. Cas. 195=(1912) M.W.N. 361; 17 M.L.J. 99 (100); 3 M.L.T. 163.]

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* Appeals against Orders Nos. 126 and 127 of 1898.

(1) 6 B.H.C.R. A.C.J. 12 (15, 16).

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—
APPELLATE
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—
22 M. 234.

APPEAL against the remand order of W. F. Grahame, District Judge of South Arcot, in appeal suit No. 119 of 1898 (original suit No. 660 of 1897, on the file of the District Munsif of Tindivanam).

The facts of this case appear, sufficiently for the purpose of this report from the judgment.

Ramachandra Ayyar, for appellant.
Sivasami Ayyar, for respondent.

JUDGMENT.

The facts of this case are briefly as follows :—In original suit No. 373 of 1896, the plaintiff obtained a decree for possession of land against certain persons said to be the plaintiff's tenants. On proceeding to execute the decree, the present defendant, who was no party to the decree, refused to give up possession, and plaintiff therefore brought the present suit (original suit No. 660 of 1897) under Section 331, Civil Procedure Code. The plaintiff alleged that he purchased the land from Mari Mudali, the last owner, and had possession from that time, but that the defendant wrongfully claimed to be in possession under his sister Subbammal, who had no title. The defendant alleged that he purchased and got possession of the land from Subbammal, the widow of Moothia Mudali, the last male owner. The issues framed were as follows:—(1) Whether Mari Mudali had right to, and enjoyment of, the plaint properties or not ? (2) Whether the deed and the decree on which plaintiff relies are valid and operative against defendant and his deed or not ? (3) Whether plaintiff had possession and enjoyment of the properties, or whether Subbammal's husband and she had possession and the deeds she executed are valid or not ? (4) Whether defendant had no possession and the obstruction offered is unlawful or not ? (5) What other order is necessary in case plaintiff fails ?

[236] Before the trial, the defendant put in a petition under Section 9 of the Indian Oaths Act X of 1873, in these terms :—" If the plaintiff "should get into the witness-box in this Court and make an oath according to law, that payment of money has been made to Mari Mudali as "mentioned in the sale-deed executed by Mari Mudali to the plaintiff in "this suit ; that the plaint lands have been in her enjoyment from date "of bond ; that, subsequent to the said sale, neither Moothia Mudali, "Subbammal nor Subbaraya Mudali enjoyed it, this defendant will forfeit "his right of contesting this suit."

The defendant subsequently desired to withdraw the petition on grounds which the Court found to be insufficient. The plaintiff then took the oath in the form proposed and the District Munsif, on the strength of it, decided all the issues in plaintiff's favour and gave her a decree for possession. Against this decree, the defendant appealed and the District Judge, relying on the case of *Vasudeva Shanbog* v. *Naraina Pai* (1) remanded the suit for disposal after recording evidence on both sides, apparently on the ground that the defendant was at liberty to revoke the agreement with regard to the oath and that, as the defendant's consent was not adhered to after the oath was taken, the proceedings taken in connection with the oath were not binding, and the only course was to dispose of the case *de novo* on evidence taken in the ordinary way. Against this order of remand, the present appeal is made by the plaintiff.

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(1) 2 M. 356.

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We think that the District Judge is in error in supposing that *Vasudeva Shanbog* v. *Naraina Pai*(1) is an authority for holding that a party who has agreed to the administration of an oath under Section 9 of the Indian Oaths Act is at liberty, without good reason, to revoke the agreement so as to render the taking of the oath invalid or futile for all purposes. The learned Judges in that case did not discuss what the effect of the party to be bound withdrawing from the agreement would be in regard to matters of fact duly sworn to in accordance with the agreement, nor did they decide that the oath could not legally be administered after such party had signified his wish to withdraw. There is nothing in Sections 9 to 11 of the Act which allows a party to retract after the opponent has accepted the proposal. The Act gives the Court a [237] discretion to administer the oath or not, and if a party after agreeing to an oath satisfies the Court that there is good ground for retracting, the Court would probably exercise a wise discretion in refusing to administer the oath, but when a party puts forward frivolous reasons for retracting we think the Court is justified in administering the oath, notwithstanding the retractation. This has been expressly decided in *Ram Narain Singh* v. *Babu Singh* (2) and *Abaji* v. *Bala*(3) and there is nothing in the case of *Vasudeva Shanbog* v. *Naraina Pai* (1) to support the contrary view. Indeed it is plain that if the facts sworn to in that case had been sufficient for the decision of the suit, the learned Judges would have decided it accordingly instead of remanding it for disposal on the merits. What the learned Judges in that case decided is that, if the party to be bound by the oath does not adhere to the agreement, the taking of the oath by the other party cannot be regarded as an adjustment of the suit under Section 375, Civil Procedure Code, so as to be made the ground for a decree by consent being recorded by the Court. The taking of an oath was itself a mode of adjustment under the old Regulation (III of 1802), but the Regulation was repealed, and when the Indian Oaths Act was passed it did not re-enact the provisions of the Regulation. It only allowed the Court, in its discretion, to permit the taking of an oath in a form proposed by one party and accepted by the other, and it enacted (Section 11) that "the evidence so "given shall, as against the person who offered to be bound as aforesaid, be "conclusive proof of the matter stated." If the matter stated affords sufficient material for the decision of the suit, a decree may be passed on the facts thus conclusively proved. If the facts so proved are not sufficient for the decision of the case, such further facts as are necessary must be proved in the ordinary way, by evidence adduced on both sides. The facts proved by the special oath are, however, conclusively proved, and the further evidence must, in our opinion, be limited to matters not proved by the oath.

The mistake lies in attempting to utilize the Oaths Act for a purpose outside its scope, and in treating it as if it were the old Regulation re-enacted in a new form. It does not provide for the adjustment of a suit in an arbitrary way by the oath of a party, but it provides for the conclusive proof of facts by the oath of a [238] party. It is for the parties, and for the Court acting under these provisions of the Oaths Act, to take care that the facts to be proved by the oath are sufficient for the decision of the suit. Otherwise they must be supplemented by facts proved in the ordinary way.

The clause in the agreement that the defendant would "forfeit his

(1) 2 M. 356. (2) 18 A. 46. (3) 22 B. 281.

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"right of contesting the suit" if the plaintiff should take the oath, must be understood with reference to the scope of the Act under which the agreement was made, and therefore means that the defendant will not raise any contention as to any matter sworn to by the plaintiff, but will accept her oath. The facts proved by the oath are admittedly not sufficient to decide the first and second issues of the suit. They do not touch the title of Mari Mudali through whom the plaintiff derives her title. It was therefore necessary to remand the suit for a finding on those issues, but the District Judge was in error in remanding the suit for disposal *de novo* on all the issues. The facts sworn to by the plaintiff in her oath must be regarded as conclusively proved, and the further evidence on both sides must be limited to other matters. With these remarks, we confirm the order of remand and direct that costs in this appeal do abide and follow the result of the suit.

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22 M. 238 = 1 Weir 32.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS *v.* YAKOOB SAHIB.*
[16th and 20th September, 1898.]

Penal Code—Act XLV of 1860, *Sections* 65, 67—*Imprisonment in default of fine—Towns Nuisances Act (Madras)—Act III of* 1889, *Section* 3, *Clause* 10.

An accused having been convicted of an offence under Section 3, Clause 10, of the Towns Nuisances Act (Madras), 1889, and sentenced to pay a fine of Rs. 8 and in default of payment to undergo simple imprisonment for a week:

Held, (1) that Section 67 of the Indian Penal Code refers solely to cases in which the offence is punishable with fine only: and has no application to offences punishable either with imprisonment or with fine, but not with both; such sentences are governed by Section 65 of the Indian Penal Code: and

[239] (2) that the sentence of imprisonment in default should not exceed one-fourth of the maximum term of imprisonment provided for the offence.

CASE referred for the orders of the High Court, under Criminal Procedure Code, Section 438, by E. A. Elwin, Acting District Magistrate of Bellary, in summary case No. 244 of 1898, on the file of the Bench Magistrate of Hospet.

Accused was convicted under the Towns Nuisances Act (Madras), 1889, Section 3, Clause 10, of an offence which is punishable thereunder with fine not exceeding Rs. 50 or imprisonment of either description not exceeding eight days. The Magistrate sentenced him to pay a fine of Rs. 8 and in default to undergo simple imprisonment for a week.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown:—Section 65 of the Indian Penal Code applies, not Section 67. The Magistrate, under Section 65, cannot impose more than one-fourth of the maximum term of imprisonment in default of payment of the fine; even if the offence be punishable with imprisonment as well as fine; *a fortiori* he cannot impose more than one-fourth of the maximum term of imprisonment prescribed by the section under which the accused was convicted, which provides for a sentence of fine or imprisonment but not for both.

The accused was not represented.

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* Criminal Revision Case No. 260 of 1898.

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JUDGMENT.

BENSON, J.—In this case the accused was found guilty of an offence punishable under Section 3, Clause 10, of Act III of 1889, and was sentenced to pay a fine of Rs. 8 or in default to undergo simple imprisonment for a week. The punishment awardable under the section is a "fine not exceeding Rs. 50 or imprisonment of either description not "exceeding eight days."

The question is whether the award of a week's imprisonment in default of payment of the fine is legal, or whether the term of imprisonment in default is limited by Section 65, Indian Penal Code, to one-fourth of the term (eight days) of imprisonment awardable for the offence under Section 3 of Act III of 1889, *i.e.*, to two days in the present case. Section 67, Indian Penal Code, has obviously no application to the case. It refers solely to the cases in which the offence is punishable with fine only. The present case is punishable with imprisonment or with fine at the option of the Magistrate, though not with both. Section 65, Indian Penal Code, however, in my opinion, is applicable to such a sentence. The words "punishable with imprisonment as well as fine" in that [240] section must be understood in the same sense as those words bear in Section 64. The wording of Section 64, it must be admitted, is not happy, but I am of opinion that the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed. Those cases the section divides into three classes, *viz.*, offences (1) "punishable with imprisonment as well as "fine," (2) "punishable with imprisonment and fine" and (3) "punishable "with fine only." The first of these classes in my opinion includes two classes, *viz.*, (*a*) offences like the present punishable with imprisonment or fine in the alternative, and (*b*) offences punishable, as most of those under the Indian Penal Code are, with imprisonment, or fine, or both, cumulatively. Grammatically it would seem also to include the second class, *viz.*, offences punishable with imprisonment and fine, but this class is separately mentioned, probably because reference was intended to cases in which a substantive sentence of imprisonment must be awarded, the fine, if any, being only in addition thereto. The Legislature, by Section 64, having given the general power to impose imprisonment in default of payment of fine, then proceeded to lay down limits to that power. Section 65 limited the power in the first class of cases, Section 67 in the third class. If the second class is, as I think it is, included in the first, then Section 65 applies to it also; but, in any case, Section 33, Criminal Procedure Code, imposes the same limit in unmistakable terms. It seems to me unreasonable to suppose that the Legislature did not intend to include cases like the present in the first class since the result would be that, in such cases alone, there would be no limit save that of the general power of a Magistrate, and a first-class Magistrate in a case like the present could award two years' rigorous imprisonment in default of payment of a petty fine, though in all other classes of cases his power is strictly limited.

There is no reason for such an anomaly, and I do not think that the language of the several sections obliges us to hold that it exists.

I would therefore modify the sentence of imprisonment in default passed in this case to one of two days only.

MOORE, J.—It appears to me to be clear that this case comes under Section 65 of the Indian Penal Code. That section applies to all cases where the offence is punishable with imprisonment as well as fine, *i. e.*,

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as I understand the wording, cases where fine and [241] imprisonment can be awarded and also those where the punishment may be either fine or imprisonment (as in the present case) but not both. The only cases that it does not apply to are those dealt with in Section 67 where fine only can be awarded. An offence committed under Section 3, Act III of 1889, is liable to fine not exceeding Rs. 50, or to imprisonment of either description not exceeding eight days. In default of payment of fine the maximum term of imprisonment that can be awarded is, under Section 65, Indian Penal Code, two days.

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22 M. 241 = 9 M.L.J. 179.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice), and Mr. Justice Moore.

GRANT (*Plaintiff*), *Appellant v.* SUBRAMANIAM (*Defendant*), *Respondent.** [8th and 13th September, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 295, *proviso* (*b*)—*Same judgment-debtor—Sale of lands under attachment—Disposal of amount realised—Rateable distribution.*

A father and son having mortgaged certain villages, the mortgagee obtained against both mortgagors a decree for the amount due, which was transmitted for execution to a District Court. The villages were subsequently, by order of the District Court, attached, and plaintiff, as receiver representing the mortgagee then obtained an order that the villages under attachment should be sold free from the mortgage, and that plaintiff should have the same rights against the proceeds of sale, as he, as such receiver, had against the property to be sold. Some of the villages were sold accordingly and the amount realised paid into the District Court. The defendant, who had obtained a separate decree against the son alone (the father having meanwhile died) in the same District Court, applied for, and was granted, a rateable distribution of the moneys realised by the sale of the villages attached and sold as aforesaid, towards satisfaction of his decree. On plaintiff bringing a suit for the recovery of the amount so obtained by defendant from the District Court:

Held, (1) that the judgment-debtor against whom plaintiff and defendant held decrees was the same within the meaning of Section 295 of the Code of Civil Procedure, it being immaterial that in plaintiff's suit there had been a co-defendant against whom the decree might have been separately executed; and [242] (2) that the order for sale of the villages under attachment was illegal and invalid in so far as it gave plaintiff the same rights against the proceeds of sale as he had by virtue of the mortgage against the property to be sold.

[R., 26 M. 179 (182) = 12 M.L.J. 276 (278); 8 O.C. 86 (89.]

APPEAL against the decree of Mr. Justice Boddam sitting on the original side of the High Court in civil suit No. 1 of 1898.

Suit for money. The late zemindar of the Karvetnagaram samasthanam and his eldest son, the present zemindar, had in 1878 mortgaged thirty-three villages as security for a debt. In 1880 the mortgagee (to whom plaintiff had since been appointed receiver) instituted a suit (No. 378 of 1880) in the High Court of Judicature at Madras against both the mortgagors, claiming the amount due on the mortgage and praying that, in default of payment, the mortgaged premises might be sold, and the proceeds applied in and towards the payment thereof. He obtained a

* Original Side Appeal No. 25 of 1898.

1898 SEP. 13. — APPELLATE CIVIL. — 22 M. 241 = 9 M.L.J. 179.

decree ordering payment of a sum of money. This decree was, on 22nd December 1880, ordered to be transmitted to the District Court of North Arcot for execution. In 1885 the mortgagee filed execution application No. 12 of 1885 in the District Court of North Arcot praying for attachment of the villages comprised in the mortgage deed, in execution of the amount decreed to be paid to him, and the villages were attached in pursuance of such application.

In December 1886 plaintiff was appointed receiver as representing the mortgagee in civil suit No. 148 of 1885 in the Madras High Court and was re-appointed in September 1896. On 12th December 1888 plaintiff, as such receiver, filed a petition praying that the said villages then under attachment might be ordered to be sold free from the mortgage, but that plaintiff might be given the same rights against the proceeds of sale as he, as such receiver, had against the property to be sold. An order was passed by the District Court in the terms of plaintiff's petition on 11th March 1889. In October 1895 certain of the villages comprised in the deed of mortgage, and so attached, were sold in pursuance of the said order of 11th March 1889, and under the attachment issued in the execution application No. 12 of 1885 already referred to, and the amount so realised was paid into the District Court of North Arcot.

In July, 1889, defendant obtained a decree in the District Court of North Arcot against the present zemindar, who had been defendant No. 2 in the mortgagee's suit already referred to **[243]** (No. 378 of 1880), and upon defendant's application the District Court of North Arcot allowed defendant a rateable distribution of the money realised by the sale of the villages attached, and sold pursuant to the order of 11th March 1889 and defendant was accordingly paid a sum based upon such a rateable distribution towards satisfaction of his decree. Plaintiff contended that defendant was not entitled to any such rateable distribution and claimed a refund of the sum so received on the grounds, *inter alia*, (1) that by virtue of the order of 11th March 1889 plaintiff had the same charge and rights on the sale proceeds of the villages sold as he had against the villages themselves; (2) that the decree in the suit by the mortgagee was against the late zemindar and his son whilst defendant's decree was against the son only.

Defendant claimed that he was entitled to the rateable distribution he had received out of the sum realised by the sale of the villages pursuant to the order of 11th March 1889, and contended that plaintiff was not entitled to the rights of a mortgagee in those properties, and did not by virtue of the said order of 11th March 1889 acquire the same charge and rights on the sale-proceeds of the villages sold as he had against the villages themselves, assuming the mortgage to be found valid and binding. And he claimed that the decree in the mortgagee's suit conferred no greater rights than the decree obtained by the defendant.

An issue was framed as follows:—"Whether the order of the District "Court of North Arcot allowing defendant a rateable distribution of the "money realised by the sale of the villages attached and sold under the "order of 11th March 1889 was wrong?"

It was held that the order was not wrong and that plaintiff was not entitled to recover anything from the defendant.

The plaintiff preferred this appeal.

Mr. *K. Brown*, for appellant.

The Advocate-General (Hon. *C. Arnold White*), for respondent.

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APPELLATE CIVIL.

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JUDGMENT.

SHEPHARD, OFFG. C.J.—The plaintiff in order to recover has to show that the defendant was not entitled to receive the money paid to him in the distribution of the proceeds of the sale which took place in 1895.

The first question is whether the judgment-debtor, against whom the defendant holds a decree, is the same within the meaning of Section 295 of the Code of Civil Procedure, as the judgment-[244] debtor against whom the decree in which the plaintiff is interested was passed. This latter decree, obtained in 1880, was made against the late zemindar and his son, the present zemindar. In 1884 the father died, and in 1889 the defendant obtained a decree against the present zemindar. Meanwhile, in December 1888, application for execution of the decree of 1880 was made in the District Court of North Arcot on behalf of the plaintiff. It was stated therein that the late zemindar was dead, that the present zemindar was his legal representative, and that the mortgaged property of which sale was required was then enjoyed by the present zemindar. No special application and no special order seem to have been made under Section 234 of the Code of Civil Procedure. No attempt was made to realize the property as assets of the deceased zemindar. It was simply the property of the present zemindar, one of the judgment-debtors, that was to be sold.

Under these circumstances I am clearly of opinion that Section 295 of the Code of Civil Procedure applies. The only judgment-debtor under the decree of 1880 with whom we are concerned is the individual who is judgment-debtor under the other decree.

It is immaterial that in the first suit he had a co-defendant against whom the decree might have been separately executed. It seems to me a mistake to say that there is a conflict between *Shumbhoo Nath Poddar* v. *Luckynath Dey*(1) and *Deboki Nundun Sen* v. *Hart* (2). Farran, J., in *Nimbaji Tulsiram* v. *Vadia Venkati* (3) shows how they may be reconciled, and I adopt his statement of the law.

The next contention on behalf of the appellant is that in consequence of the order of the District Judge, dated 11th March 1889, directing that the sale be made free of the mortgage, and that the receiver should have the same rights against the proceeds as against the property, the case is one in which the proviso *(b)* to Section 295 of the Code of Civil Procedure comes into force. Accordingly no order for rateable distribution ought to have been made. If the order of 11th March 1889 was a valid and proper order, this contention must be sound. As between the judgment-debtor and the purchasers the order may be conclusive. The sale which took place in pursuance of it has not been questioned by either of them and [245] cannot be questioned in the present suit, because neither the purchasers nor the judgment-debtor are before the Court. The sale is an admitted fact, but it does not follow that the defendant is bound by the terms of the order under which the sale was effected. If those terms instead of being embodied in an order had been made the subject of a mere agreement between the decree-holder and the judgment-debtor, it is plain that the other judgment-creditors would not have been prejudiced thereby. They cannot by any such agreement be deprived of the benefit of the provision which Section 295 of the Code of Civil Procedure makes for their protection. Seeing that the order was entirely illegal being made

(1) 9 C. 920. (2) 12 C. 294. (3) 16 B. 683.

in contravention of the 99th section of the Transfer of Property Act, I think that those terms of it of which the plaintiff seeks to take advantage can have no other force than they would derive from the agreement of parties. If the plaintiff had not possessed a mortgage interest, the order for sale omitting the terms in question would have been a legal one. What the defendant asks is that he should not be in a worse position than he would be in if such a legal order had been made. Such terms of the order as are based on the existence of the plaintiff's mortgage were, according to the defendant's contention, terms which the District Court had no power to impose, and therefore should not be considered to have any judicial force. In my opinion this is the right view of the matter, and the order of the 11th March 1889, in so far as it recognizes the plaintiff's mortgage, is not valid or binding as against the defendant. In this view of the case it is unnecessary to consider whether proviso (*b*) to Section 295 of the Code of Civil Procedure, which was enacted before the Transfer of Property Act came into force and applies to moveable as well as immoveable property, affects the case of a mortgage held by the decree-holder himself; nor is it necessary to consider the question whether the remedy on the mortgage was lost by limitation or by the fact that a suit had previously been brought upon it.

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For the reasons already stated I think the suit was rightly dismissed, and I would dismiss the appeal with costs.

MOORE, J.—I concur.

Wilson & King—Attorneys for appellant.

Branson & Branson—Attorneys for respondent.

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22 M. 246 = 2 Weir 625.

[246] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.

VENKATAKRISHNA PATTER (*Counter-petitioner*), *Petitioner v.* CHIMMUKUTTI (*Petitioner*), *Respondent.** [29th March, 1899.]

Criminal Procedure Code—Act V of 1898, *Section* 488—*Usage in Malabar—Order for maintenance of child—Marumakkatayam law as observed by Nayar community.*

The father of a child born during the continuance of the form of marriage known as sambandham, under the Marumakkatayam law as observed by the Nayar community in Malabar, is liable to have an order made against him for its maintenance under Section 488 of the Code of Criminal Procedure.

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the order of R. E. Holland, Acting Head Assistant Magistrate of Malabar, in miscellaneous case No. 41 of 1898.

The respondent had applied under Section 488 of the Criminal Procedure Code for an order against the petitioner for the maintenance of her child, of which she alleged he was the father. In her evidence she said that the petitioner had had sambandham with her on 15th Edavom, 1069, until 30th Magarom, 1073: that she had one child by him; that it had been born three years previously ; that the sambandham was over ; that the

* Criminal Revision Case No. 52 of 1899.

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petitioner did not pay for the child's maintenance; and that she had no other means. The Acting Head Assistant Magistrate, after hearing other evidence, believed the respondent's claim and ordered the petitioner to pay Rs. 5 a month to the respondent for the child's maintenance. Against that order the petitioner presented this petition on the grounds, among others, that, since the child belonged to a Marumakkatayam family, the father of it was not legally liable for its maintenance; that Section 488 of the Criminal Procedure Code could not supersede the usages and customs of the class to which the parties belonged; that the provisions of Section 488 are intended to provide against vagrancy, and the tarwad being legally bound and in a position to maintain the child, the section did not apply.

[247] *Sundara Ayyar* and *Venkataramana Ayyar*, for petitioner.

Govindan Nambiar, for respondent.

JUDGMENT.

We have no doubt but that the Magistrate believed the woman and found that the petitioner before us was the father of the child. He is therefore liable, as ruled by this Court in *Ayya Patter* v. *Kaliani Ammal*(1).

We dismiss the petition.

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22 M. 247 N = 2 Weir 624.

(1) Criminal Revision Case, No. 338 of 1893 (unreported). In this case the petitioner in the Magistrate's Court had applied for an order under Section 488 of the Code of Criminal Procedure, directing the counter-petitioner to pay her a monthly allowance for the maintenance of her child aged two years and three months, of which she alleged that the counter-petitioner was the father. In defence, the counter-petitioner denied his liability for maintenance, the petitioner being a woman of the Nayar caste. The Acting Head Assistant Magistrate referred to the petition as the first which had come to his notice of a woman of the community referred to claiming that the provisions of Section 488 should be put in force on behalf of her child; he therefore heard a considerable amount of evidence regarding the customs of that community, which he summarised as follows:—

"The recognised form of marriage among Nayars is known as 'sambandham.' A "Brahmin may have sambandham with a Nayar woman in the same way in which "a Nayar can have it with a Nayar woman. Practice seems to vary in regard to the "residence of the wife.

"Apparently a custom is gaining ground akin to that prevailing in North Malabar, "according to which the wife is expected to live in the husband's house, but this is "certainly not the usual practice. The sambandham can be dissolved at the will of "either party, but, during its existence, the woman is expected to be faithful to her "husband. In regard to the maintenance of the wife and children, in all the cases "in which they live with the husband or father, the latter undertakes the liability of "maintaining them; but, when they live in their own tarwad house, the husband is "expected to give the extra expenses of his wife such as clothing, &c. The education "of the children appears to be regarded as one of the duties of the father, but, in some "cases the expense is shared between the father and the karnavan of the tarwad."

This being the recognised form of relationship among the Nayars, he held that child born during its continuance must be presumed to be the child of the man who was received and recognized as the husband; and on the evidence he found that the child for which maintenance was claimed was the child of the counter-petitioner. In considering the question of counter-petitioner's liability under Section 488 of the Criminal Procedure Code, he overruled the objection that an order under that section would affect the Marumakkatayam law as observed by the Nayar community. With reference to the words "unable to maintain itself" in the section, it was contended that the maintenance of the child being a charge upon the tarward property, it was a matter for inquiry if the tarward funds were insufficient for its support, and that the father's liability for maintenance could only arise if they were shown to be so insufficient. Having heard evidence on this point, the Acting Head Assistant Magistrate found that if the means of the tarwad had anything to do with the liability of the father, the tarwad was too poor to take the responsibility of supporting the child. He, however, construed the phrase "unable to maintain itself" to mean "unable to earn its own livelihood." In the result he held the counter-petitioner liable to [248] maintain the child and accordingly made an order for the payment by him of Rs. 3 a month.

22 M. 248.

1898 Nov. 11. — APPELLATE CIVIL. — 22 M. 248.

[248] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

KUMARASAMI PILLAI (*Defendant*), *Appellant v.* PRESIDENT, DISTRICT BOARD OF TANJORE (*Plaintiff*), *Respondent.**
[11th November, 1898.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 110—*Rent Recovery Act* (*Madras*) —*Act VIII of* 1865, *Section* 10 —*Suit to recover arrears of rent—Suit to enforce acceptance of patta pending—Time from which period of limitation is computed.*

The cause of action, with reference to limitation, in a suit for rent, accrues on the date on which the rent is payable by custom or contract, irrespective of whether patta has been tendered or a suit to enforce acceptance of patta under the Rent Recovery Act (Madras), 1865, is pending.

[R., 27 M. 241 (F.B.)=14 M.L.J. 67.]

SECOND appeal against the decree of F. H. Hamnett, Acting District Judge of Tanjore, in appeal suit No. 519 of 1896, modifying the decree of K. Krishnama Chariar, District Munsif of Kumbakonam, in original suit No. 232 of 1895.

Suits by the District Board of Tanjore against two of its tenants for the recovery of the rents alleged to be severally due by them for faslis 1301 and 1302. Defendants having refused to accept the pattas tendered them for the above faslis, summary suits had been brought against them for compelling acceptance of the pattas and decrees were obtained. Cause of action was alleged to [249] have arisen on the dates of the said decrees, respectively. Defendants contended that the cause of action for fasli 1301 had arisen on the date when the rents were actually payable for that fasli, which date was more than three years before suit; and that the claim in respect of fasli 1301 was therefore barred by limitation. The District Munsif upheld this objection, and, relying upon *Sriramulu* v. *Sobhanadri Appa Rau* (1), held that the claim for fasli 1301 was barred by limitation. On the rest of the claim he awarded Rs. 60-8-0. On appeal this decree was modified by the Acting District Judge who directed the defendant to pay plaintiff Rs. 476-6-0 in addition to the Rs. 60-8-0, awarded by the Lower Court. Referring to *Sriramulu* v. *Sobhanadri Appa Rau* (1), he considered that decision to have been very generally misunderstood by the Lower Courts in that district; that both the Judges had clearly ruled that the right to sue began only after tender of a proper patta; and, according

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Against that order the counter-petitioner presented this petition, on the grounds, among others:—that Section 488 of the Criminal Procedure Code did not apply to the case; that taking the usage and custom of Nayars into consideration it could not be held to be proved that the counter-petitioner was the father of the child; that there could be no presumption that a child born during a sambandham was the child of the sambandhakaran; and that the tarwad being according to the law and custom bound to maintain all the children of the family, no order for maintenance could be made against the father under Section 488 of the Criminal Procedure Code.

The Court (COLLINS, C.J., and SHEPHARD, J.) on the 20th September 1893 delivered the following judgment:—"As the facts are found, there is no doubt that the "order is right. There is no foundation for the suggestion that the law enacted by the "Code does not apply to Malabar. The petition is dismissed."

[N.B.—This case has been followed in 22 M. 246 and referred to in 19 M. 461.—ED.]

* Second Appeal No. 1787 of 1897.

(1) 19 M. 21.

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to the principles enunciated in that case, limitation in the present suits only began to run from the dates of the judgments in the suits under Section 10 of the Rent Recovery Act (Madras), 1865. He held that the suits were not time barred for fasli 1301.

The defendant preferred this second appeal.

Rangacharyar, for appellant.

Pattabhirma Ayyar, for respondent.

JUDGMENT.

It has been repeatedly held that the cause of action with reference to limitation in a suit for rent, like the present, accrues on the date on which the rent is payable by custom or contract, irrespective of whether patta has been tendered or a suit to enforce acceptance of patta is pending; *Sriramulu* v. *Sobhanadri Appa Rau* (1), *Rangayya Appa Rau* v. *Venkata Reddi* (2). [250] and *Paramasiva Goundan* v. *Kandappa Goundan* (3).

We are unable to agree with the District Judge that the present case is distinguishable from the first of the above cases. No doubt the learned

(1) 19 M. 21.

22 M. 249-N.

(2) Referred Cases Nos. 11 and 13 to 136 of 1893 (unreported). The judgment of PARKER and SHEPHARD JJ., in this case was delivered on 16th January 1895 as follows:—"The suits are brought in 1893 to recover rent due for the faslis ending June 1888 and 1889. *Prima facie* they are barred by the Act of Limitation, and the contention that the cause of action was suspended during the pendency of proceedings to enforce the acceptance of pattas is one which has been admittedly overruled in previous decisions. But it was argued for the plaintiff that the provisions of Section 72 of the Rent Recovery Act had been overlooked, and that the effect of that section was to give the landlord a fresh right of action against the tenant. We do not think that the section bears this construction. It declares that a copy of the judgment shall be of the same force and effect as a muchalka executed by the tenant. Under the muchalka the obligation would be to pay rent in the fasli to which the muchalka relates, and under the judgment there can be no other obligation. It is an apparent hardship for the landlord, that he should, after succeeding in compelling his tenants to accept pattas, be unable to recover his rent. But the landlord was at liberty to institute a suit before the other proceedings were concluded. His proper course was to file such a suit, and if necessary to have the hearing adjourned until the disposal of the other proceedings between him and the tenants. Following the decision of this Court we think the question referred must be answered in the negative. We make no order as to costs."

[F., 22 M. 248; R., 27 M. 143 (147) (P.C.) = 31 I.A. 17 = 14 M.L.J. 1 = 6 Bom. L. R. 241 = 8 C.W.N. 162 = 8 Sar. P.C.J. 617.]

22 M. 250-N. = 8 M.L.J. 201.

(3) Second Appeal No. 1091 of 1897 (unreported). On 30th August 1898 the Court (SUBRAMANIA AYYAR and BENSON, JJ.) delivered judgment in this case as follows:—"The real question for decision is whether the suit for recovery of rent for fasli 1301 is barred. It is not correct to say that the landlord's right to the rent accrues only after exchange of patta and muchalka, or tender of patta. The right of the landlord to the rent is a right existing prior to, and independent of, the written engagements prescribed by the Rent Recovery Act. The exchange of patta and muchalka or tender of patta is a condition imposed by law as a necessary preliminary to the filing of a suit, but does not affect the accrual of the cause of action for purposes of limitation in a suit like the present for arrears of rent. (See *Coburn* v. *Coledge*, (1897) 1 Q.B. 702.) Such cause of action accrues when the rent becomes payable, according to contract or usage. It was for the plaintiff to show that the rent became due within three years prior to the bringing of his suit. He has not attempted to do so. As the defendants pleaded limitation in their written statement the plaintiff ought to have called evidence to prove the facts necessary to show that his suit was in time. Having failed to do so, we cannot at this stage allow him to remedy the defect. We, therefore, dismiss the second appeal with costs."

[F., 22 M. 248; Appr., 10 M.L.J. 26 (27).]

Judges in that case referred to the patta as correct, but whether it was correct or not is immaterial with reference to the question as to when the rent becomes due. In the present case therefore the claim for the rent for fasli 1301 must be held to be barred by limitation. The claim except as regards road-cess and the rent for punja is clearly barred, as it appears on the face of the plaint that the cause of action accrued before the end of the fasli. As regards road-cess and punja it is urged that they became due only at the end of the fasli, *viz.*, on the 30th June 1892, *i.e.*, within three years of the suit. No such allegation however was made or was proved in the Lower Courts, and it is inconsistent with the case placed before the District Munsif.

We must therefore hold that the entire claim is time-barred, and reversing the decree of the Lower Appellate Court we must restore that of the District Munsif with costs in this and in the Lower Appellate Court.

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22 M. 251.

[251] APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Moore.

BOYSON AND OTHERS (*Defendants*), *Appellants v.* DEANE AND ANOTHER (*Plaintiffs*), *Respondents.** [9th and 21st September, 1898, and 7th February, 1899.]

Specific Relief Act—Act I of 1877, *Section* 54—*Injunction—Remedy in damages.*

Under the Specific Relief Act, 1877, Section 54, the Court may grant a perpetual injunction against a defendant who invades or threatens to invade a plaintiff's right, in cases there specified, and, *inter alia*, when the invasion is such that pecuniary compensation would not afford adequate relief. The rule so laid down differs from the rule upon which the decisions are based in English law. In the latter the right to an injunction is a *prima facie* right to which a plaintiff is entitled on proof that material injury has been sustained, provided that no circumstances are disclosed to deprive him of that *prima facie* right. Under the Specific Relief Act an injunction is not to be given when the remedy in damages is considered adequate.

[R., 36 M. 11 (13) = 11 Ind. Cas. 642 = 21 M.L.J. 742 = 10 M.L.T. 121 = (1911) 2 M.W.N. 89 ; 9 Ind. Cas. 417 = 21 M.L.J. 313 = 9 M.L.T. 383 = (1911) 1 M.W.N. 251 (255); 12 Ind. Cas. 635 = 22 M.L.J. 62 (65) = 10 M.L.T. 473.]

APPEAL against the decree of Mr. Justice Boddam sitting on the original side of the High Court in civil suit No. 284 of 1897.

Suit for the removal of a certain building and for an injunction. Plaintiffs had enjoyed as an easement and without interruption for more than twenty years the access and use of light and air into certain windows. Defendants had, it was alleged, largely diminished the amount of light and air to which plaintiffs were entitled, by raising a boundary wall between the premises of the plaintiffs and defendants ; and it was intended, the plaint alleged, to still further raise the said wall and also to build other walls and erect buildings. Plaintiffs claimed that the injury to their property was such that injunction, and not damages, was the proper remedy for the Court to award. Defendants denied that any amount of light and air to which plaintiffs were entitled in respect of the said

* Original Side Appeal No. 16 of 1898.

1899 FEB. 7. — APPELLATE CIVIL. — 22 M. 251.

windows had been at all diminished by the defendant's buildings or that such buildings had in any way caused substantial damage to the plaintiffs in respect of the said windows and denied any present intention of further raising the height of the said buildings; and they submitted that if the plaintiffs were entitled to any relief, damages [252] would be a sufficient remedy. The third issue was:—"Whether the plaintiffs are entitled to "an injunction or to any and what damages." On this issue the judgment of the Court was as follows:—

"I have found that there has been a material disturbance of the "plaintiff's easements to the right to the free passage of light and air to "the windows and openings mentioned in the plaint except H1, causing "substantial damage to the plaintiffs, as it interferes with their physical "comfort and prevents them from carrying on their accustomed business as "beneficially as they had done previous to the erection which caused the "disturbance. This would entitle the plaintiffs to compensation, and the "only question is whether I ought, in the circumstances, to hold that "compensation in money damages is sufficient, or whether I ought to "grant a mandatory injunction. Such an injunction may be granted where "there exists no standard for ascertaining the actual damage caused or likely "to be caused by the invasion and also where the invasion is such that "pecuniary compensation would not afford adequate relief.

"I am of opinion that (as the plaintiffs' evidence is entirely uncon-"tradicted) this case comes within the latter of the above alternatives, and "having regard to the conduct of the defendants throughout, particularly "the way in which, despite protests, they have continued to build to the "injury of the plaintiffs' admitted ancient lights, apparently hurrying on "these building operations in the belief that, once erected, they would pre-"vent the plaintiffs from getting anything but pecuniary damages, I think "I should not be doing my duty if I did not hold that the plaintiffs are "entitled to a perpetual injunction restraining the defendants from continu-"ing to interfere with the plaintiffs' right to the free passage of light "and air to their windows H_2, and H_3 and J_1 and J_2 and to an order direct-"ing that the defendants at once remove so much of their buildings as "interfere with the plaintiffs' right to free passage of air and light to H_2, "H_3 and J_1, J_2 in the plaint mentioned." A perpetual mandatory injunction was granted.

The defendants preferred this appeal.

Mr. *E. Norton* and Mr. *J. B. M. Ryan*, for appellants.

Mr. *K. Brown* and Mr. *R. A. Nelson*, for respondents.

JUDGMENT.

SHEPHARD, OFFG. C.J.—The only part of the decree with which we are concerned is that which relates to the windows marked H_2, H_3, and J_1, J_2, in regard to which windows a perpetual [253] injunction has been given. The learned Judge found that the light coming through the two windows upstairs had, owing to the defendants' building, become a reflected light instead of a pure and true light, that the light at the windows below was materially affected, and that the plaintiffs were not able to carry on their business as conveniently as they did before the obstruction was erected. If the damage to the plaintiffs had been confined to an alteration of the character of the light without any diminution of the quantity of light reaching the rooms lit by the four windows in question, I do not think the plaintiffs would have been entitled to any relief.

Such authority as there seems to be on the subject goes to show that a complaint of disturbance of an easement in respect of ancient lights is not established by proving that the light has in consequence of the defendant's acts become glaring or reflected (*Lazarus* v. *Artistic Photographic Company* (1), *Lanfranchi* v. *Mackenzie* (2)), and this, if I may say so, appears to be the reasonable view of the matter. The point is of importance in this case because the gist of the plaintiffs' complaint is that now, or rather when the building had reached its full height, they got a reflected light which was not suitable for the business of sampling indigo. I cannot help thinking that if the complaint had not been made the learned Judge would have contented himself with giving relief in the way of damages. So far as regards the upper windows, though the evidence is scanty, there can be little doubt that at certain times of year or certain hours in the day a diminution of light must be caused by a building stretching out at right angles to the line of the plaintiffs' house and considerably overtopping their windows. Still more must this be the case with regard to the windows below, as to which, moreover, the evidence is more distinct. In point of air, too, the plaintiffs must have suffered to a certain extent. It was hardly denied by the defendants' learned counsel that some compensation was due to the plaintiffs. But on their behalf it was strenuously argued that no remedy except by way of injunction would be efficacious. The question must be decided with reference to the tests prescribed in Section 54 of the Specific Relief Act. Assuming that the plaintiffs are entitled to compensation, the Court may grant a perpetual injunction in respect of an invasion of a right to, or **[254]** enjoyment of, property when the invasion is such that pecuniary compensation would not afford adequate relief.

This test is in practice a difficult one to apply. On the one hand it may be said that there can be no disturbance of an easement on which a pecuniary value cannot be placed because it is always possible to ascertain the difference in the selling value of the property brought about by the obstruction of which complaint is made. On the other hand, if the phrase means "such a compensation as would, though not in specie, in "effect place the plaintiffs in the same position in which they stood before," it would, as observed by Farran, J., be difficult to predicate of any material obstruction to ancient lights that pecuniary compensation could bring about the result (*Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai* (3).

Only in the case in which the money might be spent in the structural alteration or re-arrangement of the premises could that result possibly be produced. The question really comes to be one of degree. At the one end of the scale is the case in which the plaintiffs' building will be rendered useless, unless the proposed building is stopped. At the other is the case in which diminution of light is comparatively small though still substantial. If I may take *Martin* v. *Price* (4) as a statement of the English law on the subject I think it must be admitted that it is different from the law we have to administer here under the Specific Relief Act and the Easements Act; see *Dhunjibhoy Cowasji Umrigar* v. *Lisboa* (5) and *Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai* (3). In *Martin* v. *Price* (4) the evidence was to this effect:—The plaintiff's house standing on ground higher than the level of the houses opposite

(1) [1897] 2 Ch. 214. (2) L.R. 4 Eq. 421. (3) 18 B. 474 (488).
(4) [1894] 1 Ch. 276. (5) 13 B. 252.

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faced a street from 35 to 37 feet wide: opposite was a house having an elevation of 37 feet and a frontage of 77 feet. For that house defendant proposed to substitute one having a frontage of 27 feet and a height of 62 feet. Kekewich, J., having regard, among other things, to the term for which plaintiff held, gave judgment for £120 damages and refused an injunction. The Court of appeal held that as the plaintiff had sustained material injury he was entitled to an injunction in the absence of proof of circumstances depriving him of the *prima facie* right. No reference was made to [255] the test prescribed by the Specific Relief Act. According to that decision the rule of English law is the converse of the rule prevailing here. There the right to an injunction is the *prima facie* right: here an injunction is not to be given when the remedy in damages is considered adequate. For a statement of the law in terms more consonant with that which we have to administer I would refer to Lord Westbury's judgment in *Jackson* v. *Duke of Newcastle* (1). This case, decided in 1864, has, with reference to another point, been disapproved in later cases. With regard to that other point the Indian Legislature seems to have followed it nevertheless, and it may well have been present to their minds when the Specific Relief Act was being framed. See Michell's Law of Easements, page 234.

In the present case I am of opinion that the damage proved is comparatively small, and is very far short of rendering the plaintiffs' premises useless. There is no evidence as to the value of the property, but it certainly cannot be assumed that the depreciation caused by the darkening of the windows would amount to any considerable percentage of the selling value of the house. Again, and this I think is most important, no attempt has been made to prove that the plaintiffs cannot, at a moderate expense, so alter or rearrange their premises as to neutralize the effect of the defendant's building. If this is possible, I do not see how the plaintiff's can say that compensation in money will not afford them adequate relief.

For these reasons I think the injunction must be dissolved and if the plaintiff desire it there must be an enquiry as to the amount of damages.

MOORE, J.—I concur.

[An enquiry as to the amount of damages was asked for and ordered, and a finding was duly returned.]

Barclay, Orr & David.—Attorneys for appellants.

King & John Josselyn.—Attorneys for respondents.

22 M. 256.

[256] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

VENKATA CHANDRAPPA NAYANIVARU (*Plaintiff*), *Appellant v.* VENKATRAMA REDDI AND OTHERS (*Defendants*), *Respondents.**

[3rd February, 20th and 21st July and 3rd August, 1898.]

Civil Procedure Code—Act XIV of 1882, *Sections* 12, 48, 244—*Proceeding in execution—Pending suit.*

A suit, according to Section 48 of the Code of Civil Procedure, must commence with a plaint, and a proceeding which is capable of terminating in a decree or

* Appeal No. 110 of 1897.

(1) 3 De. G.J. & S. 275 (284).

an order having the force of a decree cannot, on that ground alone, be deemed to be a suit within the meaning of the Code, if it has not commenced with a plaint. Such a proceeding is, in strictness, only a proceeding in a suit :

Semble : that a proceeding under Section 244 is not a suit within the meaning of Section 12 of the Code of Civil Procedure.

[R., 14 C.P.L.R. 100 (102); 17 C.P.L.R. 178 (190) ; 1 S.L.R. 86 (87) (F.B.).]

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in original suit No. 35 of 1896.

This suit having come on for settlement of issues, the defendants objected that it was not maintainable because the plaintiff had previously put in a petition under Section 244 (*c*) of the Code of Civil Procedure in which the same relief had been claimed. It was contended that the plaintiff must proceed either by petition or by suit, and could not carry on both at the same time. The petition in question (miscellaneous petition No. 448 of 1896) had been filed on 29th July 1896, and the suit on 17th September 1896. The petition was posted for final hearing on 27th November and the suit to the same day for settlement of issues. The facts which gave rise to both suit and petition were as follows :—A suit had been brought by three plaintiffs on a mortgage, and a decree obtained, which was executed, and a sale of the mortgaged lands ordered. Pending sale, the defendant died and his representative, then a minor, was brought on the execution proceedings as representing the judgment-debtor, and was represented in them by a legally appointed guardian, appointed by the Court of Wards. **[257]** After various objections, raised on behalf of the minor, the mortgaged property was sold, the purchasers being one out of the three decree-holders and two persons who were not decree-holders. The sale was duly confirmed and possession given to the purchasers. Upon the minor attaining his majority, he filed miscellaneous petition No. 448 of 1896 already referred to as a petition in the course of execution of the suit, making the three decree-holders and the two purchasers who were not decree-holders counter-petitioners. The petition alleged that the decree was only a money decree which declared a mortgage lien, that it was executed by attachment and sale of the mortaaged property, that such attachment and sale were void under Section 99 of the Transfer of Property Act, and that such void sale occurred while petitioner was a minor, and asked, under Section 244, Civil Procedure Code, and Section 99 of the Transfer of Property Act, that the sale might be set aside and the property re-delivered to the petitioner with mesne profits. The plaint alleged the same facts, and the relief prayed for in the plaint and in the petition was identical, though the plaint alleged additional grounds upon which that relief should be granted. The petitioner in miscellaneous petition No. 448 of 1896 was plaintiff, and the counter-petitioners therein were impleaded as defendants, in this suit.

The District Judge held (1) that the petition under Section 244 (*c*), Civil Procedure Code, was a suit for the purposes of Section 12, and (2) that the matter in the suit being directly and substantially in issue in the petition the suit could not be tried whilst the petition was pending for trial ; and he rejected the plaint.

The plaintiff preferred this appeal.

Hon. *Bhashyam Ayyangar* and *Gopalasami Ayyangar*, for appellant.

Mr. *K. Brown* and *Pattabhirama Ayyar*, for respondents.

JUDGMENT.

The first point taken on behalf of the appellant was that a proceeding in execution to which Section 244 of the Code of Civil Procedure applies

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is not a suit within the meaning of the Section 12 of the Code. No doubt there is authority for the view that the term suit is a very comprehensive one, that it is understood to apply to any proceeding in a Court of Justice by which an individual pursues that remedy in a Court of Justice which the law affords him, that the modes of proceeding may be various, but that if a right is litigated between parties in a Court [258] of Justice the proceeding by which the decision of the Court is sought is a suit. Moreover in *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog* (1) cited by the learned counsel for the respondents, Westropp, C.J., and Melvill, J., seemed inclined to hold that a proceeding in execution, in which an order under Section 244 is passed, being a proceeding which terminates in a "decree," is a suit within the meaning and intention of the Code of Civil Procedure. But on the other hand some observations of the Judicial Committee in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (2) would seem to imply that a proceeding under Section 244 of the Code of Civil Procedure is not a suit. A suit, according to Section 48 of the Code, must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree could not on that ground alone be deemed to be a suit within the meaning of the Code if it had not commenced with a plaint. Such a proceeding in strictness is only a proceeding in a suit. This is apparently the view of the Legislature, judging by the explanation added in 1892 to Section 647 of the Code. It would therefore seem more correct to hold that a proceeding under Section 244 is not a suit within the meaning of Section 12. However we do not wish to express a decided opinion on the point, since, even if the view just expressed be erroneous, the decision of the District Judge must, with reference to the other point taken on behalf of the appellant, be set aside and the suit remanded for trial, at all events in so far as it is based on the allegation that the debt for which the sale impeached took place was not such as to bind the plaintiff under the Hindu Law. This ground was not raised in the previously instituted execution proceedings which was relied on as precluding the Judge under Section 12 from trying the present suit. The identity of matter, directly and substantially in issue, required by that section, being thus wanting in the present instance, the Judge should have not dismissed the suit. The Lower Court's decree is therefore reversed and the suit remanded for disposal according to law. The costs of this appeal will abide and follow the result.

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22 M. 259.

[259] APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

RANGASAMI PILLAI (*Plaintiff*), *Appellant* v.
KRISHNA PILLAI AND OTHERS (*Defendants Nos.* 1 *to* 14),
*Respondents.** [5th and 6th October, 1898.]

Civil Procedure Code—Act XIV of 1882. *Section* 43—*Whole claim in respect of cause of action—Mortgage—Redemption — Mortgage sued on not proved—Admissions by defendants of mortgage right —Subsequent suit on admissions.*

In a previous suit plaintiff had sued to redeem a kanom of 1859. The kanom not being established, the suit failed. At the time of bringing the suit, plaintiff

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* Second Appeal No. 1609 of 1897.

(1) 6 B. 54 (62). (2) 11 I.A. 37 (41).

was aware that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. On the plaintiff now bringing a suit based on the admissions referred to: | 1898 Oct. 6.

Held, that plaintiff could and should in the previous suit have based his claim in the alternative on the admissions instead of confining that suit to the specific mortgage which he failed to prove. Having chosen to take the course which he did, he was barred from bringing a fresh suit by Section 43 of the Civil Procedure Code, as it must be taken that he abandoned or relinquished his claim on the basis of the admissions when he brought his first suit on the kanom specifically alleged.

APPELLATE CIVIL.

22 M. 259.

[Overruled, 29 M. 153 (154) (F.B.) = 16 M.L.J. 48; Diss., 28 M. 406 (409); N.F., 8 A.L.J. 47 = 9 Ind. Cas. 53 (54); R., 31 M. 385 (389); 17 C.P.L.R. 178 (182); 17 Ind Cas. 445 (465) = 23 M.L.J. 543 (575) = 12 M.L.T. 500 = (1913) M.W.N. 1 (26); Disc., 26 M. 760 (777) = 13 M.L.J. 448 (463).]

SECOND appeal against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 621 of 1896, reversing the decree of B. Cammaran Nayar, District Munsif of Palghat, in original suit No. 203 of 1895.

In a suit to redeem a kanom the plaint alleged that defendants held the property on a kanom from plaintiff's predecessor in title; that plaintiff had acquired the equity of redemption in 1856; that the kanom was renewed in 1859; that plaintiff had brought a suit in 1892 for redemption of the renewed mortgage of 1859, which suit was dismissed on the ground that he had failed to prove the mortgage; that on appeal the judgment was reversed on the ground that, though the mortgage of 1859 was not proved, another mortgage had been established; but that decision was reversed on second appeal on the ground that plaintiff having failed to prove the mortgage on which he had sued should not be permitted to fall back on another mortgage. The [260] ground upon which plaintiff now based his suit was expressed by the District Judge to be as follows:—

"As I understand the nature of the suit, the plaintiff, having originally set up that the defendants were holding the plaint paramba on a kanom of 1859, executed in their favour by his vendors, and having failed to prove that kanom, has now filed the present suit, alleging that there is a previous kanom, whose date he was not in a position to give at the time he filed the plaint, and offering to redeem it.

In his previous suit plaintiff had filed certain exhibits which contained admissions of defendants being kanomdars under plaintiff's predecessor in title. The District Munsif found that the property was, in fact, held by defendants on kanom under plaintiff's predecessor in title; and that the equity of redemption was not time-barred. He decreed that plaintiff was entitled to redeem. The District Judge, on appeal, reversed the decree, holding that, in order to succeed, plaintiff was bound to allege and prove a specific mortgage, and that as he had not done so, he was not entitled to take advantage of the admissions of the defendants in order to make out a case for himself.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

Subramania Sastri, for respondents.

JUDGMENT.

The plaintiff in 1892 sued the defendants to redeem a kanom for Rs. 25 dated 1859. He failed to establish his mortgage, but the Lower Courts gave him a decree upon certain documents containing admissions that the

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defendants held as kanomdars under the plaintiff. In second appeal the High Court reversed the decrees of the Lower Courts and dismissed the plaintiff's suit, holding that a plaintiff failing to establish the mortgage on which the suit was based should not be allowed to fall back upon some other mortgage as to which admissions had been made in other proceedings, (*Krishna Pillai* v. *Rangasami Pillai* (1). Thereupon the plaintiff brought this suit claiming to redeem on a kanom the date and amount of which he was ignorant of and upon identically the same admissions as in the previous suit and got a decree in the Court of the District Munsif. The District Judge set the decree aside and dismissed the plaintiff's suit **[261]** on the ground that the plaintiff was bound to allege and prove a specific mortgage and the case comes before us in second appeal from this decision. We do not think that the District Judge was right in holding that unless the plaintiff alleged and proved a specific mortgage, he could not get a decree upon admissions made by the defendants. We think, however, that the plaintiff's suit was rightly dismissed as he was barred from bringing this fresh suit by Section 43 of the Code of Civil Procedure, as it must be taken that he abandoned or relinquished his claim on the real cause of action when he brought it on a false one. That there was only one cause of action, *viz.*, the right to redeem, is clear and the plaintiff, at the time of bringing his first suit, was aware of the extent of the admissions made by the defendants as they were contained in the documents put in by him and he could and should have sued in the alternative instead of confining his suit to the specific mortgage which he failed to prove. Having chosen to take that course he cannot be allowed to harass the defendants with fresh suits, to prevent which Section 43 of the Civil Procedure Code was passed.

The second appeal is dismissed with costs.

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22 M. 261=8 M.L.J. 196.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

MAYANDI CHETTI (*Plaintiff*), *Appellant v.*
OLIVER AND OTHERS (*Defendants*), *Respondents.**
[2nd and 9th August, 1898.]

Evidence Act—Act I of 1872, *Section* 92, *proviso* 4—'*Oral agreement*'—*Variation of terms of registered instrument.*

The lessor of certain land, held by the lessee under a registered deed of lease, agreed to a reduction in the rent. The agreement was not reduced to writing, but rent was thereafter paid and accepted at the reduced rate. On a suit being brought to recover arrears of rent at the rate reserved in the registered deed:

Held, that under Section 92, proviso 4 of the Evidence Act, an agreement to accept a reduced rent cannot be implied or inferred from the acts and conduct of the parties; and an unwritten agreement, if so implied, amounts to an oral agreement within the meaning of the proviso.

[262] The word 'oral' is used in Section 92, proviso 4, of the Evidence Act, in the sense of being not committed to writing, and the words 'oral agreement' in thats ection include all unwritten agreements, whether arrived at by word of mouth or otherwise.

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* Second Appeal No. 991 of 1897.

(1) 18 M. 462.

[F., 12 C.L.J. 439=8 Ind. Cas. 790 (791) ; 2 Ind. Cas. 160 (161) ; R., 26 M. 195 ; 32 M. 281 (282)=19 M.L.J. 280=5 M.L.T. 84 ; 13 C.L.J. 284 (286)=8 Ind. Cas. 47 ; 6 C.W.N. 60 (62); 129 P.W.R. 1908.]

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APPELLATE CIVIL.

22 M. 261=8 M.L.J. 196.

SECOND appeal against the decree of C. Venkoba Chariar, Subordinate Judge of Tanjore, in appeal suit No. 565 of 1896, affirming the decree of J. C. Fernandez, District Munsif of Negapatam, in original suit No. 445 of 1895.

Suit to recover arrears of rent. Plaintiff sued as trustee of two temples to recover arrears of rent due under a registered document (filed as Exhibit A in the suit), by which a permanent lease of a piece of land was created, which provided for payment, by the late Mr. Frank Oliver, of an annual rent of Rs. 106-4-0. The first defendant, widow of the deceased lessee, contended that the land was taken by her late husband for the purpose of establishing an emigration depot; that the depot had been abolished, and the land was no longer utilised for the purpose originally intended, and that in consideration of these facts the trustee of the temple had agreed to accept the reduced rent of only Rs. 50 from a certain date (namely, Fasli 1294), with the sanction of the devastanam committee. In support of this contention she relied on the evidence of one of the members of the devastanam committee, who had held office at the time of the alleged reduction, and on two documents (filed as Exhibits I and II in the suit). The first of these was a report by the then panchayat, setting out that, in consequence of the relinquishment of the emigration business, the lessee derived no income from the land and offered to pay a reduced rent of Rs. 50 per annum; and it bore an endorsement by the aforesaid member of the devastanam committee that in consideration of the altered circumstances the trustee should be empowered to receive rent at the said reduced rate. The document bore the signatures of two other members of the devastanam committee signifying their assent thereto, but recommending that a new lease deed, when prepared, should reserve to the temple authorities the right to cancel the same, should it appear that a greater income could be derived for the temple. The fourth issue framed was as follows:—"Whether it is open to first defendant to set up an oral subsequent agreement of this kind when the original lease was granted under a registered instrument?" Dealing with this issue the District Munsif said:—"The fact that no new rent-deed was taken from Mr. Oliver embodying **[263]** the new conditions laid down by the members who adopted the resolution referred to above, cannot, in my opinion, deprive the lessee of the benefit of the concession allowed to him . . . . The evidence shows that the lessee paid rent only at the reduced rent of Rs. 50, subsequent to the adoption of the resolution in question." And he found the alleged subsequent agreement to reduce the rent to be true, and gave judgment in accordance therewith. Plaintiff appealed on the grounds, *inter alia*, that oral evidence was inadmissible to vary the terms of Exhibit A, and that the modification of the terms of Exhibit A could not be deemed to be in writing.

The Subordinate Judge, in affirming the decree, held that Exhibit I was evidence of a contract to reduce the rent, and further that Section 92 of the Evidence Act was no bar to the validity of the said contract; and he gave effect to what he considered to be the real intention of the parties. He did not think it was open to plaintiff to set aside the reduction agreed upon, and in accordance with which for the previous ten years the reduced rent had been paid and accepted.

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The plaintiff preferred this second appeal.

Desikachariar, for appellant.

V. Krishnasami Ayyar, for respondent No. 1.

JUDGMENT.

The late Mr. Oliver, whom the respondents (defendants) represent, took in 1878 a lease of certain land vested in the temple represented by the appellant (plaintiff), under Exhibit A, a registered instrument, the annual rent reserved thereunder being Rs. 106-4-0. In 1886 Mr. Oliver requested the then trustee of the temple to agree to a reduction of the rent to Rs. 50 per annum. The trustee agreed accordingly, but the agreement was not reduced to writing. From that time up to the institution of this suit in 1895, Rs. 50 only were paid and accepted as the rent payable per annum. The Lower Courts in effect held that the respondents were not precluded by proviso 4 to Section 92 of the Evidence Act from proving the agreement to modify the terms of the registered lease in so far as the amount of rent was concerned. In supporting the decision of Lower Courts the learned vakil for the respondents contended, if we understood him correctly, that, in cases like the present, though no express oral agreement rescinding or modifying the terms of a written instrument could be proved, yet that an agreement to be implied from the acts and [264] conduct of the parties could be proved, and as, apart from the express agreement of 1886 between Mr. Oliver and the then trustee, an agreement to take rent at only Rs 50 might and ought to be inferred from the acceptance of rent at that rate for a period of about 10 years, the decree of the Lower Courts should be upheld. But we are unable to concur in the view that an unwritten agreement implied from the acts of the parties is not an oral agreement within the meaning of the proviso since we are of opinion that the word 'oral' therein is used in the sense of not committed to writing, and therefore the words 'oral agreement' cover all unwritten agreements whether come to by word of mouth or otherwise.

The decree of the Lower Courts must, therefore, be modified by allowing the plaintiff's claim according to the rate due under the registered lease (Exhibit A). In the circumstances of the case we direct the parties to bear their own costs throughout.

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22 M. 264.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

RANGASAMI REDDI AND OTHERS (*Defendants*), *Appellants v.* GNANA SAMMANTHA PANDARA SANNADHI (*Plaintiff*), *Respondent.** [8th, 9th and 11th August and 8th September, 1898.]

Ejectment—Defence of right of permanent occupancy—Onus of proof—Defence of special character.

In suits by the trustee of a temple to recover possession of certain lands with mesne profits, defendants set up in defence that they were absolute owners of the land in question, or, at least, were entitled to rights of permanent occupancy. In support of the latter contention they relied, *inter alia*, upon certain pymash documents, which contained the word *ulavadai* the use of which term, they contended, established the alleged right of permanent occupancy:

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* Second Appeals Nos. 496 to 507 of 1897.

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22 M. 264.

Held, (1) that, where the occupier of land resists a suit for ejectment by setting up a claim of a right of permanent occupancy, the *onus* of establishing such a right lies on the defendant inasmuch as by it he seeks to derogate from the ordinary incidents of property ; and

(2) that the right expressed by the term *ulavadai* (which means an act or right of ploughing or cultivating lands) cannot be assumed to be a permanent right.

[R., 25 M. 507 (510) ; 24 M L.J. 571 (589) = 13 M.L.T. 450 = (1913) M.W.N. 434.]

[265] SECOND appeal against the decree of C. G. Kuppusami Ayyar, Acting Subordinate Judge of Tanjore, in appeal suit No. 90 of 1896, affirming the decree of D. K. Virasami Ayyar, District Munsif of Shiyali, in original suit No. 139 of 1894.

Suits to recover possession of certain lands with mesne profits. Plaintiff was, in certain of the cases, trustee of the Sri Vythinathasami temple, the defendants being tenants holding lands under that temple. In the other cases plaintiff was trustee of the Sri Chattanadhasami temple, and the remaining defendants held under him. Plaintiff based his right to eject mainly on the terms of a number of muchalkas executed by certain predecessors of the defendants in 1830 to the then Collector of Tanjore, who was at that time in charge of the lands belonging to the Vythinathasami temple. The defendants contended that the lands belonged to them absolutely, and further, that independently of ownership they were in possession with rights of permanent occupancy, otherwise known as ulavadai kudi miras rights. The District Munsif found that plaintiff was owner, and that defendants were paying rent to him. On that finding plaintiff contended that, defendants being tenants from year to year, he was entitled to recover in the absence of any proof of right of occupancy in the defendants; and that the onus of proving rights of permanent occupancy must be on the defendants in a suit for ejectment, where plaintiff's title is admitted or proved. He cited *Achayya* v. *Hanumantrayudu*(1), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (2), *Appa Rau* v. *Subbanna* (3), and *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (4). The District Munsif held that, *prima facie*, it is for the defendants to prove the right of occupancy if plaintiff is found to be the owner ; but that there may be circumstances in a case which would throw on a plaintiff the burden of proving that the defendants are not tenants with occupancy rights, such as long possession at an unvaried rent ; and he referred on this point to *Krishnasami* v. *Varadaraja* (5). He found that the defendants had not discharged the burden of proof and decreed for the plaintiff. On appeal the Subordinate Judge also held that the onus of proving the occupancy right lay upon the defendants, and dismissed the appeal, holding that the existence of the alleged occupancy right had not been established.

[266] The defendants preferred this second appeal, on the ground, among others, that the *onus probandi* lay on the plaintiff, and they further contended that the use of the word *ulavadai* in certain pymash documents, which had been exhibited in the suit, established that the holder of the land therein mentioned had a permanent right of occupancy.

Sankaran Nayar, *Sadagopachariar* and *Krishnasami Ayyangar*, for appellants.

Hon. *Bhashyam Ayyangar*, *v. Krishnasami Ayyar*, *Sivarama Ayyar* and *R. A. Krishnasami Ayyar*, for respondent.

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(1) 14 M. 269. (2) 11 M. 77. (3) 13 M. 60.
(4) 22 C. 533 (542). (5) 5 M. 345 (358).

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22 M. 264.

JUDGMENT.

MOORE, J.—(after dealing with the facts):—A great deal has been said as to whether the onus of proving this alleged right of occupancy lies on the tenants or the burden of disproving it on the landlord. This question has been recently considered and decided by the High Court (Collins, C.J., and Muttusami Ayyar, J.) in a case which is in almost every particular identical with those now under consideration, and it was there laid down as follows:—"The claim of an occupancy right as overriding the "proprietor's right to cultivate his own land is of a special character, and "as such it is one which the party seeking to derogate from the ordinary "incidents of property is bound to establish. Of course the appellants "are entitled to the benefit of any presumption which may reasonably "arise from length of enjoyment and other special circumstances of the "case. The contention that mere length of enjoyment in the capacity of "tenants or purakudies irrespective of other circumstances is *prima facie* "proof of occupancy right, cannot be supported," (*Chidambara Pillai* v. *Tiruvengadath Ayyangar* (1)). What, therefore, has to be considered is how far the tenants have proved the permanent right of occupancy set up by them . . . . The documentary evidence produced to show the relations subsisting between the plaintiff and the four defendants to whom I have referred is very scanty. Certain pymash documents of fasli 1216 (A.D. 1807) have been produced (Exhibit A series), and an attempt has been made to found certain arguments on the wording of these documents.

On behalf of the appellants it is pleaded that the use of the word *ulavadai* in these pymash documents shows that the holder of the land there mentioned had a permanent right of occupancy.

[267] For the respondent it is maintained that the word *ulavadai* means simply "extent of cultivation" and that for example when we find in Exhibit A, purakudi Alagappen *ulavadai* followed by certain details as to extent of land and description of crops, it means that the purakudi was one Alagappen and that the extent of land cultivated by him was as there shown. This latter interpretation appears to me to be incorrect. The word used when extent of cultivation is referred to is "sagubadi." I should say that the pleader for the appellants is right in contending that the words purakudi Alagappen ulavadi mean that the purakudi Alagappen has an ulavadai right over the land mentioned, but I cannot hold that it has been proved that ulavadai means a permanent right of occupancy. In Wilson's Glossary, ulavadai is defined as: "the act or right of ploughing; the right to cultivate the lands." Such right, it is clear, cannot be assumed to be a permanent right.

Reference has been made to the decision in *Chockalingam Pillai* v. *Mayandi Chettiar* (2), and the ruling to be found there that the words "ulavadai mirasidars" used in certain deeds as describing the tenants denoted that they were persons with hereditary right to cultivate. There is, however, a great difference between ulavadai and ulavadai mirasidars. As regards the description of the cultivator in the pymash accounts as a purakudi or parapayir kudi, all that need be said is that the use of this word most certainly raises no inference that the tenant so described had a permanent right of occupancy, but, on the other hand, favours the contention that his tenancy was temporary. (Reference may be made to the definition of the word in Wilson's Glossary and to the papers on Mirasi Rights, pages 93, 96, 130, 137, 213 and 217). . . .

(1) Appeal No. 1 of 1886 (unreported). (2) 19 M. 485.

On the record as it stands, it must be held that the defendants have not proved the permanent right of occupancy set up by them. It must further be added that the Subordinate Judge has in paragraph 47 of his judgment held that these purakudis are not shown to have had occupancy right either by custom or otherwise, and that this finding would appear to be one of fact which cannot be questioned in second appeal.

For these reasons I hold that the four appellants above mentioned have failed to make good the case set up by them, and as their case is admittedly much stronger than that of the other appellants, all these second appeals must be dismissed with costs.

[268] SUBRAMANIA AYYAR, J.—The onus clearly lay on the appellants to prove that they possessed a permanent occupancy right. The Subordinate Judge, upon a careful and elaborate consideration of the whole evidence adduced by the parties, has held that the existence of such occupancy right has not been established. This conclusion is binding upon us. I agree that these appeals should be dismissed with costs.

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22 M. 268=8 M.L.J. 199.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

NARAYANAMMA AND OTHERS (*Petitioners Nos. 2 to 4*), *Appellants* v. RAMAYYA CHETTI (*Counter-Petitioner*), *Respondent.**
[23rd August, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 253—*Execution of decree against surety.*

A surety entered into a bond, undertaking to produce certain debt bonds in case the defendant in a suit should fail to produce them, or to pay the amount mentioned therein. Upon an application being made that execution should issue against the surety:

Held, that a bond so worded did not make the surety liable for the performance of the decree so as to bring the case within Section 253 of the Code of Civil Procedure and that the liability of the surety could not be enforced in execution.

APPEAL against the order of C. Venkoba Chariar, acting District Judge of Cuddapah, in civil miscellaneous petition No. 317 of 1897 (miscellaneous petition No. 465 of 1894 in original suit No. 16 of 1888).

During the pendency of a suit for partition, which was subsequently dismissed, the plaintiff applied for an order to the defendant to produce the debt bonds and family accounts. The defendant produced the bonds, which were returned to him upon one R binding himself, by his security bond, to produce the bonds in case the defendant failed to produce them, or pay the amount mentioned therein. R also undertook to lodge in Court any amount if collected by the defendant on the bonds. The defendant having died, the plaintiff applied by civil miscellaneous petition No. 465 [269] of 1894, asking for notice to issue to the surety to produce the bonds or their value. Upon hearing the petition the Court ordered that execution should issue for the amount that the surety had rendered himself liable for under his bond; but that order was set aside and on the matter coming on again for disposal, the District Judge held that the

* Appeal against Order No. 173 of 1897.

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surety bond was not worded in such a way as to make the surety liable for the performance of the decree or any part thereof. And inasmuch as it merely contained an undertaking by the surety to produce the bonds or pay their value in case of his failure to produce them, he held that Section 253 of the Civil Procedure Code was inapplicable. He therefore dismissed the application for summary process against the surety.

Petitioners Nos. 2 to 4 preferred this appeal.

Sundara Ayyar, for appellants.

Hon. *Bhashyam Ayyangar* and *Seshachariar*, for respondent.

JUDGMENT.

The wording of the bond does not in terms make the surety liable for the performance of the decree so as to bring the case clearly within the purview of Section 253, Civil Procedure Code. It is, however, contended for the appellant that Section 253 is applicable to all cases in which it may reasonably be inferred that the real intention was that the surety should satisfy the decree, notwithstanding that the bond does not expressly bind the surety to do so. As illustrations of such a liability, cases of security taken under Sections 479 and 485, Civil Procedure Code, but in which the bonds failed to clearly express the liability of the surety in the terms of the Code, were referred to. In such cases, no doubt, the circumstances under which the security was given, and the manifest object of taking the security might be properly considered. But the security in the present case was not taken under any of these provisions of the Code, and we are not in a position to say that the direct object of the Court was to provide for the satisfaction of the decree. Under the terms of the bond it was open to the Court to call upon the surety to perform his undertaking before any decree was passed and irrespective of any decree that was about to be passed. We therefore agree with the District Judge that the case does not fall within the purview of Section 253, and the liability of the surety cannot be enforced in execution.

We dismiss the appeal with costs.

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22 M. 270 (P.C.) = 3 C.W.N. 161 = 26 I.A. 16 = 7 Sar. P.C.J. 459.

[270] PRIVY COUNCIL.

PRESENT :

The Lord Chancellor of Ireland, Lord Hobhouse, Lord Macnaghten, and Sir R. Couch.

[*On appeal from the High Court at Madras.*]

ROBERT FISCHER (*Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*), *Respondent.*

ROBERT FISCHER (*Defendant*), *Appellant v.* ROBERT G. ORR AND ANOTHER (*Plaintiffs*), *Respondents.* [16th and 17th November and 10th December, 1898.]

Separate registration and assessment of a village alienated from a zamindari—Regulation XXV of 1802 (*Madras*), *Section* 8—*Assessment of Land Revenue Act* (*Madras*)—*Act I of* 1876—*Invalid order of Government Declaratory decree—Specific Relief Act—Act I of* 1877, *Section* 42—*Construction of agreement.*

By the effect of Sections 5 and 6 of the Madras Act I of 1876 the decision of the Collector, in a case within his jurisdiction, whether for or against separate

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registration of a portion alienated from a zamindari, when once duly sanctioned as provided by that Act, can only be questioned in a Civil Court.

Under Sections 7 and 8, the apportionment of the assessment may be appealed from the Collector to the Board of Revenue, and power is reserved to the Governor in Council to order re-adjustment of the separate assessment if fraud or material error should appear. Separate registration, on the other hand, is a matter of private right.

The grantee of the perpetual lease of a village, alienated thereby from a zamindari, sued for a declaration of the invalidity of an order of the Government, inasmuch as it directed the cancellation of the Collector's order, after sanction by the Board, for the separate registration of the village:

Held, that this declaration should be decreed. The objection that the suit was contrary to the law enacted in Section 42 of the Specific Relief Act, 1877, was not sustainable. No further relief could have been required by the plaintiff. The effect of the declaration itself, for which he had sued, would be sufficient to maintain the Collector's original order, which was valid in law, while the order of the Government directing its cancellation was not legal and was void. Nor was the suit defective for want of parties.

Another suit, heard on appeal with the above, having been brought by the lessees of the entire zamindari, against the same grantee, raised the question,—what was the obligation entered into by him in respect of payment of the revenue upon separate registration and separate assessment of the village. This [271] involved the construction of terms in the documents entitling the grantee to the village, and these, according to the plaintiffs, obliged him to pay a fixed sum to the zamindari:

Held, that he was only liable, after the registration and assessment, for burdens lawfully incident to the separate holding, and that they were to be discharged by direct payment by him to the Collector.

[R., 34 B. 676=12 Bom. L.R. 697=7 Ind. Cas. 945 (947); 39 C. 353 (373)=14 C.L.J. 552=16 C.W.N. 817 (829); 23 M. 385 (388); 17 M.L.J. 423 (425, 429).]

TWO appeals, consolidated, of which the first was from a decree (30th April 1896) of the High Court, affirming a decree (23rd July 1894) of the Subordinate Judge of Madura; the second was from another decree (30th April 1896) of the High Court reversing, on second appeal, a decree (19th December 1894) of the District Judge of Madura, who had reversed a decree (25th July 1894) of the Subordinate Judge (1).

In the first of these appeals the question was as to the finality of the order, as far as the executive administration was concerned, when approved by the Board of Revenue, made by the Collector of a District under the Madras Act I of 1876 (to make better provision for the separate assessment of alienated portions of permanently-settled estates) in regard to separate registration of a village alienated from a zamindari under Regulation XXV of 1802, Section 8. And the question related to there having been a specific remedy provided in the above Act for persons aggrieved by an order for such separate registration. There were also further questions decided as to the non-joinder of certain parties interested in the zamindari; and whether the claim preferred in the suit accorded with Section 42 of the Specific Relief Act, 1877.

In the second of these appeals the question was,—what was the obligation into which the grantee of the alienated village had entered in respect of the revenue, as between himself and the representatives of the entire zamindari interest, when the village should be no longer part of it, after the separate registration;—a question dependent on the construction of the documents constituting the title by the grant.

(1) *Fischer* v. *Secretary of State for India in Council*, and *Orr and another* v. *Fischer*, 19 M. 292.

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The first of the suits giving rise to the appeals was instituted in the Court of the Subordinate Judge on the 3rd March 1892 by the plaintiff, who claimed to be the proprietor of the village of Kondagai in virtue of grants of which the last was a permanent [272] lease, dated the 23rd January 1890, from the zamindar of Shivaganga, the zamindari of which the village was formerly part. The plaintiff having obtained an order on the 13th November 1890 from the Collector of the Madura District for the separate registration and assessment of that village under the provisions of Act I of 1876, sued for a declaration that an order of the Governor in Council of the 14th November 1891, directing the cancellation of the above order, should be declared to be beyond the powers of the Government to make, and of no legal effect. The defence was a denial of the plaintiff's right to the separate registration, and the defendant alleged that the suit was opposed to the provisions of Section 42 of the Specific Relief Act, 1877, there having been an omission to ask for the consequential relief to which, if the case had been well founded, the plaintiff would be entitled. It was also objected that the lessees, next here referred to, and the zamindar, had not been made parties.

The second of these suits was brought on the 29th April 1892 in the District Munsif's Court, whence it was transferred to that of the above Subordinate Judge, the plaintiffs being Messrs. Orr and Stranack, the respondents in the second of the appeals, who, on the 23rd May 1887, had become lessees of the whole of the Shivaganga zamindari. Mr. R. Fischer was the defendant. The claim was for the balance of a sum alleged to be annually due from him in respect of the village of Kondagai to the zamindari, that balance being named "poruppu, magamai, and road cess "for the Fasli year 1300."

The following, among other enacted laws, related to the points in dispute:—

The Madras Regulation XXV of 1802, after declaring the right of proprietors to alienate without the previous consent of the Government, enacts in Section 8 that unless their transfers should have been regularly registered at the office of the Collector, and unless the assessment of revenue should have been previously determined on such alienated portions of their land, the transfer should be of no legal force or effect to exempt the zamindar from the assessment on the entire zamindari.

The Madras Act I of 1876, the object of which is stated above, enacts in Section 1 that "the alienor or alienee of any portion of a permanent-"ly-settled estate may apply to the Collector, . . . [273] for its "registration in the name of the alienee and for its separate assessment."

The Act gives directions for the holding an inquiry, and in Section 2 provides:—"If on such inquiry it appears that the alienation has taken "place and that all the parties to such alienation concur in applying for "the separate assessment of the portion alienated, and if objection is not "taken by any person interested in the estate, or being taken is disallowed "by the Collector, he shall proceed to register the alienated portion in "the name of the alienee, and to apportion the assessment of such alienated "portion in the manner provided in Section 45 of Madras Act II of 1864, "subject to the sanction laid down in Section 46 of that Act."

The Act I of 1876 provides in Section 5 :—"Any person aggrieved "by the fact of the separate registration of such portion may sue in a "Civil Court for a decree declaring that such separate registration ought "not to be made." By Section 6, "any person, aggrieved by the

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"Collector's refusal to register may sue in a Civil Court for a decree "declaring that such separate registration ought to be made;" and in Section 7 the Act provides,—"Any person aggrieved by the apportionment of the assessment under Section 2 may appeal to the Board of "Revenue within ninety days from the date of such assessment; and the "order of the Board of Revenue shall be final;" lastly, Section 8 enacts,—"The Governor in Council may at any time, if it appears that "there has been fraud or material error in the apportionment of such "separate assessment, cause the same to be re-adjusted."

The provisions of Section 42 of the Specific Relief Act, 1877, are:—"Any person entitled to any legal character or to any right as to any "property may institute a suit against any person denying, or interested to "deny, his title to such character or right, and the Court may in its "discretion make therein a declaration that he is so entitled and the "plaintiff need not in such suit ask for any further relief. Provided that "no Court shall make any such declaration where the plaintiff being able "to seek further relief than a mere declaration of title omits so to do"

The first suit was dismissed by the Subordinate Judge on the 23rd July 1894. His judgment was that the Collector had acted without jurisdiction in making his order of the 13th November [274] 1890, the parties interested, the lessees of the entire zamindari not having concurred in the application.

He decreed, in favour of the plaintiffs in the second suit, Rs. 910, the balance of the annual Rs. 3,500, which, in his view of the case, the defendant had agreed to pay, independently of the future assessment upon the village of Kondagai.

The course of appeal in the second suit was to the District Judge who reversed that decree. The plaintiffs contended that the zamindari was entitled to receive either by direct payment or indirectly by a deduction from the settled peishcush, not less than Rs. 3 500; and that whatever the separate assessment in the future might be, the difference, if it amounted to less than that sum by the year, must be for the benefit of the zamindari; while if the assessment should exceed that sum the excess must be charged against the defendant's village, and not against the zamindari. This brought before the District Judge the question of the validity of the Government order of the 14th November 1891. That order was now held by him to be inoperative, and, being void, was considered by him as leaving the Collector's original order of the 13th November 1890 still subsisting. He was of this opinion on account of the rule, which he thought to prevail, that if a statute gives a particular remedy for enforcing a right which it creates there is no other remedy. He concluded as follows:—

"In the result, I am of opinion that as the Collector's order of 1890 "for separate registration has never been set aside by a Court of competent jurisdiction, it has full force and effect. No fraud or material error "in the apportionment of separate assessment has been suggested and the "order of the Board of Revenue on the point is final. I have already alluded to the fact, admitted by the plaintiffs in appeal, that it is immaterial "whether the separate assessment on the village of Kondagai is paid "directly to the zamindari treasury, or, being paid into the Government "treasury, is deducted from the peishcush payable on the zamindari, and "I have found that the defendant is not under any obligation to pay more "than the assessment apportioned by the Collector with the sanction of "the Board of Revenue. The question whether he has paid only the

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"original assessment or the revised assessment does not arise in this suit "and is one which does not affect the plaintiffs, as the separate registra-"tion and [275] assessment relieve the zamindar and his representatives "of all liability in respect of the portion alienated."

The judgment of the High Court, delivered in both cases, which were heard on appeal together, is reported at length in *Fischer* v. *Secretary of State for India in Council* (1). Full particulars are there given of the grants of the village to Mr. R. Fischer, from the first, which was made by the Rani Kattama Natchiar, the zamindarni, in 1872, down to the last, dated the 23rd January 1890, conferring upon him the perpetual lease, which the zamindar ratified. In that judgment also appear the clauses, extracted from the documents of title, containing the terms on which the lessees of the Shivaganga zamindari relied in the second of these suits.

The Judges were of opinion that there was in the first suit no petition in the plaint for consequential relief, unless it could be found in the form asking generally for relief. Even if those words were enough to show what relief was expected when the order of the 14th November 1891 should have been cancelled, the suit was still, in their opinion, defective for want of parties, the lessees of Shivaganga not having been joined. The suit was held by them to be unsustainable with regard to the provisions of Section 42 of the Specific Relief Act, 1877, and their decree therefore reversed the judgment of the District Judge in the second suit, and affirmed the decrees of the Subordinate Judge in both suits.

On the first of these appeals, Mr. *J. D. Mayne*, for the appellant, argued that the High Court had erred in their judgment on the following points :—The Collector having made his order for the separate registration and assessment of the village, and that order having been confirmed by the Board of Revenue, the only remedy of which a lessee of the zamindari could avail himself was by a suit in the Civil Court having jurisdiction under Section 5 of the Madras Act I of 1876, if he had been aggrieved by the order relating to the separate registration. The powers of the Government were not applicable to the question of separate registration in this case. They could be exercised in regard to the separate assessment of revenue, at the proper stage, under Section 8 of the Act, but only on the appearance of fraud or material error. [276] And separate registration had been dealt with by legislation as a matter of civil right to be decided, if questioned, by the Courts of law. A special mode of relief was provided in Sections 5 and 6 of the Act in cases of grievance occasioned by either its grant or refusal. Where a statute created a right and gave a remedy for its infringement that particular remedy could alone be applied. He referred to *Doe* v. *Bridges* (2) ; *Barraclough* v. *Brown* (3) ; *Pasmore* v. *Oswaldtwistle Urban District Council* (4). As to the objection made by the defence, resting upon Section 42 of the Specific Relief Act, the necessary effect of a declaratory decree, such as that now asked, would be to put all parties into the position in which they were when the original order of 13th November was passed. So that to ask for additional relief was unnecessary. In reference to declaratory suits and consequential relief, he referred to *Rooke* v. *Lord Kensington* (5) ; *Kattama Natchiar* v. *Dorasinga Tever* (6).

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the respondent, in the first appeal, admitted that the order of the Governor in Council,

(1) 19 M. 292. (2) 1 B. & Ad. 847. (3) (1897) A.C. 615 at p. 621.
(4) (1898) A.C. 387. (5) 2 K. & J. 753 ; 25 L.J. Ch. 795.
(6) 2 I.A. 169.

which directed cancellation of the Collector's order of the 13th November 1890, could not be supported. But they contended that the High Court was right in holding that, in reference to Section 42 of the Specific Relief Act, 1877, there should be no decree for the plaintiff in the suit against the Government, as framed. The plaintiff was in a position to ask for specific relief, in addition to a declaration of the invalidity of the order of the Government of the 14th November 1891, if he were entitled to that declaration; and he had omitted so to do. What ought to have been asked for was that the order of the 13th November 1890 should be restored. However, in regard to such restoration, if it had been asked, there were other persons interested in the zamindari rights besides the transferor and the transferee. The Court below had not found in favour of the appellant that there was such a concurrence by the lessees of the zamindari in the application for separate registration as would authorize the original order of the Collector; and their absence from the first suit rendered that suit defective. The appellant had been rightly held dis-entitled to the declaratory decree which he claimed.

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[277] Mr. *J.D. Mayne* was not heard in reply in the first suit, but in the second proceeded to argue that the agreement between the parties, as shown by the documents of title to the village, had not been rightly understood by the High Court. The appellant, defendant, had undertaken to satisfy the revenue demand in respect of the village of Kondagai, calculated to be, for the purpose of this transaction, covered by the Rs, 3,500 fixed for payment annually to the zamindar. But he had not undertaken to continue that payment after the transfer should have become complete, by the separate registration, and separate assessment having been ordered. The effect of the agreement must be taken to be that its end came on the village ceasing to be part of the zamindari, when the revenue on the village would have become payable direct to the Collector. Upon separate registration, separate assessment would follow; and the plaintiffs would, on their part, be relieved of all liability for the revenue in respect of the alienated village.

In the second suit Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the respondents, argued that the High Court had rightly construed the contract between the parties. The intention shown by the documents of title was that the fixed sum should be paid until a separate assessment upon the village had been definitely and validly made. That had not been effected. Upon consideration of the objections, that had not yet been met, the liability to the zamindari should remain as provided for by the parties.

Mr. *J. D. Mayne* replied.

Afterwards, on the 10th December 1898, their Lordships' judgment was delivered by LORD MACNAGHTEN.

JUDGMENT.

These two appeals were heard together and argued on the materials contained in one record.

The first appeal, in which alone the Secretary of State is interested, has reference to an order of the Government of Madras by which the Collector of Madura was directed to cancel the separate registration of a certain village belonging to the appellant known as Kondagai and formerly part of the zamindari of Shivaganga. In the Court of first instance the order in question was upheld by the Subordinate Judge. With his judgment before them the learned Judges of the High Court said nothing in

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approval or condemnation. They passed the matter by as one of "the "many difficult questions dealt with by the Courts below" which in their view it was not "necessary to decide or to discuss" in order to [278] determine the rights of the parties. But the rights of the parties depended on the validity of the Government order and on nothing else. It was the beginning and the end of the controversy. Mr. Cohen very properly and very wisely admitted that he could not justify the action of the Government. This frank admission relieves their Lordships from the duty of commenting upon what took place in terms which otherwise the occasion would require. At the same time their Lordships cannot help observing that it would have been better if the Government had been wise in time and had recalled their order without suit instead of trying to shelter themselves on technical grounds and under a dilatory plea. There was no room for a defence on the merits. And therefore the whole argument of the learned counsel for the respondent was directed to show (1) that the suit was demurrable in consequence of the provisions of the Specific Relief Act No. I of 1877, and (2) that even if the suit were not demurrable it would be defective for want of parties.

The question raised in the second appeal is one of more difficulty. It depends on the true construction and effect of the grant under which the appellant's title is derived.

Following the course of the argument their Lordships propose in the first instance to deal with the appeal to which the Secretary of State is a party.

On the 13th of March 1890 the appellant, as proprietor of Kondagai, applied for separate assessment and registration. Notice of the application was duly sent by the Collector to the zamindar and to certain persons who had obtained a lease of the zamindari and who are the respondents in the second appeal. Separate objections were lodged on behalf of the zamindar and the lessees. The Collector disallowed both sets of objections and decided that "separate registration and sub-assessment of the village be "ordered under Section 8 of Regulation XXV of 1802 and Act I of 1876." Taking the average income of the zamindari and of the village for the past three years he fixed the peishcush for Kondagai at Rs. 2,757-4-1. The Collector then submitted the case with the records connected with it to the Board of Revenue. By resolution dated the 5th of December 1890 the Board confirmed the separate assessment as proposed by the Collector.

In March 1891 the lessees addressed a petition by way of appeal to the Board of Revenue alleging that the village had been [279] "unlaw-"fully sub-divided and the peishcush improperly reduced." They objected to sub-division altogether. They complained of the assessment as inadequate and inequitable, being in their view "based upon figures which "did not fairly represent the average revenue of the village."

The Board of Revenue replied to this petition through the Collector by a resolution of the 21st of April 1891 declaring that the Board "had no "power to interfere with the Collector's orders as to the separate registration "of the village which" could "only be set aside by a suit in a Civil Court "(*vide* Section 5 of Madras Act I of 1876)." At the same time they requested the Collector "to report the result of taking a longer period, say "of seven or ten years, instead of the three-year period, on which the "calculation has now been made."

The Acting Collector of Madura reported that taking the income of the village on an average for ten years the peishcush would be Rs. 3,027-2-8.

Thereupon the Board of Revenue under Section 7 of the Act revised their original order and by resolution, dated the 17th of August 1891, substituted that figure for the former assessment.

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So far the proceedings appear to have been perfectly regular. And it was open to the lessees under the express provisions of Section 5 of the Act of 1876 if they were "aggrieved by the fact of the separate registration" of the village to "sue in a Civil Court for a decree declaring that such "separate registration ought not to be made."

Instead, however, of taking that course Mr. Orr, one of the respondents, in the second appeal, describing himself as resident lessee wrote on behalf of the lessees to the Chief Secretary to the Government complaining of the action of the Collector and the inaction of the Board of Revenue. He stated that the lessees were prepared to sue the Government and that he had in fact served notice on the Collector of their intention to do so. But he suggested that whatever the powers of the Revenue Board might be the Government itself had "complete power" and he prayed "the "Government to exercise that power with the result of saving both the "Government and the lessees the loss of time, trouble and expense which "a suit" would "entail."

The Government did not disavow or disclaim the arbitrary power ascribed to them by Mr. Orr and they seem to have accepted [280] readily his view as to the undesirability of the litigation with which they were threatened. By an order dated the 12th of October 1891 addressed to the Board of Revenue they pointed out that "by Section 5 of Regulation II of "1803 Collectors were bound to obey all orders communicated to them by "the authority of the Board of Revenue." They considered (they said) that the Board had "full general authority and power in the event of its "deeming the Collector's action to have been wrong to order him to revise "his procedure." The order however went on to say that his Excellency the Governor in Council desired to be furnished with "a full report on the "merits of the case before issuing definite orders thereon." In their resolution in reply dated the 29th of October 1891 the Board referred the Government to the Collector's original report on the case pointing out that the formalities prescribed by Act I of 1876 were duly observed by the Collector before he decided to register the village separately under the Act. "But" they added "the Board is and at the time it passed its proceedings "was of opinion that his decision was wrong" assigning for that conclusion a reason which seems to have been founded on a misapprehension of their own. Then the reply proceeds as follows :—

"2. Still, even so, as his proceedings had already been passed and "were judicial under the Act the Board was of opinion that it could not "then interfere with them in the absence of a special provision in the "Act enabling it to do so and there is no such special provision, the "remedy by the Act itself against the Collector's action being by Civil "suit.

"3. The Board was of opinion that the general control conferred on "them by Section 5 of Regulation II of 1803 did not cover the case."

This remonstrance provoked the following peremptory order dated the 14th of November 1891:—

"His Excellency the Governor in Council is unable to accept the "views of the Board of Revenue expressed in paragraphs 2 and 3 . . . . "A Collector's action in separately registering and assessing a portion of "a permanently-settled estate is not judicial but purely fiscal. In such

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"matters the Collector's proceedings are those of a Revenue official and are "therefore clearly subject to the control of the Board and Government under "Regulation II of 1803. The fact that the Collector takes action under an "Act [281] giving him power to do so and that parties aggrieved may sue "in the Civil Courts does not oust this general control.

"2. In the present case the proceedings of the Collector of Madura "were wrong and the Board should have set them aside in exercise of its "powers under Regulation II of 1803. The Collector will now be directed "to cancel the separate registration of Kondagai village and its hamlets."

This order was issued without notice to the appellant and without giving either the Collector or the appellant any opportunity of being heard upon the matter. It will be observed that while the order of the 14th of November states that the Collector's proceedings were wrong, it does not attempt to explain in what the alleged error consisted. On receipt of the order which was communicated to him "for information and guidance" the Collector cancelled his order for the separate registration of Kondagai and informed the appellant of the fact.

It is not disputed now that the Government were mistaken in their view of the Act of 1876. It is perfectly plain on the face of the Act and it was conceded by the learned counsel for the Secretary of State that the decision of the Collector in a case within his jurisdiction whether for or against separate registration when once duly sanctioned as provided by the Act can only be questioned in a Civil Court. As regards the apportionment of the assessment, an appeal limited in time does lie to the Board of Revenue—Section 7. But the only power reserved to the Governor in Council is the power unlimited in point of time of requiring re-adjustment of the separate assessment if it appears that there has been fraud or material error in the apportionment—Section 8. The apportionment of the assessment is a matter which concerns the Government. It may affect the security of the revenue. Separate registration is a matter of private right with which the Government has no business to interfere.

The sole question therefore now left for decision is the question whether the appellant's claim can be sustained having regard to the nature and extent of the relief sought and the frame of the suit.

The plaint prays that the order complained of may be declared "*ultra vires* and illegal and of no binding effect on plaintiff." It asks no further specific relief. In that, it is said, the plaint sins against the Specific Relief Act, which forbids the Court to entertain [282] a suit for a declaratory decree which may be followed by consequential relief unless that relief be asked for specifically—and so it was held by the High Court.

Now in the first place it is at least open to doubt whether the present suit is within the purview of Section 42 of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of Section 50 of the Chancery Procedure Act of 1852, 15 & 16 Vict., cap. 86, as interpreted by judicial decision. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is, in substance, a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect. That is not the sort

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of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? What further relief can be required? If the so-called cancellation is pronounced void the order of the Government falls to the ground and the decision of the Collector stands good and operative as from the date on which it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector's book. Cancellation in obedience to illegal commands of the Government can have no more effect than cancellation made at the dictation of a lawless mob which the officer in charge has no power to resist. It does not appear what steps the Collector took when the commands of the Government were communicated to him beyond sending a notification to the appellant. Presumably his proper course would have been to make a note or memorandum against the entry of the decision in his book, to the effect that the decision was cancelled by virtue of an order of the Government of such and such a date, and then, on the determination of a suit such as this adversely to the Government, it would be his duty to make a further note or memorandum to the effect that the cancellation was declared void by the order of the Court in such and such a suit. And so the cancellation or obliteration, if there was actual cancellation or obliteration, would be virtually effaced and the temporary cloud upon the decision cleared away. But then it was [283] asked,—what would happen if the Collector ignored the order of the Court? What remedy would the appellant have if he had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the Court at defiance. It is impossible to suppose that the Government would countenance such conduct as that. But the remedy in such a case, if it did occur, would be simple enough. Every order such as that which the appellant asks for carries with it liberty to apply. On a proper application and on proper notice being given it would be found that the arm of the Court would be long enough to reach the offender whatever his position might be.

The suggestion that no order ought to be made in the absence of the zemindar and the lessees will not bear a moment's examination. If the order of the Government which is impeached in this suit is pronounced void and of no effect, how can it have the effect of setting the matter at large and making it incumbent on the appellant to proceed as if the Collector had refused his application for separate registration instead of granting it, as in fact he did?

Their Lordships are of opinion that the Government have been wrong throughout, and that the suit is properly framed and not open to objection under the Specific Relief Act.

They will therefore humbly advise Her Majesty that the appeal ought to be allowed, with costs, in both Courts and that it ought to be declared that the order of the Government of Madras of the 14th of November 1891 is void and of no effect.

The respondent will pay the costs of the appeal.

The respondents in the second appeal are the lessees of the zemindari of Shivaganga. They were plaintiffs in the suit which was brought to recover a sum of money claimed to be due from the appellant to them, as such lessees, under or by virtue of the provisions contained in certain documents of title constituting of connected with the grant of village of Kondagai.

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The question, stated shortly, is this:—What was the measure of the obligation undertaken by the grantee in respect of the Government revenue, in the event of Kondagai being separately registered? Was the proprietor of that village, as between himself and the zemindar of Shivaganga, then to become liable simply for the Government revenue, whatever it might be, or was he to be bound in any event to pay to the zemindari annually Rs. 3,500, a sum [284] which might be greater or possibly might be less than the Government revenue assessed upon the village when separately registered?

There are three documents to be considered. The earliest in date is the most important for the purpose of the present controversy. It was made on the 13th of December 1872 between Kattama Natchiar, a Hindu widow, then Rani of Shivaganga, her son and her three daughters of the one part and one Robert Fischer, the appellant's father, of the other part. It purports to be an agreement for the absolute sale of the village of Kondagai to Fischer, the father, in consideration of past and future services but only in case of the happening of some one of several events therein mentioned. The event was not in fact determined, and, according to the decision of this Board in a suit then pending, could not be determined during the Rani's lifetime. The next document was subsequent to that decision. It is dated the 14th of May 1877. By it the five persons, parties to the agreement of the 13th of December, of the first part, purport to grant Kondagai to Fischer, the father, on the terms of that agreement.

On the Rani's death Dorasinga Tevar, the son of an elder sister of the Rani, established his title to the zemindari to the exclusion of the Rani's children. On the 22nd of February 1883 Dorasinga Tevar executed a deed confirming the Rani's grant in favour of Fischer, the father, and thereupon, as was admitted at the Bar, Fischer's title to the village became absolute. In the course of the argument their Lordships were referred to a document which was executed by Dorasinga's successor, but in their Lordships' opinion that document cannot affect the present question.

The deed of the 22nd February 1883 declares that Fischer is to hold the village "under the terms of the deeds dated 13th December 1872 and "the 14th May 1877." It does not purport to alter the conditions of the holding in any respect. Nor, in their Lordships' opinion does the deed of the 14th of May 1877 show any intention to depart from the terms of the agreement of the 13th of December 1872.

The deed of the 13th December 1872 is not free from ambiguity. At that time, of course, the village of Kondagai was not assessed separately and provision had to be made for the grantee bearing his proper share of Government revenue. The deed declares that the grantee is to pay "every year to the Circar as peishcush Rs. 3,500." It is not disputed that until separate [285] registration of the village that sum was to be paid to the zemindari as the proper proportionate contribution to the revenue assessed on the whole zemindari. But then, in the very next paragraph, the deed clearly contemplates and provides for the separate registration of Kondagai, and payment, by the proprietor of Kondagai to the Collector, of the peishcush which the Collector was to fix.

On the whole it appears to their Lordships that according to the true construction of the documents in question the sum of Rs. 3,500 was provisionally fixed as a sum sufficient to cover the proportionate amount of the Government revenue attributable to the village of Kondagai until the separate registration of the village, but that the intention was that when

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the separation was effected it should be a final and complete separation and that thenceforth the proprietor of Kondagai should only be liable for the burthens properly incident to the property and should discharge those burthens in the ordinary way by direct payment to the Collector.

This was the view of the District Judge who reversed the judgment of the Subordinate Judge and was in turn reversed by the High Court.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the suit dismissed with costs in the three Courts below.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitor for the respondent: The Solicitor, India Office.

Solicitors for the respondents in the second appeal: Messrs. *Burton, Yeates & Hart.*

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22 M. 286.

[286] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

TIRUMAL RAO (*Plaintiff*), *Appellant v.* SYED DASTAGHIRI MIYAH AND ANOTHER (*Defendants Nos.* 1 *and* 3), *Respondents.** [2nd December, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 310-*A—Execution of decrees—Transfer of Property Act—Act IV of* 1882, *Section* 88—*Application to set aside sale of mortgaged property.*

Section 310-A of the Code of Civil Procedure, applies where a sale of immoveable property has taken place under a mortgage decree, so as to enable the owner of such property who duly complies with its provisions to have such sale set aside.

Where the owner of immoveable property applies under that section to have a sale of property set aside, he is under a liability to deposit a sum equal to five per cent. on the purchase-money for payment to the purchaser, even where the land has been purchased by the decree-holder.

[F., 10 M.L J. 228 (229); Appr., 25 B. 104 (105); R., 15 C.L J. 89 (94)=16 C.W.N. 736 (740); 3 O.C. 42 (44).]

APPEAL against the order of H. O. D. Harding, Acting District Judge of Kurnool, in civil miscellaneous petition No. 15 of 1898, in the matter of original suit No. 11 of 1896.

Plaintiff, having obtained a decree against the defendants for the amount due on a mortgage, applied for execution, and a sale of the mortgaged land was ordered. Plaintiff, by leave of the Court, becoming the purchaser, defendant No. 1, within thirty days thereafter, applied, under Section 310-A of the Code of Civil Procedure, to have the sale set aside, and deposited in Court the amount of the decree and percentage. The sum, equal to five per cent. of the purchase-money referred to in Section 310-A (*a*) for payment to the purchaser was not deposited, because the Acting

* Appeal against Order No. 84 of 1898.

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District Judge decided (as he subsequently recorded) that such payment was not necessary, the purchaser being the decree-holder. The Acting District Judge held that Section 310-A was imperative and that the money had been paid within thirty days. He therefore set the sale aside.

The plaintiff preferred this appeal.

[287] *Sundara Ayyar*, for appellant.—Section 310-A of the Code of Civil Procedure does not apply to sales of mortgaged property under the Transfer of Property Act, 1882 (*Kedar Nath Raut* v. *Kali Churn Ram* (1)). [COLLINS, C.J., referred to the conflicting decisions in the Calcutta cases, namely, *Girish Chundra Basu* v. *Apurba Krishna Dass* (2), which was overruled by *Jagodanund Singh* v. *Amrita Lal Sircar* (3); and *Ashruf Ali Chowdhry* v. *Net Lal Sahu* (4) overruled by *Kedar Nath Raut* v. *Kali Churn Ram* (1). The decision in Allahabad also differed from that of Calcutta. Under those circumstances the Court must express its own view.] Secondly, there has been no valid deposit as provided for in Section 310-A of the Code of Civil Procedure. Clause (*a*) of that section renders it obligatory on the applicant to deposit in Court, for payment to the purchaser, a sum equal to five per cent. of the purchase-money. If a decree-holder in a suit on a mortgage purchases with leave of the Court, he stands in the position of an independent purchaser and is entitled to the five per cent. "Leave to bid puts an end to the disability of the mortgagee and puts him "in the same position as any independent purchaser" (*Mahabir Pershad Singh* v. *Macnaghten* (5) per Lord Watson at page 692 ; see also *Krishnasami Ayyar* v. *Janakiammal* (6)). Moreover, reasonable notice should have been given (*Srinivasa Ayyangar* v. *Ayyathorai Pillai* (7)).

Hon. *Bhashyam Ayyangar*, for respondent.—*Srinivasa Ayyangar* v. *Ayyathorai Pillal* (7) is conclusive. The High Court is empowered to frame rules under Section 104 of the Transfer of Property Act. In Calcutta, rules have been framed under that section, but the Madras High Court has made no such rules on the Appellate Side. Section 310-A of the Code of Civil Procedure is therefore applicable. [COLLINS, C.J.—You must tender the right amount into Court including the five per cent. provided by the Act to be deposited before the sale can be set aside. We have held in another case that were a tender has been made within thirty days, and the office to which the money was tendered was closed or refused to accept the money, it was a valid tender of payment under Section 310-A of the Code of Civil Procedure.]

JUDGMENT.

[288] The appellant first urges that Section 310-A has no application to sales under a mortgage decree and relies on the authority of the recent Full Bench case of *Kedar Nath Raut* v. *Kali Churn Ram* (1). No decision of this Court to the same effect has been brought to our notice, and the decisions of the Calcutta and Allahabad High Courts have not been uniform or settled. In the case of *Srinivasa Ayyangar* v. *Ayyathorai Pillai* (7) the exact question was not expressly discussed, but it was decided by implication that Section 310-A is applicable to decrees like the present. That decision seems to us to be in accordance with the policy which underlies the amendment of the law made by that section. We are therefore disposed to follow it rather than the decision of the Calcutta High Court to which we have referred. The appellant next urges that

(1) 25 C. 703 (707). (2) 21 C. 940 (3) 22 C. 767. (4) 23 C. 682.
(5) 16 C. 682 (692). (6) 18 M. 153. (7) 21 M. 416.

Section 310-A was not complied with since the five per cent. required thereby to be deposited was not, in fact, deposited. It appears from the order of the District Judge, dated 17th June 1898, on miscellaneous petitions Nos. 65 and 81 of 1898, that the order of the District Judge now appealed against does not state the facts correctly that the five per cent. was not, in fact, paid, and that it was not so paid, because the District Judge decided that it was not necessary to pay it in the circumstances of this case.

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That decision of the District Judge was, we think, certainly wrong, and we must take it that the judgment-debtor was prepared to pay within the time limited, the whole sum payable under the section, but was virtually prevented from doing so by the decision of the Judge that a smaller sum only was payable. In these circumstances we think that the judgment-debtor must be held to be entitled to the benefit of the section, and that all the parties should now be replaced in the position in which they would have been if the District Judge had not misdirected the respondents. This is in accordance with the view taken in *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry* (1) and also with the procedure followed by this Court in *Srinivasa Ayyangar* v. *Ayyathorai Pillai* (2).

We therefore set aside the order appealed against as it contains and proceeded on a mistaken view of the facts, and in lieu of it we direct that if the respondents shall have paid into Court the whole **[289]** amount including the five per cent. payable under Section 310-A, within ten days of the Lower Court's receipt of this order, then the sale will stand set aside, but if they fail to do so their petition will stand dismissed. If they pay within the time each party will bear his own costs throughout, otherwise, respondents must pay the appellants' costs throughout.

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22 M. 289=9 M.L.J. 64.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

SINAYA PILLAI (*Defendant*), *Appellant* v. MUNISAMI AYYAN AND OTHERS (*Plaintiffs*), *Respondents*.* [29th November, 1898, and 17th January, 1899.]

Guardians and Wards Act—Act VIII of 1890. *Sections* 29, 30—*Mortgage by guardians on estate of minor—" Previous permission of the Court "—Contract Act—Act IX of* 1872, *Section* 64—*Transfer of Property Act—Act IV of* 1882, *Section* 35.

Guardians duly appointed under the Guardians and Wards Act, 1890, having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mortgagee sued to recover the amount of principal and interest due. The necessity had been urgent, the terms of the deed fair, and the money had been duly applied; but the guardians had not obtained the sanction of the Court as directed by Section 29 of the Guardians and Wards Act, 1890. On its being contended that the mortgage was invalid and incapable of being enforced;

Held, that a mortgage so executed was not void but only voidable; and that the defendant was entitled to avoid the mortgage but only on the condition of restoring any benefit received by him thereunder to the person from whom it had

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* Appeal No. 144 of 1898.

(1) 25 C. 609. (2) 21 M. 416.

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been received. The fact that the person who had received the benefit was the defendant, did not alter his position.

[F., 25 A. 59 (61); 8 A.L.J. 754 = 11 Ind. Cas. 764 (765); R., 3 C.L.J. 260 (268); 4 Ind. Cas. 1082 = 19 M.L.J. 737.]

APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Madura (West), in original suit No. 6 of 1898.

Suit for money due on a simple mortgage-deed, executed in favour of first plaintiff by defendant's guardians. The admitted facts were that the mortgage had been executed for the purpose of enabling the guardians of the defendant, who was a minor, to discharge debts binding on his estate; that there had been urgent [290] necessity for the loan; that the terms of the mortgage were fair; that the money had been duly applied for the purpose for which it had been borrowed; and that the guardians who had executed the deed had been appointed under the Guardians and Wards Act, 1890. The defence was that the said guardians had omitted to obtain the sanction of the Court for the execution of the mortgage, as directed by Section 29 of the Guardians and Wards Act, 1890, and that the mortgage was, in consequence, void and incapable of being enforced. The Subordinate Judge decreed in plaintiffs' favour.

The defendant preferred this appeal.

Sivasami Ayyar, for appellant.

V. Krishnasami Ayyar and *Srinivasa Ayyangar*, for respondents.

JUDGMENT.

The plaintiffs sued for the principal and the balance of interest due on a simple mortgage of the minor defendant's property. The mortgage was executed by the guardians of the defendant appointed under the Guardians and Wards Act (VIII of 1890), but the guardians failed to obtain the sanction of the Court as required by Section 29 of the Act. The mortgage was executed to enable the guardians to discharge debts incurred by the minor's late father, which debts were admittedly binding on the minor's estate. There was urgent necessity to borrow the money, as the creditors were pressing simultaneously and would have filed suits and forced a sale of the property. The terms of the mortgage were fair, and the money was actually applied for the benefit of the minor's estate.

All this is admitted before us, but the minor defendant, by another guardian specially appointed *ad litem*, pleaded that the mortgage, not have been sanctioned by the Court, was void and incapable of being enforced.

The Subordinate Judge decreed for the plaintiff, and the defendant now appeals. We have no doubt but that the decree of the Subordinate Judge is right.

The mortgage executed by the guardian without sanction is not void. It is only voidable. This is clear from Section 30 of the Act, which must be read with Section 29. The minor defendant, through his guardian *ad litem*, desires to avoid the mortgage. He is entitled to do so, but only on condition that he shall restore any benefit which he has received thereunder to the persons from [291] whom it was received. This principle is acknowledged in Section 64 of the Indian Contract Act, in Section 35 of the Transfer of Property Act, and generally by the Indian Courts as Courts of equity and good conscience, *Shurrut Chunder* v. *Rajkissen Mookerjee* (1), *Girraj Baksh* v. *Kazi Hamid Ali* (2) and *Raj Lakhi Ghose* v. *Debendra*

(1) 15 B.L.R. 350. (2) 9 A. 340.

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Chundra Mojumdar (1)). The fact that the person who has received the benefit is the defendant, does not, in our opinion, make any difference, for the mortgage is *prima facie* one binding on his estate, and he, in effect, says "set it aside, on the technical ground that it was not sanctioned "by the Court."

The minor defendant cannot, of course, be made personally liable for the debt (*Waghela Rajsanji* v. *Skekh Masludin* (2)), but the mortgaged property and his estate generally are made liable by the terms of the instrument of mortgage, and this is all that the decree of the Subordinate Judge also makes liable.

We therefore confirm the decree and dismiss this appeal with costs.

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22 M. 291.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

RAMANAPPA (*Counter-petitioner*), *Appellant* v. THE OFFICIAL LIQUIDATOR, BELLARY BRUCEPETTA STOCK AND LOAN TRANSACTING COMPANY, LD. (*Petitioner*), *Respondent*.* [21st October, 1898.]

Companies Act—Act VI of 1882, *Sections* 169, 214—*Practice—Companies—Winding up —Notice of appeal.*

Notice of an appeal from any order or decision made or given in the matter of the winding up of a Company by the Court must, under Section 169 of the Indian Companies Act, 1882, be given to the respondent within three weeks after the order complained of has been made, unless such time is extended by the Court of Appeal.

[R., 33 A. 611=8 A.L.J. 719=10 Ind. Cas. 903; 25 M. 576.]

APPEAL against the order of the District Judge of Bellary, in miscellaneous petitions Nos. 529 and 576 of 1897.

[292] Petition by the official liquidator of the Bellary Brucepetta Stock and Loan Transacting Company, Limited, under Section 214 of the Indian Companies Act, 1882, praying the Court to order the counter-petitioner to pay Rs. 610 with costs. For the counter-petitioner it was urged that the claim was barred by limitation, and that since his liability was due solely to his having become a surety, he could not be liable to pay under Section 214 of the Indian Companies Act. The District Judge rejected both pleas and made the order prayed for.

The counter-petitioner preferred this appeal. The appeal was duly filed, but notice of it was not given as prescribed by Section 169 of the Indian Companies Act.

Venkataramana Ayyar, for appellant.

Ramasami Ayya, for respondent, took the objection that notice had not been given as prescribed by Section 169 of the Indian Companies Act. By that section, no appeal shall be heard from any order or decision made in the winding up of a company, unless notice of the same be given within

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* Appeal No. 93 of 1898.

(1) 24 C. 668. (2) 11 B. 551.

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three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure, unless such time is extended by the Court of Appeal.

JUDGMENT.

It is objected that notice was not given within three weeks in compliance with Section 169 of the Companies Act. The appeal was filed within that time, but the law also requires that notice in the manner provided by the Civil Procedure Code, should be given. This was not done. The section has been considered in this Court and in the High Court of Calcutta and Allahabad. One of the cases (*In re Sarawak and Hindustan Banking and Trading Company, Limited* (1)) was actually decided and reported before the present Act was passed. It must, therefore, be assumed that as the Legislature made no change in the wording of that section it did not consider the construction put on the section by the Court wrong. It must be admitted that the requirements of the section press somewhat severely on would-be appellants. But we do not feel justified in differing from the view taken by the District Court.

We must, therefore, dismiss the appeal with costs.

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22 M. 293.

[293] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

MUNISAMI NAIDU (*Petitioner and Plaintiff No.* 1), *Petitioner v.* MUNISAMI REDDI (*Counter-petitioner and Defendant No.* 30). *Respondent.** [13th December, 1898.]

Civil Procedure Code—Act XIV of 1882. *Sections* 206, 551—*Amendment of decree—Power of Court of first instance after appeal.*

On the hearing of an appeal by a District Court, certain special costs were directed to be paid by the defendant, but, by a clerical error, that direction was omitted from the decree when it was drawn up. Plaintiff applied to the District Judge under Section 206 of the Code of Civil Procedure, for rectification of the error in the decree, but the Court refused to amend, it appearing that defendant had appealed to the High Court, which had dismissed his appeal and confirmed the decree of the District Court. The appeal had in fact been dismissed under Section 551 of the Code of Civil Procedure. Plaintiff then petitioned the District Court to review its order refusing to amend. This was rejected, the District Court holding that the decree, of which amendment was asked, was the decree of the High Court, which a District Court had no power to amend. On plaintiff petitioning the High Court to revise this order of the District Court:

Held, (1) that the case was governed by the ruling of the Full Bench in *Pichuvayyangar* v. *Seshayyangar* (18 M. 214) where it was held that the jurisdiction of a Court of first instance to amend a decree under Section 206 was ousted by the confirmation of that decree on appeal;

(2) that the decision referred to applies equally to second appeals dismissed under Section 551 of the Code of Civil Procedure, and to second appeals tried after notice to the respondent.

[F., 30 A. 290=5 A.L.J. 584=A.W.N. (1908) 109; R., 11 C.L.J. 81=5 Ind. Cas. 304; 11 C.L.J. 159 (161); 4 M.L.T. 341.]

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* Civil Revision Petition No. 366 of 1898.

(1) 4 C. 704.

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of A. Venkataramana Pai, Acting District Judge of North Arcot, on miscellaneous petition No. 229 of 1898.

Petitioner had been plaintiff in a suit in which, on appeal, the District Judge ordered the defendant to pay the costs of the plaintiff in the appeal, as well as the costs of a hearing on remand. The decree, when drawn up, omitted that portion of the order relating to the payment of costs of the hearing on remand, the omission being due to a clerical error. Petitioner applied to the District Court under Section 206 of the Code of Civil Procedure for rectification of the error, but at the hearing it was represented [294] that there had been an appeal to the High Court in which the District Court's decree had been confirmed, and that in consequence the decree which was in force was that of the High Court, which could not be amended by the District Court. An order to that effect was accordinly made. It appeared that the appeal referred to had been preferred by the counter-petitioner, defendant in the suit, and had been in fact rejected by the High Court under Section 551 of the Code of Civil Procedure. Petitioner then prayed the District Court to review the order made on his application under Section 206, and to order the amendment of the decree. He submitted that under the circumstances there was no decree of the High Court, and that the District Court alone could rectify the mistake. The Acting District Judge made an order on the review petition, as follows:—"The High Court's decree in express terms confirms this Court's "decree. The decree to be amended is therefore the decree of the High "Court. This Court has no power to amend it. Petition rejected with "costs." Against this order, the petitioner presented this petition.

Seshagiri Ayyar, for petitioner, relied upon *Bapu* v. *Vajir* (1), *Royal Reddi* v. *Lingha Reddi* (2) and *Uma Sundari Devi* v. *Bindu Bashini Chowdhrani* (3). [COLLINS, C.J., referred to *Pichuvayyangar* v. *Seshayyangar* (4), and *Uma Sundari Devi* v. *Bindu Bashini Chowdhrani* (3) as being opposed to petitioner's contention. There had been an appeal which had been dismissed.]

Sundara Ayyar, for respondent, was not called upon.

JUDGMENT.

Notwithstanding the decision in *Bapu* v. *Vajir* (1), we think that the case is governed by the ruling of the Full Bench in *Pichuvayyangar* v. *Seshayyangar* (4). The view of the Calcutta High Court (*Uma Sundari Devi* v. *Bindu Bashini Chowdhrani* (3)) is directly opposed to that of the Bombay High Court.

The present question was not argued, apparently, when the case of *Pichuvayyangar* v. *Seshayyangar* (4) was decided, but the terms of the decision are general, and in our opinion it applies equally to second appeals dismissed under Section 551 of the Civil Procedure Code and to second appeals tried after notice to the respondent.

We therefore dismiss this petition with costs.

(1) 21 B. 548. (2) 3 M. 1. (3) 24 C. 759. (4) 18 M. 214.

1898
DEC. 9.
APPELLATE CIVIL
22 M. 295 = 9 M L.J. 1.

22 M. 295 = 9 M.L.J. 1.

[295] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

KUNHAYAN (*Plaintiff*), *Appellant v.* ITHUKUTTI AND OTHERS (*Defendants Nos.* 3, 2 *and* 1), *Respondents.**
[8th and 9th December, 1898.]

Civil Procedure Code—Act XIV of 1882, *Section* 285—*Execution—Sale—Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers.*

Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, Section 285 of the Code of Civil Procedure does not take away the jurisdiction of the inferior Court, and any proceedings by such inferior Court in contravention of that section will be vitiated only where there has been notice of the proceedings in the superior Court.

[F., 13 C P.L.R. 145 (147); R., 34 C. 836 (839) = 6 C.L.J. 130.]

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 166 of 1897, reversing the decree of M. R. Kelappan, Acting District Munsif of Quilandy, in original suit No. 129 of 1896.

Suit for possession by plaintiff, who claimed as transferee from a purchaser at a sale by a Munsif's Court. At the time when the said Munsif's Court sale took place, namely, in 1885, the property was under attachment in execution of a decree on the file of the Subordinate Court, which attachment continued till 1886, when the property was sold by the Subordinate Court. The question was whether the auction-purchase by the plaintiff's assignor was, under the above circumstances, valid. The District Munsif held that it was. He distinguished *Muttukaruppan* v. *Mutturamalinga* (1), on the ground that there was no evidence that the Munsif's Court or the parties concerned had notice that an attachment subsisted at the time of the sale; and he followed *Bykant Nath Shaha* v. *Rajendro Narain Rai* (2), as showing that where the decree-hoder, the auction-purchaser and the Munsif, are ignorant of a previous attachment by a superior Court, the Munsif is competent to hold a sale in execution of his decree, and such sale confers a [296] valid title on the purchaser. The third defendant, who was in possession, appealed; and the District Judge, considering himself bound by *Muttukaruppan* v. *Mutturamalinga* (1), held the sale by the District Munsif's Court to plaintiff's assignor to be null and void.

The plaintiff preferred this second appeal.

Mr. *C. Krishnan*, for appellant:—In the case upon which the District Judge relied, namely, *Muttukaruppan* v. *Mutturamalinga* (1), this point was not discussed, and in a subsequent ruling of the High Court in *Subramania Chetti* v. *Ramasami Ayyan* (3), this Court followed the ruling in *Bykant Nath Shaha* v. *Rajendro Narain Rai* (2). The Bombay and Calcutta High Courts have held that such a sale is not invalid; see *Ram Narain Singh* v. *Mina Koery* (4); *Dwarka Nath Doss* v. *Banku Behari Bose* (5); *Obhoy Churn Coondoo* v. *Golam Ali* (6); also *Addul Karim* v.

* Second Appeal No. 262 of 1898.

(1) 7 M. 47.
(2) 12 C. 333.
(3) Second Appeal No. 193 of 1893 (unreported).
(4) 25 C. 46.
(5) 19 C. 651.
(6) 7 C. 410.

Thakordas (1); *Turmuklal Harkisanrai* v. *Kalyandas Khushal* (2); and *Patel Naranji Morarji* v. *Haridas Navalram* (3).

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Ryru Nambiar and *Appu Nedungadi*, for respondents:—Under Section 285 of the Code of Civil Procedure, as soon as an attachment is made by a superior Court, the jurisdiction of the inferior Court to proceed in execution in continuance of its attachment is at once taken away; and therefore all further proceedings in the Munsif's Court are invalid, being without jurisdiction, and a sale by such Court becomes void. No question of notice arises under Section 285 of the Code of Civil Procedure: see *Muttukaruppan* v. *Mutturamalinga* (4), and *Chunni Lal* v. *Debi Prasad* (5); *In re Badri Prasad* v. *Saran Lal* (6)); and *Aghore Nath* v. *Shama Sundari* (7), *Muttukaruppan* v. *Mutturamalinga* (4) has not been expressly overruled and should be followed.

JUDGMENT.

The Judge was of course right in taking the case of *Muttukaruppan* v. *Mutturamalinga* (4) as binding upon him. But in that case the point whether there was notice of the proceedings in the superior Court either to the inferior Court or to the parties in the inferior Court was not raised or considered. In *Subramania Chetti* v. *Ramasami Ayyen* (8), the decision in *Muttukaruppan* v. *Mutturamalinga* (4) was distinguished on this ground, and it was **[297]** held that a sale by the inferior Court was not, *ipso facto*, null and void, and the ruling in *Bykant Nath Shaha* v. *Rajendro Narain Rai* (9) was approved and followed. The most recent decisions in Calcutta (*Ram Narain Singh* v. *Mina Koery* (10)) and in Bombay *Abdul Karim* v. *Thakordas* (1)) take the same view, holding that Section 285, Code of Civil Procedure, does not take away the jurisdiction of the inferior Court, and that any proceeding by the inferior Court in contravention of that section would be an irregularity which would vitiate such proceedings only if there were notice of proceedings in the superior Court. This question of notice could however only arise between the parties in the two proceedings.

Strangers like the first and second respondents are not at all entitled to impeach the proceedings in the inferior Court on the ground that they were in contravention of Section 285, Code of Civil Procedure. We must therefore reverse the decree of the District Judge and remand the appeal for disposal on the other points according to law.

Costs will abide and follow the result.

(1) 22 B. 88. (2) 19 B. 127. (3) 18 B. 458. (4) 7 M. 47.
(5) 3 A. 356. (6) 4 A. 359. (7) 5 A. 615.
(8) Second Appeal No. 193 of 1893 (unreported). (9) 12 C. 333.
(10) 25 C. 46.

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DEC. 5.

APPEL-
LATE
CIVIL.

22 M. 297.

22 M. 297.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

VELU AND ANOTHER (*Defendants Nos. 4 and 5*), *Appellants v.* CHAMU AND OTHERS (*Plaintiff and Defendants Nos. 1, 2, 3 and 6*), *Respondents.** [5th December, 1898.]

Hindu Law—Iluvans of Palghat—Custom relating to partibility of property—Tiyans.

In a suit for partition amongst parties belonging to the caste of Iluvans of Palghat it having been contended that the ordinary Hindu Law relating to partibility of property had no application.

Held, that *Raman Menon* v. *Chathunni* (I.L.R., 17 Mad. 184), relating to the Tiyans, could not be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that the Iluvans and the Tiyans had at one time been of one class. Upon the evidence adduced to the effect that[298]the former class had for long been treating themselves as separate from the latter and that partition was enforced as a matter of right amongst the Iluvans the Courts were entitled to find the custom relating to partibility among the Iluvans proved.

SECOND appeal against the decree of the District Judge of South Malabar in appeal suit No. 199 of 1897, affirming the decree of A. Venkataramana Pai, Subordinate Judge of Palghat, in original suit No. 16 of 1895.

Suit for partition and recovery of plaintiff's one-third share of family property. The parties belonged to the caste of Iluvans of the Palghat taluk following the Makkatayam law of inheritance. The principal issue was whether the plaintiff was entitled to seek compulsory partition according to the custom of the said caste. The Subordinate Judge held that he was. On appeal, the District Judge considered that, on the evidence adduced, no other conclusion could have been arrived at. The rulings of the High Court in relation to the Tiyans of Calicut did not, in his opinion, conclude the case, referring, as they did, to Tiyans of Calicut taluk alone, and it not being certain that the Iluvans now formed a portion of the Tiyan community, or were bound by its customs and laws, even supposing their origin to have been identical. The almost universal prevalence of partition in the Iluvan community, as shown by the evidence which had been adduced, favoured the view that it was compulsory rather than dependent on mutual consent; and this conclusion was supported by the fact that in a long current of judicial decisions from the year 1872, the right to partition had been tacitly assumed. He upheld the finding of the lower Court that the plaintiff was entitled to sue for partition.

Defendants Nos. 4 and 5 appealed on the ground, among others, that the ordinary Hindu Law in regard to partibility of property ought not to have been held applicable to the Iluvans of Palghat.

Sankaran Nayar and *Govinda Menon*, for appellants.

Appu Nedungadi, for respondent No. 1.

JUDGMENT.

Tha case of *Raman Menon* v. *Chathunni* (1) cannot be taken to lay down that the rule of partibility does not prevail among the Iluvans of

* Second Appeal No. 86 of 1898.

(1) 17 M. 184.

Palghat, even assuming that at one time Iluvans and Tiyans were of one class. The evidence shows, however, that Iluvans have long been treating themselves as a separate class [299] from Tiyans and that they follow the rule of partibility. This is shown by proof of numerous instances of partition being enforced as a matter of right, and there is no instance in which it was refused. Upon such evidence the Courts were entitled to find the custom proved.

1898 DEC. 5. — APPELLATE CIVIL. — 22 M. 297.

The second appeal is dismissed with costs.

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22 M. 299=9 M.L.J. 10.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

GOWDU MAGATA AND ANOTHER (*Plaintiffs*), *Appellants v.* GOWDU BHAGAVAN AND OTHERS (*Defendant and his legal Representatives*), *Respondents.** [6th December, 1898.]

Civil Procedure Code—Act XIV of 1882, *Sections* 523, 540—*Agreement to refer—Decision thereon is a decree—Right of appeal.*

In a suit to file an agreement to refer a matter to arbitration, a decision was passed refusing a reference on the ground that the agreement to refer was not proved. On the plaintiff appealing against such refusal;

Held, that a decision passed under Section 523 of the Code of Civil Procedure is a decree and an appeal lies therefrom under Section 540 of the Code.

[R., 27 M. 255 (257) (F.B.)=14 M.L.J. 356; 2 C.L.J. 80; 84 P.R. 1901=112 P.L.R. 1901.]

SECOND appeal against the decree of G. Campbell, Acting District Judge of Ganjam, in appeal suit No. 36 of 1896, affirming the decree of G. Raghava Rao, Acting District Munsif of Sompet, in original suit No. 437 of 1895.

Suit to file a panchayat muchalka, executed by both parties, in Court, and to send it to arbitrators to partition the property of both parties, which was in possession of the defendant. The District Munsif refused to refer the matter to arbitration on the ground that the muchalka was not proved, and he dismissed the suit. Plaintiff appealed, upon which the defendant contended that there was no appeal, as the proceedings of the Lower Court amounted to an order, under Section 523 of the Code of Civil Procedure and not to a decree. Upon this objection the Acting District Judge said:—"Section 523 speaks of an order of reference after the agreement "[300] is filed, and a proceeding in which an order of reference is refused, "and the filing of the muchalka disallowed, clearly seems to be an order "only. The only orders from which appeals lie are mentioned in Section "588, and Section 523 does not find place there. See also *Daya Nand* v. "*Bakhtawar Singh* (1) and *Bhola* v. *Gobind Dayal* (2)." He found that no appeal lay, and dismissed the appeal.

The plaintiffs preferred this second appeal.

Rangachariar, for appellants.

Pattabhirama Ayyar, for respondents Nos. 2 to 4.

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* Second Appeal No. 1279 of 1879.

(1) 5 A. 333.

(2) 6 A. 186.

1898
DEC. 6.

APPELLATE CIVIL.

22 M. 299 = 9 M.L.J. 10.

JUDGMENT.

The contention is that there is an appeal from a decision passed under Section 523, Code of Civil Procedure, refusing to refer the matter to arbitration, the ground of refusal being that the alleged agreement to refer was not proved. The decision is one passed in a proceeding which the Legislature enacts shall be a suit, and is obviously an adjudication upon the right claimed by the plaintiff, and it decides the suit. The decision, therefore, clearly falls under the definition of a "decree" in the Code, and is appealable under Section 540. The ruling of the majority of the Full Bench in *Daya Nand* v. *Bakhtawar Singh* (1) rests on the footing that the proceeding under Section 523 is not a suit, but it seems to us that the plain language of the section cannot be ignored, though the action is begun, not as usual by a plaint, but by an application. The reasoning of the dissenting Judge (Oldfield, J.) in the above case is what we prefer to adopt. The ruling of this Court in *Vikrama* v. *Mallichery Kristnan Nambudri* (2) with reference to Section 525, which contains similar language to that in Section 523 also rests on the assumption that the proceeding under that section is not a suit, a view which is not consistent with the plain terms of the section. That decision may, however, be supportable on other grounds. There is a clear distinction between the case under Section 525 where the Court refuses to file an award, and the case under Section 523 where the Court refuses to enforce an alleged agreement to submit to arbitration.

In the former case no right is conclusively negatived, for the award can be enforced by an ordinary suit. In the latter case the right, if not enforced under Section 523, cannot be enforced at all (see Section 21 of the Specific Relief Act.)

[301] In such a case, therefore, the only further remedy is by appeal. We must therefore reverse the decree of the Lower Appellate Court and remand the appeal to be heard and disposed of according to law. Costs will abide and follow the result.

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22 M. 301.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

RAMA SASTRI (*Defendant No. 4*), *Appellant v.*
NARASIMHA AYYAR AND OTHERS (*Plaintiff and Defendants Nos. 1 to 3*), *Respondents.**
[31st October, 1898.]

Transfer of Property Act—Act IV of 1882, *Section* 135—*Sale of actionable claim—Mortagee by assignment—Assignee of prior lien.*

The assignee of a mortgagee obtained a decree for the principal and interest due under the mortgage, subject to a prior lien of the appellant. The appellant's prior lien had also been acquired by assignment, the consideration for which was proved to have been Rs. 575, though it purported to have been a much larger sum. On the appellant contending that Section 135 of the Transfer of Property Act did not apply so as to prevent his claiming a lien for the larger sum:

Held, that the appellant was only entitled to a lien for the price paid by him for the assignment.

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* Second Appeal No. 1977 of 1897.

(1) 5 A. 333. (2) 3 M. 68.

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Coimbatore, in appeal suit No. 55 of 1897, affirming the decree of A. Sambamurti Ayyar, District Munsif of Karur, in original suit No. 753 of 1896.

1898 OCT. 31. — APPELLATE CIVIL. — 22 M. 301.

Suit to recover principal and interest due under a registered hypothecation bond executed by defendant No. 1 to plaintiff's assignor. The facts, as found by the District Munsif, were that defendant No. 3 had held at prior lien which she had assigned to defendant No. 4 for Rs. 575, though the assignment purported to have been for a larger consideration. A decree was passed in plaintiff's favour for the principal and interest due, subject to the fourth defendant's prior lien for Rs. 575. The fourth defendant appealed, contending that Section 135 of the Transfer of Property Act did not apply and that he was entitled to a prior lien for the [302] full amount of consideration which purported to have passed from him to the third defendant. The District Judge rejected the contention, holding that an actionable claim had been sold; and he confirmed the decree of the Lower Court.

Defendant No. 4 preferred this second appeal, on the ground, among others, that a mortgage is not an actionable claim within the meaning of Section 135 of the Transfer of Property Act, and that the plaintiff being himself an assignee of a mortgagee was not entitled to the benefit of that section.

Seshagiri Ayyar, for appellant.
Sundara Ayyar, for respondent No. 1.

JUDGMENT.

Assuming that the object of Section 135 of the Transfer of Property Act was, as contended for the appellant, only to protect the party who was originally liable under the actionable claim, that is to say, the mortgagor in cases like the present, that object would be defeated by allowing the appellant more than the amount paid by him as the price for the assignment to him. For in that case the mortgagor would have to pay that amount to the respondent when redemption is sought by the mortgagor from the respondent. We think therefore the Lower Appellate Court was right in declining to allow the appellant more than the price paid by him. The second appeal fails and is dismissed with costs.

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22 M. 302.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

DHARMAPURAM PANDARA SANNADHI (*Defendant No. 3*), *Appellant v.* VIRAPANDIYAM PILLAI (*Plaintiff*), *Respondent.**
[13th and 18th October and 4th November, 1898.]

Hindu Law—Inheritance of property left by ascetic—Rules relating to ascetic persons of the Sudra caste.

It being clearly implied by all the authorities that a Sûdra cannot enter the order of yathi or sannyasi, the devolution of property left by a deceased person of the caste referred to, who has become an ascetic and renounced the world, is [303] regulated by the ordinary law of inheritance, in the absence of proof of any general or special usage to the contrary.

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* Second Appeal No. 1751 of 1897.

1898 Nov. 4. APPELLATE CIVIL. 22 M. 302.

[N.F., 9 Bom. L.R. 318 (N); F., 40 C. 545 (547) = 17 C.W.N. 517 = 18 Ind. Cas. 474; 4 M.L.T. 83 (84).]

SECOND appeal against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 285 of 1895, reversing the decree of K. Ramachandra Ayyar, District Munsif of Trichinopoly, in original suit No. 217 of 1894.

Suit by plaintiff, as the heir of his deceased brother, to recover a house left by him. The second and third defendants claimed the property as representing the mutt into which, as they alleged, the deceased had been admitted as a tambiran or ascetic. They claimed that plaintiff and his brother were divided, and that according to the rules of the mutt and to law and custom governing the devolution of property of deceased disciples, the property of the deceased belonged to the mutt. The District Munsif found that the brothers were divided; and that the probabilities were that the deceased had become a tambiran, andi or sannyasi, and that he had become attached to the third defendant's mutt. In these circumstances, he, relying upon Smriti Chandrika, Chapter XI, Section VII, held that the property he died possessed of should go to the mutt. The plaintiff appealed to the District Judge, who thought the evidence indicated that the deceased had not entirely cast off the world. He added :—"His case appears to me to come under the rules regarding ascetics who "retain worldly property the succession to which is regulated by the "ordinary law and not by the special rules of succession applicable to "ascetics. Those special rules, without doubt, were intended to apply to "the property acquired by an ascetic while he held that position, or such "absolute necessaries as he might take with him into his new state, "and originally applied only to Brahmans (West and Buhler's Hindu law, "3rd edition, Introduction to Chapter V, page 124). The rule that a "bairagi could hold secular property came later, and is opposed clearly to "the original idea of asceticism : hence, probably, the condition that the "secular property goes to the natural heirs. The question in the case of "Sudra ascetics is one really of custom and usage : for the shastraic law "does not apply to them ; in this suit, however, the customs of the "tambirans have not been proved, and both sides have relied on the "decided cases and the law of the Smriti Chandrika quoted by the lower "Court. Acting upon that law, it appears to me that the house never "became the spiritual property of the [304] deceased, but remained his "secular property at his death, and should go to his secular heir, *i.e.*, to "the plaintiff." He allowed the appeal and gave possession of the property as prayed.

Defendant No. 3 preferred this second appeal.

V. Krishnasami Ayyar, for appellant.

Sundara Ayyar, for respondent.

JUDGMENT.

SUBRAMANIA AYYAR, J.—It is doubtful whether, as alleged on behalf of the appellant, the deceased Tiruchittambalam to whose property the dispute relates, had at the time of his death become an ascetic and completely renounced the world. For, subsequent to the time he is said to have done so, he had litigation with his brother, the respondent, and recovered under a compromise decree the house in question. But supposing Tiruchittambalam had become an ascetic as alleged, it cannot, as urged for the appellant, be held that the case is governed by the rules

laid down in the Hindu Law books (1) as to the devolution of the property of a yathi or sannyasi. For Tiruchittambalam was Sudra, and was therefore not entitled to enter the order of yathi or sannyasi. Though some authorities such as the Mitakshara held that it is competent for a Brahman alone to become a sannyasi, and others, as will be seen from the passage in the Nirnaya Sindhu quoted in West and Buhler's Digest of Hindu Law, 3rd edition, page 552, that a Kshatrya and Vysia also can enter that order, yet all the authorities necessarily and clearly imply that a Sudra cannot; nor do we think that the passages in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(2), in which reference is made to the rules regarding the devolution of the property of a spiritual family, as the learned Chief Justice and Muttusami Ayyar, J., expressed it, imply, as was, urged for the appellant, that those rules were taken by the learned Judges to govern the descent of the property of Sudra ascetics. It is clear that the learned Judges refer to those rules to show that the usage there established with reference to the relation subsisting between the heads of the two institutions referred to in that case, was somewhat analogous to the relation subsisting between the members of a spiritual family spoken of in the Hindu Law books.

[305] The respondent is, therefore, entitled, under the ordinary law of inheritance, to the property in dispute, as no attempt was made to show that any special usage existed with reference to the devolution of the property of Sudra ascetics generally or ascetics connected with the appellant's adhinam or mutt. The decree of the Lower Appellate Court is right. The second appeal fails and is dismissed with costs.

MOORE, J.—I concur.

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22 M. 305 = 9 M.L.J. 14.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

RANGAMMAL (*Plaintiff*), *Appellant* v. ECHAMMAL AND OTHERS (*Legal Representatives of the Deceased Defendant*), *Respondents*.* [27th and 28th October and 4th November, 1898.]

Hindu Law—Maintenance of son's widow—Self-acquired property—Property inherited from maternal grandfather.

A Hindu died, leaving property with his widow, of which a portion was self-acquired and the remainder had been inherited by him from his maternal grandfather. He had also, by will, devised certain items to his wife. His son, who had pre-deceased him, had also left a widow, who now claimed maintenance from her mother-in law:

Held, that inasmuch as property inherited from a maternal grandfather is not self-acquired, the rule of non liability for maintenance relating to self-acquired property ought not to be extended to property of this description, which was therefore liable to the maintenance claimed.

Semble, that the moral obligation to support a son's widow, to which her father-in-law is subject, acquires, on his death, the force of a legal obligation as against his self-acquired assets, in the hands of his heir; and that a testamentary

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* Second Appeals Nos. 1970 and 1971 of 1897.

(1) By Whitley Stokes (Madras Reprint, 1865).—the Mitakshara, Chapter II, Section VIII, page 450.

(2) 10 M. 375.

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disposition of such self-acquired assets, made in favour of volunteers by a person morally bound to provide maintenance, cannot affect the position of a party whose moral claim has become a legal right.

Ammakannu v. *Appu* (11 M. 91) considered.

[**F.**, 24 M.L.J. 106 (109) = 13 M.L.T. 97 (99) = (1913) M.W.N. 40; **Appr.**, 29 C. 557 (573) = 6 C.W.N. 530; **R.**, 31 M. 338 (342) = 18 M.L.J. 254 = 3 M.L.T. 266; 16 Ind. Cas. 139 (145) = 23 M.L.J. 223 = 12 M.L.T. 230 = (1912) M.W.N. 861 (868); **Expl.**, 25 B. 263 = 2 Bom. L.R. 894 (897).]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Coimbatore, in appeal suit No. 111 of 1896, affirming the decree of T. T. Ranga Chariar, District Munsif of Coimbatore, in original suit No. 74 of 1895.

[306] Suit by a widow against her mother-in-law for maintenance. Plaintiff's husband had died while she was still a child. Subsequently his father had also died, leaving a widow, the defendant, in possession of certain property. As to a portion of that property, it was found to have been inherited by the defendant's husband from his maternal grandfather. The District Munsif, relying on *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (1) and *Sivaganga Zamindar* v. *Lakshmana* (2), held this to be family property in the hands of defendant's late husband, in which plaintiff's husband had an interest, though he could not have enforced its partition as against his late father. He also held that the other items of the plaint property were joint family property of the husbands of the plaintiff and defendant; and that the plaintiff was entitled to maintenance. He further held that a devise by will of the defendant's husband of certain items of plaint property to defendant could not affect the plaintiff so as to destroy her right to maintenance. On appeal, the District Judge, with regard to a portion of the property, found that plaintiff had failed to prove that it was ancestral. With regard to that which defendant's husband had inherited from his maternal grandfather, he referred to *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (1), *Sivaganga Zamindar* v. *Lakshmana* (2), Mayne's Hindu Law, 5th edition, at pages 281 and 289 and arrived at the conclusion that plaintiff's husband had not been a coparcener with a right to partition, and that plaintiff could not claim maintenance out of it. He also held that the land bequeathed by will to defendant by her husband was not liable for plaintiff's maintenance. He dismissed her suit.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar and *Raghava Ayyangar*, for appellant.

Ramachandra Rao Saheb and *Ganapati Ayyar*, for respondents.

JUDGMENT.

SUBRAMANIA AYYAR, J.—*Ammakannu* v. *Appu* (3), relied on, on behalf of the respondents, no doubt lays down that a Hindu is under no legal obligation to maintain his son's widow out of his self-acquired property. There, however, the doctrine adopted in *Adhibai* v. *Cursandas Nathu* (4), *Janki* v. *Nand Ram* (5); *Kamini* **[307]** *Dassee* v. *Chandra Pode Mondle* (6), and *Devi Prasad* v. *Gunwanti Koer* (7), cited for the appellant, was not considered. That case, therefore, cannot be taken to preclude our following the view laid down in the latter cases. According to that view, the moral obligation to support the appellant, to which her

(1) 9 I. A. 128. (2) 9 M. 188 (190, 191). (3) 11 M. 91. (4) 11 B. 199.
(5) 11 A. 194. (6) 17 C. 373. (7) 22 C. 410.

father-in-law was subject would, on his death, have acquired the force of a legal obligation as against his assets in the hands of his heir. Consequently the appellant must be held entitled to maintenance out of his self-acquired property in the hands of his widow, the deceased defendant, unless the fact that she took the same under his will distinguishes this case from the *ratio decidendi* of the cases cited for the appellant. In one of them, *viz.*, *Adhibai* v. *Cursandas Nathu* (1), Farran, J., appears to have been inclined to hold that in a matter like this a devisee would occupy a better position than an heir. The observations of the learned Judge, however, are *obiter dicta*, and even as such seem not to represent his decided opinion, *Adhibai* v. *Cursandas Nathu* (1). The better conclusion is, perhaps, that, the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator he could, by his will, have directed that she should get no maintenance out of his estate. But in cases like this, her claim to maintenance, originating from the status acquired by her marriage, becomes a legal right independently of his volition and comes into existence at the same moment as the dispositions in favour of the volunteer become operative. It is consequently difficult to see how the latter could affect the former. It is not, however, necessary to put our decision in favour of the appellant on this ground, since it can well be based on the other ground urged. Now it is shown by the evidence that, in addition to his self-acquired property, the appellant's father-in-law died possessed of considerable property inherited by him from his maternal grandfather, or that which had been acquired with the sale-proceeds thereof. Though such property was not liable for partition at the instance of the appellant's husband, yet, it having been held by the Judicial [308] Committee that property inherited from the maternal grandfather is not self-acquired property, (*Muttayan* v. *Zamindar of Sivagiri* (2)), the rule of non-liability established by decided cases with reference to self-acquired property ought not to be extended to inherited property of the description just alluded to. In regard to such property the female would have been entitled to claim maintenance even in the life-time of the person inheriting it. This view seems to be warranted, especially as the theory that the right of a widowed female to maintenance is dependent on the possession by the party called upon to provide the maintenance of assets derived from the husband of the female claiming the maintenance appears to have had little or no foundation in the Smritis or commentaries, according to Messrs. West and Buhler (Digest of Hindu Law, 3rd edition, pages 245-252) and Dr. Jolly (History of the Hindu Law, pages 134 and 135). The latter learned author refers to a passage from the writings of Kamalakara to show that it is incumbent on sons and grandsons to maintain indigent widows and daughters-in-law, though no wealth of the father may be in existence. He also explains that the passage in the Smriti Chandrika relied on in support of the contrary view does not really touch the point. He further points out that in the Saraswati Vilasa, Section 522, the duty of a father to provide for his son's widow is stated unconditionally (page 135, note).

The decree of the lower Appellate Court cannot therefore be sustained. It is reversed and that of the District Munsif restored, subject to

(1) 11 B. 199. (2) 6 M. 1 at p. 19.

1898 Nov. 4. — APPELLATE CIVIL. the modification that plaint items Nos. 4, 5 and 6, which had been alienated by the father-in-law several years before his death, be not charged with the appellant's maintenance. The respondents must pay the appellant's costs in this and in the Lower Appellate Court.

MOORE, J.—I concur.

22 M. 305 = 9 M.L.J. 14.

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22 M. 309.

[309] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

GOPAL RAO (*Plaintiff*), *Appellant v.* NARASINGA RAO AND OTHERS (*Defendants and Representatives of Defendant No.* 1), *Respondents.**
[17th January, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 43—*Relinquishment by guardian of minor of part of claim—Subsequent suit for part relinquished.*

While plaintiff was a minor, his guardian had sued for and obtained a decree for arrears of shrotriem in respect of faslis 1290 and 1291. Having attained his majority, plaintiff now sued for similar arrears alleged to be due in respect of the previous faslis 1287, 1288, and 1289, contending that the relinquishment of a portion of a claim in a suit by a guardian could not preclude a suit for the portion relinquished from being subsequently brought, on the attainment of his majority, by the person on whose behalf the guardian had acted:

Held, that it cannot be said that Section 43 of the Code of Civil Procedure has no application to a suit in which the plaintiff is a minor. The acts of a guardian in the conduct of a suit must be upheld unless it be shown that they were unreasonable or improper.

[R., 14 Ind. Cas. 95 (97).]

SECOND appeal against the decree of E. C. Rawson, District Judge of Vizagapatam, in appeal suit No. 78 of 1897, reversing the decree of R. Hanumanta Rao, District Munsif of Rajam, in original suit No. 330 of 1896.

Suit to recover arrears of shrotriem in respect of portions of faslis 1287 and 1288 and the whole of fasli 1289. Plaintiff had been a minor under the Court of Wards until the year 1895, and during his minority the shrotriem in respect of the faslis mentioned had fallen into arrears, together with the shrotriem for faslis 1290 and 1291. The agent to the Court of Wards had instituted a suit and obtained a decree against the defendants in 1884 for the shrotriem due in respect of the two last mentioned faslis. Plaintiff, having attained his majority, now sued for the arrears accrued due in respect of the previous faslis, claiming the privilege of Section 7 of the Limitation Act. Defendants objected that the suit was barred by Section 43 of the Code of Civil Procedure as well as by lapse of time. The District Munsif ruled that the suit was not barred by time; and this ruling was upheld on appeal. He further held [310] that the privilege accorded to a minor under Section 7 of the Limitation Act, might, by analogy, be applied to prevent a suit from being barred under Section 43 of the Code of Civil Procedure; and that the right to sue was that of the minor, which could be exercised or not by his guardian, but which, if not exercised, would continue to exist until the minor became qualified to act for himself. The District Judge reversed this ruling. He held that inasmuch as Section 43 of the Code

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* Second Appeal No. 432 of 1898.

of Civil Procedure makes no provision in favour of minors such as is made in the Limitation Act, the present claim should have been included in the previous suit of 1884, the fact that plaintiff was then a minor making no difference. He dismissed the plaintiff's suit as being barred under Section 43 of the Code of Civil Procedure.

The plaintiff preferred this second appeal.

Ayya Ayyar, for appellant.

Madhava Rao, for respondents.

JUDGMENT.

The record in the previous case is not before us, and the circumstances in which the suit was brought are not disclosed in the evidence.

We cannot say that Section 43 of the Code of Civil Procedure has no application to a suit in which the plaintiff is a minor. The acts of the guardian in the conduct of a suit must be upheld unless it is shown that they were unreasonable or improper. We must dismiss the appeal with costs.

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22 M. 310=9 M.L.J. 17.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SIVA RAMAYYA (*Plaintiff*), *Appellant v.* ELLAMMA AND OTHERS (*Defendants Nos.* 1 *to* 6, *Representative of Defendant No.* 7, *and Defendant No.* 8), *Respondents.** [30th November, 1898.]

Champerty—Purchase for an inadequate consideration—Speculative suit not necessarily champertous.

A suit having been dismissed on the ground that a sale upon which it was based had been made for a consideration so inadequate as to support the belief that it was in the nature of champerty :

[311] *Held*, that the elements required to bring the case within the authorities on the law of champertous transactions in this country were wanting. It was not a case in which an improper interest had been acquired in the unrighteous litigation of other people. The fact that a suit may be speculative does not render it champertous.

[R., 2 N L.R. 17 (21) ; 26 P.R. 1906=20 P.L.R. 1906.]

SECOND appeal against the decree of W. G. Underwood, District Judge of Cuddapah, in appeal suit No. 146 of 1896, affirming the decree of T. A. Narasimha Chari, District Munsif of Nandalur, in original suit No. 473 of 1895.

Suit to establish plaintiff's title to and recover possession of a house and lands from the defendants. Plaintiff had purchased the suit property from first defendant, who, it was said, had acquired it by inheritance and had, prior to plaintiff's purchase, vested it by a deed of gift in second defendant, who had, in turn, sold it to the remaining defendants, some of whom were now in possession. Plaintiff alleged ignorance of these alienations, which, however, was doubted by both the Lower Courts. The consideration for the sale to plaintiff was only Rs. 50, which the District Munsif thought so inadequate a price (the house being worth Rs. 150) as to cast a doubt upon the *bona fides* of the transaction. He considered

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* Second Appeal No. 11 of 1898.

1898 Nov. 30. — APPELLATE CIVIL — 22 M. 310 = 9 M.L.J. 17.

that it was an agreement in the nature of champerty; that it was a transfer taken by plaintiff to fight the battle against the defendants who had taken deeds from the second defendant; that the suit should have been brought by first defendant, and then the question of the validity of her right by inheritance might have been gone into. He held, for these reasons, that the sale to plaintiff was champertous and that plaintiff could not maintain the suit on the strength of his sale-deed. The District Judge, on appeal, after dealing with the facts, said:—"The consideration being "very inadequate, the District Munsif believed the conveyance to be "champertous. First defendant ought to have brought this suit and had "the right of her succession investigated. It is argued that the law of "champerty does not apply in India. This is scarcely a fact, looking to "the authorities quoted at pages 16 and 17 of Mr. Justice O'Kinealy's "work on Procedure. This suit is brought on a contract tending to promote unnecessary litigation. It seems to me that the District Munsif "came to a right decision." He dismissed the appeal.

The plaintiff preferred this second appeal.

Seshagiri Ayyar, for appellant.

Gurusami Chetti, for respondent No. 4.

JUDGMENT.

[312] The suit has been dismissed on the ground that the basis of the claim was champertous. But according to the authorities on the law of champertous transactions in this country, the elements required to bring this contract within the rulings are wanting. It is not a case in which the plaintiff has acquired an improper interest in the unrighteous litigation of other people nor is there any other circumstance making it champertous. It may be a speculative suit, but that does not make it champertous (*Gopal Ramchandra* v. *Gangaram Anandishet* (1)). The transaction may however be voidable under Section 53 of the Transfer of Property Act at the instance of the defendants who are transferees for value. But this will depend upon the facts, which have not been sufficiently gone into. We must therefore reverse the decrees of both the Lower Courts and direct that the suit be restored to the file of the Court of First Instance for trial and disposal upon the other issues already framed and upon the issue arising with reference to Section 53 of the Transfer of Property Act.

Costs hitherto incurred will abide and follow the result.

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22 M. 312.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

VIRABHADRA GOWDU (*Defendant No.* 2), *Appellant v.* GURUVENKATA CHARLU (*Plaintiff*), *Respondent*.*

[8th December, 1898.]

Hindu Law—Alienation of family property—Right of son whose share is unaffected—Purchaser's equity for refund of purchase money.

There is no equity in favour of the purchaser of property belonging to a Hindu family entitling him to a refund of purchase money paid in respect of a

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* Second Appeal No. 276 of 1898.

(1) 14 B. 72.

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share afterwards held to have belonged to a son and to be unaffected by the sale. The words "on payment" occurring in the last sentence of the judgment in *Sabapati* v. *Somasundaram* (I.L.R., 16 Mad. 76) do not appear in the original judgment, and are due to a printer's error.

SECOND appeal against the decree of K. Ramachandra Ayyar, Acting Subordinate Judge of Bellary, in appeal suit No. 45 of **[313]** 1896, modifying the decree of V. Suryanarayana Garu, District Munsif of Bellary, in original suit No. 834 of 1894.

Suit for partition of land and to cancel certain alienations of the same made by plaintiff's father in so far as such alienations related to the half share of the plaintiff in the suit land. The District Munsif found that plaintiff's half share was unaffected by the sale, but ordered him to refund his proportion of the sale price of the land to the purchaser, relying on *Koer Hasmat Rai* v. *Sunder Das* (1) and *Sabapathi* v. *Somasundaram* (2). On plaintiff appealing against that order, the Acting Subordinate Judge apprehended that the words "on payment," in the last paragraph of the judgment in *Sabapathi* v. *Somasundaram* (2), must be a misprint, and modified the order by declaring plaintiff entitled to have his half share partitioned and to have the same delivered over to him unconditionally.

Defendant No. 2 preferred this second appeal.

Sivasami Ayyar, for appellant.

Raghavendra Rao, for respondent.

JUDGMENT.

The authority relied on by the appellant for making the son liable for the purchase money in respect of his half share which has been held unaffected by the sale is *Sabapathi* v. *Somasundaram*(2), but, as the Subordinate Judge has surmised, the words "on payment" occurring in the penultimate sentence of the judgment are not in the original judgment, and are a printer's error.

It has been held in *Sivaganga Zamindar* v. *Lakshmana*(3) that there is no equity for the purchaser in such a case.

The second appeal fails and is dismissed with costs.

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22 M. 314

[314] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

VENKATA VIJAYA GOPALARAJU (*Plaintiff*), *Appellant* v. TIMMAYYA PANTULU AND OTHERS (*Defendants*), *Respondents*.*
[5th December, 1898 and 9th January, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 220—*Practice—Costs of guardian ad litem—Advance by plaintiff for costs of minor defendants—Contract Act—Act IX of* 1872, *Sections* 68, 70—*Right to recover amount advanced.*

Plaintiff having, in a prior suit, sued the defendants, who were minors, and their father for specific performance, was ordered by the Court to advance money to the guardian *ad litem* of the minors (who was appointed by the Court), to enable him to conduct their defence. Plaintiff succeeded, but the Court refused to provide, in its decree, for the repayment to plaintiff of the amount so advanced. On the plaintiff bringing this suit to recover that amount :

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* Second Appeal No. 98 of 1898.

(1) 11 C. 396. (2) 16 M. 76 (79). (3) 9 M. 188 (197, 200).

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Held, per SUBRAMANIA AYYAR, J. (1) that the Court in which the prior suit had been brought had power neither to direct the plaintiff to make the advances to the guardian, as had been done nor to award the amount so paid as costs in the cause. The present suit, therefore, was not unsustainable for the reason that the subject matter of it was one for the Court to have dealt with in the previous suit;

(2) that the circumstances of the case were not such as to render the amount recoverable under Section 70 of the Contract Act, inasmuch as the defendants could not be said to have enjoyed the benefit of the expenditure;

(3) that payments or charges connected with legal expenses in which infants are concerned may, in certain circumstances, come under the head of necessaries within the meaning of Section 68 of the Contract Act. Disbursements properly made in defence of the suit by the guardian *ad litem* out of the plaintiff's advances might be allowable if it be alleged and proved that there were reasonable grounds for the defence put forward, though it proved unsuccessful. But that this ground could not now be relied upon on second appeal, inasmuch as it had not been put forward in the Court below, when an issue relating to it could have been framed.

Per DAVIES, J., that a matter of this nature can and should be settled in the suit in which it arises; and that where a plaintiff is successful, a supplementary issue should be framed and tried as to the amount due to him on account of advances made by him to the guardian *ad litem* for conducting the defence and a decree passed in his favour for the total amount of costs found to have been properly incurred in the case by the guardian out of such advances.

[R., 38 C. 1 (7) = 12 C.L.J. 566 = 14 C.W.N. 945 = 6 Ind. Cas. 810.]

SECOND appeal against the decree of E. C. Rawson, District Judge of Vizagapatam, in appeal suit No. 138 of 1896, affirming the **[315]** decree of P. Lakshmi Narasu Pantulu, District Munsif of Vizianagram, in original suit No. 618 of 1894.

Suit to recover, with interest, a sum advanced by order of Court to defendants, who were minors, to enable them to conduct their defence in a prior suit, original suit No. 41 of 1892, in which plaintiff had sued them and their father for specific performance of a contract of sale of family property executed by their father in favour of the plaintiff. The father of the defendants having declined to act as their guardian *ad litem*, an officer of Court had been so appointed, and the money now sued for had been advanced by plaintiff, in pursuance of the Court's order, for the conduct of the defence of the minor defendants. The defence (which was to the effect that the debt in discharge of which the property was agreed to be sold was immoral) failed, and specific performance of the contract was ordered. The Court, however, refused to provide, in its decree, for the repayment to plaintiff of the amount advanced by him to the guardian *ad litem* in pursuance of the Court's order for the conduct of the minors' defence. Plaintiff, therefore, brought this suit to recover the amount of the said advance with interest. On the issue as to whether a separate suit lay for the recovery of such advance, the District Munsif doubted the power of the Subordinate Judge to order plaintiff to make it (referring to *Narayandas Ramdas* v. *Sahed Husein* (1)), and held that at any rate the amount so advanced should have been included by the Court in cost under Section 220 of the Code of Civil Procedure. He further held, that, considering the relationship of the parties in original suit No. 41 of 1892 and the circumstances under which the money had been advanced, Section 70 of the Contract Act had no application, and that a separate suit to recover the amount advanced would not lie. He accordingly dismissed the suit. On appeal by plaintiff the District Judge confirmed the decision of the Lower Court.

(1) 12 B. 553.

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The plaintiff preferred this second appeal.

Narayana Rao, for appellant.

Mahadeva Ayyar, for respondents.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The appellant sued, in original suit No. 41 of 1892 on the file of the Subordinate Court of Vizagapatam, the respondents and their father for the specific performance of an agreement entered into by the father to sell some lands which [316] belonged to him and the respondents as members of a joint family. The respondents, being minors, were represented in the suit by an officer of the Court who had been appointed as guardian *ad litem*. The suit was defended on their behalf chiefly on the ground that the debts, with reference to the discharge whereof the sale was agreed to be made, had been incurred for immoral purposes. But the defence entirely failed, it having been proved beyond doubt that the debts were proper debts which were fully binding on the sons. The Court thought that the father had caused the above unfounded contention to be set up in the name of his sons and decreed specific performance. In the course of the suit, however, the appellant had, in accordance with an order of the Court, paid from time to time to the guardian *ad litem* sums aggregating to Rs. 923-8-0 for purposes connected, it is said, with the defence of the suit. But the Court refused to provide, in the decree therein, for the repayment to the appellant of the amount paid to the guardian *ad litem*. In the absence of any provision of law in this country similar to Order 65, Rule 13, under the Judicature Act in force in England, the Court in which suit No. 41 of 1892 was pending had power neither to direct the appellant to make the payments which were made to the guardian *ad litem*, (*Narayandas Ramdas* v. *Saheb Husein* (1)), nor to award the amount so paid as costs in the cause. The present suit for that amount cannot therefore be held to be unsustainable for the reason that the matter was one for the Court to have dealt with in the previous suit. The question is whether the appellant is entitled to a decree for the money against the respondents. On behalf of the appellant it was contended that the case came under Section 70 of the Indian Contract Act. But the contention is untenable, (*Branson* v. *Appasami* (2)). Assuming that the section is applicable to cases where anything is done for or delivered to a person incapable of entering into a contract, it is clear that, in the circumstances of the case, the respondents cannot, within the meaning of the section, be said to have enjoyed the benefit of the appellant's expenditure. It was next urged that the case came under Section 68 of the said Act. No doubt there is authority for the view that payments or charges connected with legal matters in which infants are concerned would, in certain circumstances, come under the head of necessaries. In [317] *Clarke* v. *Leslie* (3) it was considered that money, advanced to an infant to procure him liberation from arrest for the price of necessaries or in execution of a decree for a debt for which the infant had made himself liable, would come under that head. In *Ex parte M'Key* (4) a similar view was taken as to rent paid in order to save the estate of a minor from the costs of an ejectment. In *Helps* v. *Clayton* (5) it was held that solicitor's costs, with reference to the preparation of a marriage settlement by the intended

(1) 12 B. 553. (2) 17 M. 257 (259). (3) 5 Esp. 28.
(4) 1 Ball & B. 405. (5) 34 L J.C.P. 1.

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husband of an infant (who had no property of her own to settle) under which proper provision was made for her benefit, were costs in respect of necessaries suitable to her estate and condition. *Watkins* v. *Dhunno Baboo* (1) and *Sham Charan Mal* v. *Chowdhry Debya Singh Pahraj* (2) are also in point. But turning to the present case it is evident, from the facts already stated, that the defence on behalf of the respondents in suit No. 41 of 1892 was quite untrue. Nevertheless whatever was properly disbursed by the guardian *ad litem* out of the money received from the appellant, in defending the suit might be allowable if it were alleged and proved that there were reasonable grounds for putting forward such a defence, though it proved unsuccessful. Compare *Brown* v. *Ackroyd* (3). But in the Lower Court, Section 68 on which stress is now laid not having been relied on, no allegation to the said effect was made and no issue framed as to the point. The appellant cannot be allowed at this stage to raise such an issue, as it would necessitate further enquiry.

The second appeal fails and I would dismiss it but in the circumstances without costs.

DAVIES, J.—I agree in the conclusion of my learned colleague dismissing the second appeal without costs. It seems to me, however, that there is nothing to prevent a matter of this kind being settled in the suit in which it arises and that it ought therefore to be settled. In cases where the plaintiff is successful a supplementary issue should be framed and tried as to the amount due to the plaintiff on account of advances made by him to the guardian *ad litem* for conducting the defence and then a decree given to the plaintiff for the total of the costs found to have been properly incurred in the case by the guardian out of those advances. If this be done, there will be no occasion for a fresh suit.

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22 M. 318.

[318] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

PAPAMMA (*Plaintiff*), *Appellant v.* SUBBANNA (*Defendant*), *Respondent.** [27th March, 1899.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections* 9, 50, 51—*Tender of patta during fasli—Suit commenced after Fasli.*

A suit to enforce acceptance of patta under Section 9 of the Rent Recovery Act, 1865, may be instituted after the expiration of the fasli to which the patta relates, provided that the patta has been tendered during thec ontinuation of the Fasli.

Ramasami Mudaliar v. *Rathna Mudaliar* (21 M. 148) explained.

[F., 23 M. 474 (477).]

SECOND appeal against the decree of J. H. Munro, Acting District Judge of Godavari, in appeal suit No. 37 of 1899, affirming the decree of P. Kershasp, Acting Head Assistant Collector of Godavari, in summary suit No. 29 of 1898.

Summary suit under Sections 9, 50 and 51 of Act VIII of 1865, to enforce acceptance of patta. Plaintiff had, within the fasli year, namely, on 22nd May 1898, tendered to the defendant a patta in respect

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* Second Appeal No. 177 of 1899.

(1) 7 C. 140. (2) 21 C. 872. (3) 25 L.J.Q.B. 193.

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of fasli 1307, which ended on 30th June 1898. Defendant had refused to accept the patta so tendered, and to execute a muchalka in respect of the same. The suit was commenced after the expiration of the fasli to which it related, namely, on 12th July 1898. On this ground the Acting Head Assistant Collector dismissed it, holding the decision in *Ramasami Mudaliar* v. *Rathna Mudaliar* (1) to have clearly laid down that a suit must be brought within the fasli to which the patta relates. Though that decision related to Section 8 of the Rent Recovery Act he held that the same principle must apply to a question arising under Section 9 of that Act. On appeal to the Acting District Judge the decision of the Lower Court was upheld, and the suit dismissed.

The plaintiff preferred this second appeal.

Hon. *Bhashyam Ayyangar* and *Subramania Ayyar* for appellant.—A suit to enforce acceptance of patta under Section 9 of the Rent Recovery Act is maintainable, even though it be brought after the expiration of the fasli to which it relates, provided **[319]** that the patta has been tendered within the fasli. Under the section referred to, the cause of action only arises one month after tender of patta; and under Section 51, summary suits under the Act must be brought within thirty days from the date of the cause of action. It must, therefore, be possible to bring a suit after the expiration of a fasli if patta has been duly tendered during its continuance. The Lower Courts have misunderstood the principle laid down in *Ramasami Mudaliar* v. *Rathna Mudaliar* (1). There, not only had the suit been instituted after the expiration of the Fasli, but the demand for patta had also been made after that date. In *Venkatasami Naik* v. *Setupati Ambalam* (2), it is laid down only that tender of patta must be made within the Fasli for which rent is sought to be recovered.

Seshachrirar for respondent.—The effect of the decision in *Ramasami Mudaliar* v. *Rathna Mudaliar* (1) is to lay down the broad rule that suits under either Section 8 or Section 9 of the Rent Recovery Act should be instituted before the expiration of the fasli to which the patta relates. [SUBRAMANIA AYYAR, J.—That case merely applies to tenants the rule in force against landlords. It is said that inasmuch as a landlord must tender patta within the fasli for which rent is sought to be recovered, so a tenant must be governed by the same rule, when he demands a patta from the landlord.] The Act does not limit the period during which patta may be tendered. See also *Seshadri Ayyangar* v. *Sandanam* (3). Since a suit under Section 9 is only a proceeding to enforce acceptance of patta by the assistance of the Court, if the tender of the patta must be effected during the continuance of the Fasli, so should the institution of the suit.

JUDGMENT.

In order to enable a landlord to maintain a suit to enforce the acceptance of a patta the tender should be made within the fasli, a month should have expired from the tender of the patta, and the action should be brought within thirty days from the expiry of the month allowed to the tenant to accept the patta tendered.

We do not think it was intended by the judgment in *Ramasami Mudaliar* v. *Rathna Mudaliar* (1) to lay down the rule that unless the action is brought within the fasli it cannot be sustained. The judgment must be read with the facts and the reasoning used **[320]** In the judgment shows that this is so, for the reason given for holding that the suit is

(1) 21 M. 148. (2) 7 M.H.C.R. 359. (3) 1 M. 146.

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barred is that it was held in *Venkatasami Naik* v. *Setupati Ambalam* (1) "that a patta must be tendered by a landlord within the Fasli for which rent "is sought to be recovered" and nothing more. In the present case, admittedly the above conditions have been complied with, and the fact that the suit has been brought after the expiry of the fasli is immaterial. We, therefore, allow the appeal and reverse the decrees of the Courts below and remand the appeal for disposal according to law. Costs of this second appeal will abide and follow the result.

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22 M. 320=9 M.L.J. 28.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

VENKAYYA (*Plaintiff*), *Appellant v.* RAGHAVA CHARLU (*Defendant*), *Respondent.** [17th January, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 230—*Execution of decree prevented by "fraud or force" of judgment-debtor—Period of limitation.*

Where a judgment-debtor, knowing that a warrant of attachment had been issued against his moveable property, locked up his house and so prevented the moveable property therein from being attached.

Held, that his action amounted to "fraud" within the meaning of Section 230 of the Code of Civil Procedure. In order to obtain the benefit of the proviso in that section, it is not necessary that a judgment-creditor should prove that the fraud of the judgment-debtor continued so as to prevent execution of the decree at any time. "Fraud" or "force" on the part of a judgment-debtor gives a new starting point for the period of limitation, and an application for the execution of a decree may be granted at any time within twelve years after the date on which a judgment-debtor has by "fraud" or "force" prevented execution of a decree.

[R., 35 M. 670 (673)=12 Ind. Cas. 679=22 M.L.J. 35=10 M.L.T. 413=(1911) 2 M.W.N. 434; 15 C.L.J. 678 (681)=13 Ind. Cas. 88; 8 Ind. Cas. 805=9 M.L.T. 162; 24 M.L.J. 270=13 M.L.T. 226 (227)=(1913) M.W.N. 182; 14 O.C. 238 (242).]

APPEAL against the order of T. M. Saminadha Ayyar, Acting District Judge of Nellore, on appeal against Order No. 3 of 1894, reversing the order of P. Adinarayanayya, District Munsif of Kanigiri, in execution petition No. 144 of 1894, in the matter of original suit No. 127 of 1879 on the file of the Court of the District Munsif of Kavali.

[321] Application for execution under Sections 230 to 235 of the Code of Civil Procedure. The petition was presented on 6th February 1894. Final decree had been passed in second appeal by the High Court on 9th January 1882. It was claimed in the petition that though twelve years had expired since the date of the decree in appeal, the judgment-debtor had, with the object of gaining delay, caused objection petitions to be filed, and appeals to be preferred thereon, and had so prevented the execution of the decree. The District Munsif, holding that no specific allegations of fraud were set forth in the petition, dismissed it as barred by limitation. On appeal, the application was remanded for a finding as to whether or not the judgment-debtor had by fraud prevented execution of the decree at some time within twelve years immediately before the

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* Appeal against Appellate Order No. 59 of 1898.

(1) 7 M.H.C.R. 359.

date of the application. The finding was that the first application for execution had been made on 13th July 1882 and a warrant issued, under which some immoveable property of the judgment-debtor had been attached and sold. No moveable property had, however, been attached, as the house of the judgment-debtor had been found locked and so continued until 12th August 1882, when the warrant (of which the judgment-debtor was well aware) had been returned unexecuted. There had been other applications for execution of the decree. The District Munsif held that the judgment-debtor had, by so closing his house, prevented execution by fraud. The Acting District Judge, on this finding, reversed the original order and held that the application for execution was not time-barred.

The judgment-debtor preferred this appeal.

Seshagiri Ayyar for appellant:—The averments in the petition do not amount to a charge that the judgment-debtor has by fraud or force prevented the execution of the decree. Petitioner has therefore not fulfilled the conditions required by the proviso to Section 230 of the Code of Civil Procedure, and is not entitled to the benefit of that proviso so as to enable him to execute the decree after the expiration of twelve years. Neither is the subsequent finding of the District Munsif, on remand, that the judgment-debtor had prevented excution by fraud by closing his house in 1882, sufficient to entitle the judgment-creditor to the benefit of the proviso. That finding, if accepted, at the most only holds a single act of fraud to be proved; and that shortly after **[322]** the passing of the decree. It is submitted that the judgment-creditor must establish more than this; he must show that by the force or fraud of the judgment-debtor he has been prevented from executing the decree during the whole of the twelve years. A long period is allowed by the section for the execution of a decree and the decree-holder must exercise due diligence and must not be content to rest his application for an extension of time on a single act of *mala fides* on the part of the judgment-debtor. See *Seshachalam Chetti* v. *Rajam Chetti* (1). The decision in *Annamalai* v. *Rangasami* (2), and *Bhagu Jetha* v. *Malek Bawasaheb* (3) do not apply.

Ramachandra Rao Saheb, for respondent.

JUDGMENT.

We are of opinion that the order of the District Judge is right. Whatever may be said as to other attempts to execute the decree, we think that there is no doubt but that the action of the appellant in locking up his house and keeping it locked up in August 1882, when he knew that a warrant for the attachment of his moveable property had been issued, was a contrivance or stratagem or "fraud" within the meaning of Section 230, Civil Procedure Code, (*Annamalai* v. *Rangasami* (2) and *Bhagu Jetha* v. *Malek Bawasaheb* (3)). In consequence of this conduct of the appellant, the warrant had to be returned unexecuted, and the respondent was thus, for the time, prevented from executing his decree by the fraud of the appellant, the judgment-debtor. It is argued for the appellant that the respondent (judgment-creditor) had other opportunities later on for executing the decree, and that Section 230, Civil Procedure Code, requires that it should be shown that the judgment-debtor's fraud continued to prevent the execution of the decree right up to the date of the

(1) Appeal against Order No. 17 of 1798 (unreported). (2) 6 M. 365.
(3) 9 B. 318.

1899 JAN. 17. — APPELLATE CIVIL. — 22 M. 320 = 9 M.L.J. 28.

last application for execution. We do not understand this to be the meaning of the section. In the case of *Bhagu Jetha* v. *Malek Bawasaheb* (1), the facts of which are not unlike those of the present case, the application for execution was in June 1882. The fraud complained of was in July 1879, and there is nothing to suggest that the fraud continued to prevent the judgment-creditor from taking other steps to execute the decree. It seems to us that the proviso to Section 230, Civil Procedure Code, permits the execution of a decree **[323]** at any time within twelve years after the date on which the judgment-debtor has by fraud or force prevented the execution of the decree on an application, properly made, for execution; in other words, fraud or force gives a new starting point for the twelve years' limitation. The proviso is intended to prevent the twelve years' rule of limitation being an inducement to judgment-debtors to evade execution by fraud or force with a view to obtaining the benefit of the twelve years rule.

This view of the case is not opposed to our decision * * on which the appellants' pleader relies since in that case the Judge had not found that execution of the decree was, in fact, prevented by the fraud of the judgment-debtor.

In the present case we find that the judgment-debtor did, by fraud (within the meaning of Section 230, Civil Procedure Code), prevent the execution of the decree in August 1882, that is, at a time within twelve years immediately preceding the application for execution now before us, and that this application is therefore not barred by the twelve years rule.

We dismiss the appeal with costs.

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22 M. 323.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

ZAMORIN OF CALICUT (*Plaintiff*), *Appellant v.* NARAYANAN MUSSAD AND OTHERS (*Defendants and Representative of Defendant No. 17*), *Respondents.** [20th, and 23rd January, 1899.]

Civil Procedure Code—Act XIV *of* 1882, *Section* 13—Res judicata—*Suit for land based on plaintiff's title—Prior suit alleging that defendants held on lease from plaintiff —Dismissal of prior suit no bar to subsequent claim.*

In a previous suit in which plaintiff had been a party, it had been attempted to assert plaintiff's title to a piece of land occupied by the defendants by proving that they held the same by virtue of an alleged specific lease. The Court had held that no such lease had been executed. Plaintiff now claimed the land as belonging to his devasom, and sued to recover it on the strength of his title; he also set up the alleged lease once more:

[324] *Held*, that though the question of the validity of the lease was *res judicata* plaintiff was at liberty to sue also on the strength of his title, independently of the lease, and he was not estopped from so suing by the fact that the former suit had been based on the lease alone. If the relation of landlord and tenant were shown to have existed prior to the specific lease sued upon, it was for the tenant to prove that such relation had ceased to exist. In the absence of such proof the relation would be presumed to continue, and the tenant's possession in that case could not be adverse.

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* * L.P.A. No. 52 of 1898, ED.

* Second Appeals Nos. 523 and 524 of 1898.

(1) 9 B. 318.

[F., 29 M. 515 (517); **Rel.**, 15 Ind. Cas. 189=15 O.C. 45; **R.**, 23 M. 629 (632); 26 M. 760 (778)=13 M.L.J. 448 (465); 92 P.R. (1902)=16 P.L.R. 1903.]

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APPELLATE CIVIL.

22 M. 323.

SECOND appeal against the decree of the District Judge of South Malabar in appeal suits Nos. 285 and 286 of 1897, reversing the decree of J. A. de Rozario, Acting Principal District Munsif of Calicut, in original suit No. 814 of 1895.

Suit to recover land with arrears of rent. Plaintiff claimed the land as belonging to his devasom, and sought to recover it on the strength of his title. In a previous suit (original suit No. 1014 of 1893) plaintiff had attempted to assert his title by giving a melcharth to a third person and allowing him to sue upon it. In that suit (the present seventeenth defendant being plaintiff, and the present plaintiff being ninth defendant), it was alleged that the land was held by the present defendants under a specific lease of 1849. An issue was framed and tried thereon and it was found that no such lease had been executed. The same lease was now set up by plaintiff in the present suit. Among the issues framed were the following:—

"(1) Whether the suit is *res judicata* by the decree in suit No. 1014 of 1893?; (2) whether the lease sued on is true?; (3) whether the property is held under the lease sued on?; (5) whether plaintiff has jenm title to the property, and are the defendants debarred by the decree in suit No. 1014 of 1893 from questioning the jenm title of plaintiff to the property?; (6) whether plaintiff's title is barred by adverse possession?"

The District Munsif held that the jenm right of the plaintiff's devasom to the plaint land had been amply made out; that plaintiff had failed to prove the lease; that in any case inasmuch as that lease had been made the basis of the former suit (original suit No. 1014 of 1893) and adjudicated upon therein, a second suit upon it was not maintainable; that the suit was not barred by limitation; and that plaintiff was entitled to recover possession on the strength of his proved title as jenmi.

The District Judge, on appeal, held that the suit was barred by limitation, and that the subject-matter of it was *res judicata*. It **[325]** appeared to him that the possession of the defendants must be held to be adverse, and since it was not disputed that they had been in possession for a period greatly exceeding the period of limitation, the suit should be dismissed. It was not sufficient, he said, in suits for ejectment, that the plaintiff should show his title to the land at some remote period; he must prove that it subsisted at least within a period of twelve years preceding the suit. Plaintiff had failed to do this, or to show that there had been any distinct admission of his title within that period. The appeal was allowed and the suit dismissed.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

Appu Nedungadi, for respondents Nos. 8 and 9.

JUDGMENT.

We agree with the District Judge that the invalidity of the lease sued upon is *res judicata* by the decision in the former suit, but the District Judge is in error in holding that the plaintiff (appellant) was not at liberty to sue also on the strength of his title, independently of the lease, and that he is estopped from so suing by the fact that the former suit was based on the lease alone (*Kandunni* v. *Katiamma* (1)).

(1) 9 M. 251.

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22 M. 323.

If the relation of landlord and tenant is shown to have existed prior to the specific lease sued upon it is for the tenant to prove that it has ceased to exist. In the absence of such proof it is presumed to continue, and the tenant's possession in that case cannot be adverse.

The failure to prove the lease sued upon is not by itself proof that a prior tenancy did not exist, though the circumstances connected with such failure may well be considered as an element in deciding the question. We must, therefore, set aside the decree of the District Judge and remand the appeal for disposal on the merits. Costs in this Court will abide and follow the result.

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22 M. 326=9 M.L.J. 31.

[326] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

ADAIKKALAM CHETTI (*Plaintiff*), *Appellant v.* MARIMUTHU AND ANOTHER (*Defendants*). *Respondents.** [23rd, and 25th January 1899.]

Hindu Law—Parties—Bond in favour of one undivided brother for the benefit of himself and others—Suit by promisee alone—Payment to younger undivided brother—Discharge—Onus of proof.

In a suit on a bond executed by the deceased father of defendants, in favour of the plaintiff, the defendants, while admitting the bond and the consideration for which it had been given, contended that, inasmuch as plaintiff had four undivided brothers and the deed had been executed in his name for the benefit of himself and his brothers, the latter should have been joined as plaintiffs, and that plaintiff could not maintain the suit alone. They also pleaded payment to plaintiff's undivided younger brother, which payment they contended was binding on the plaintiff;

Held, that plaintiff was entitled to sue for the family debt without joining his undivided brothers, the contract on which the suit was based being in plaintiff's sole name and not purporting to have been obtained on behalf of any others but himself. And that as to to the payment pleaded, if true, plaintiff was, as regards the promisor, the only person *prima facie* entitled to payment; it therefore lay on the promisor to show that a payment to a third party was binding on the plaintiff, which had not been done. The contention that payment to any member of the family was by itself necessarily binding on the member who took the contract, could not be supported.

[N.F., 32 M. 284 (289)=4 Ind. Cas. 38 (41)=19 M.L.J. 372=5 M.L.T. 351; F., 24 B. 123 (124); R., 35 M. 685 (689)=10 Ind. Cas. 874=21 M L.J. 508=(1911), 1 M. W.N. 442.]

SECOND appeal against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 465 of 1897, reversing the decree of M. Subba Ayyar, District Munsif of Pattukota, in original suit No. 351 of 1896.

Suit to recover the amount due on a registered hypothecation bond executed to plaintiff by the deceased father of the two defendants. The defendants admitted the bond and the consideration upon which it had been given; they, however, contended that inasmuch as plaintiff had four undivided brothers, and the deed had been executed in his name for the benefit of plaintiff and his brothers, the latter should have been joined as plaintiffs, and that plaintiff could not sue alone. They further pleaded payment, alleging that the amount due on the bond had been paid to

* Second Appeal No. 675 of 1898.

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JAN. 25.

APPELLATE CIVIL.

22 M. 326 = 9 M.L.J. 31.

plaintiff's **[327]** undivided younger brother and that such payment was binding on the plaintiff. The District Munsif having framed issues on both points, held that, whether plaintiff were undivided with his brothers or not, he alone could maintain the suit, being the eldest, and so, naturally, the managing member of the family, and the plaint bond standing in his name. On the other issue he found that there had been disputes between the plaintiff and his brothers, and he did not believe the payment alleged. He decreed in favour of plaintiff for the amount claimed.

The Subordinate Judge, finding that the debt on the bond was a joint one in favour of plaintiff and his brothers, held that plaintiff could not maintain the suit in his sole name. He found the issue as to discharge by payment to plaintiff's younger or other also against the plaintiff, and reversed the decree.

The plaintiff preferred this second appeal.

Hon. *Bhashyam Ayyangar*, for appellant.

Ramachandra Rao Saheb, for respondents.

JUDGMENT.

The first question is whether the plaintiff is entitled to sue without joining his undivided brothers, the debt being family property. We think he is entitled to, inasmuch as the contract on which the suit is based is in his sole name and does not purport to have been obtained by him on behalf of any others but himself (*vide Bungsee Singh* v. *Soodist Lall* (1), *Dayabhai Lallubhai* v. *Gopalji Dayabhai* (2) and *Hari Vasudev Kamat* v. *Mahadu Dad Gavada* (3)). In the case of this very family it has been previously held by this Court that the plaintiff could sue alone to enforce acceptance of patta of family lands.*

The next question is whether the payment, which the Subordinate Judge would appear to have found (though his language is not clear) was made in discharge of the bond, was a valid discharge as against the plaintiff. As the sole promisee under the contract the plaintiff was, as regards the promisor, the only person *prima facie* entitled to payment. It therefore lay on the promisor to show that his payment to a third party was binding on the plaintiff. No circumstances justifying such payment were put forward. The only plea set up was that the payment to any member of the family is by itself necessarily binding on the member who took **[328]** the contract in his own name. There is no authority for such a wide proposition. In this case there was nothing to prevent payment being made to the plaintiff himself, and no explanation is given why payment was not made to him, while the fact that he was quarrelling with his brothers at the time indicates that the payment was not *bona fide*. We must therefore reverse the decree of the Lower Appellate Court and restore that of the Munsif, with the plaintiff's costs in this and in the Lower Appellate Court. Time for redemption is extended to the 1st April next.

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* S. A. 1303 of 1897.—ED.

(1) 7 C. 739 at p. 745. (2) 18 B. 141. (3) 20 B. 435.

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JAN. 17.

APPELLATE CIVIL.

22 M. 328.

22 M. 328.

APPELLATE CIVIL

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

X (*Petitioner*), *Appellant v.* X, (*Respondent*), *Respondent.**
[11th and 17th January, 1899.]

Divorce Act—Act IV *of* 1869, *Sections* 12, 13—*Divorce—Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion—Drunkenness of wife—Leaving wife without provision for maintenance.*

Evidence adduced at the hearing of a petition by a husband for the dissolution of his marriage with his wife showed that the petitioner had left his wife voluntarily on account of her drunkenness; that he had not maintained her or contributed to her support since so leaving her; that he had no reason for believing that his wife had committed adultery during the time he had lived with her; and that she had (if the evidence were believed) been leading an immoral life since the petitioner had so left her. The petition was dismissed, whereupon the petitioner appealed:

Held, that the petitioner having deserted his wife without just or reasonable cause, and without making any provision for her, had conduced to the adultery (if any had been committed), and the petition had been rightly dismissed.

APPEAL against the decree of Mr. Justice Boddam in original matrimonial suit No. 2 of 1898.

Suit by a husband for dissolution of marriage. In his petition, petitioner alleged that he had been "obliged to leave his wife in consequence of her quarrels and extremely intemperate habits," **[329]** and that he believed her to be leading the life of a common prostitute. The suit coming on for settlement of issues, the respondent not appearing, and counsel for the petitioner and evidence adduced on his behalf having been heard, the petition was ordered to be dismissed, the judgment of the Court being as follows:—

"I am of opinion that this petition should be dismissed. If a man "deserts his wife and, without justification, leaves her in a foreign country "to die or get her own living as she can without doing anything to "support her, I do not think he can complain if she commits adultery. He "marries her for better or for worse. If she drinks, that may perhaps "excuse his continuing to live with her, though I do not think it does; "but it certainly does not justify him in declining or omitting to support "her. He has been guilty of desertion, and even if she is the woman who "lived by prostitution in Chintadripet, he who seeks the assistance of "this Court must come with clean hands which is not the petitioner's case. "Petition dismissed."

Against this order the petitioner preferred this appeal.

Mr. *J. H. M. Ryan*, for appellant.—The petitioner could have explained the circumstances under which he had left his wife, and the means which she had. Merely leaving a wife under such circumstances does not amount in law to desertion: at any rate, having regard to her intemperance, there was reasonable excuse. No doubt it is the duty of the Court, under Section 12 of the Indian Divorce Act, to satisfy itself that the petitioner has not been in any manner accessory to the adultery; and Section 13 is imperative in its direction that the petition shall be

* Original Side Appeal No. 39 of 1898.

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dismissed if the petitioner shall be shown to have been accessory to or has been conniving at the adultery complained of. But neither section applies to this case, because the act here charged against the petitioner is that he deserted her. Section 14 deals with desertion and wilful separation on the part of a petitioner, but that section is not imperative in its terms like Section 13; it gives the Court a discretion by providing that the Court shall not be bound to pronounce a decree if it finds that the petitioner has deserted or wilfully separated from the respondent without reasonable excuse. The facts, as proved before the Lower Court, do not justify the exercise of this discretion, and inasmuch as the desertion as now found may operate as a bar to any further petition, although the respondent may continue her [330] immoral life, it is submitted that the decision should be reversed or a new trial granted.

The respondent was not represented.

JUDGMENT.

This is an appeal against a decree dismissing a petition praying for the dissolution of petitioner's marriage with his wife on account of her adultery.

There was no appearance at the trial on the part of the respondent and there was no co-respondent. It appeared from the evidence of the petitioner that he married the respondent (apparently also a European) in Lower Burma in 1887, he being at the time a private soldier (see description in marriage certificate). They lived together in various places until January 1898 when he left her (the place is not stated either in the petition or in the evidence) on account, as he says, of her drunkenness, and has never lived with her since. There was no issue of the marriage, and the petitioner says he has no reason to believe that his wife ever committed adultery during the time they lived together.

Evidence was called by the petitioner which, if believed, proves that, since her husband left her, the respondent has been leading an immoral life. We observe, however, that the second witness, the head constable, speaks to the identity of the respondent from a photograph only—a very unsatisfactory mode of identification—and the other witnesses who allege that they witnessed grave improprieties or actual acts of adultery are persons, with perhaps one exception, of the lowest class. The petitioner in his evidence states that he left his wife voluntarily on account of her drunkenness, that he has not sent her any money or offered in any way to maintain her since he left her, and no further explanation of his conduct in leaving his wife was given. It is not suggested that the petitioner is without means himself; he is holding a respectable position. The learned Judge dismissed the petition on the ground that the petitioner had deserted his wife without just or reasonable cause, had left her in a foreign country and had declined or omitted to support her, and had thus deprived himself of the right to relief. The appeal is now argued by counsel who did not appear at the trial, and he contends that the petitioner did not desert his wife, that the mere act of leaving her did not amount to desertion and draws our attention to one of the grounds of appeal,—that petitioner could have proved that the respondent had been left with ample means to live comfortably as a married woman.

[331] It appears to us that the fact of desertion is admitted by the petitioner himself; he does not suggest that he intended to return to her. "I left my wife voluntarily," he says, "on account of her drunkenness." He is not asked if she is an habitual drunkard or any particulars relating

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to her conduct. It has been held in England that even gross and habitual intemperance combined with violence of temper are not sufficient reasons to justify a husband in going away from his wife, leaving her to support herself and not troubling himself as to how she is living (*Heyes* v. *Heyes* (1)). The petitioner was represented at the trial by counsel instructed by an English attorney, and it is impossible to believe the attorney would so far neglect his duty as not to have enquired into the circumstances attending the petitioner's leaving his wife and whether or not she had any friends in Madras or at the place he left her to whom she could go, or whether she was in a position to maintain herself respectably, but not a word was asked the petitioner when a witness on these points, or whether she was in possession of property, and, if so, to what amount. It is the duty of the Judge to satisfy himself not only as to the facts alleged but also whether or not the petitioner has been in any manner accessory to the adultery, and if he finds he has been accessory to the adultery, he shall dismiss the petition (Act IV of 1869, Sections 12 and 13). With regard to the statement in the grounds of appeal that the wife had ample means to live on it is a mere allegation and has not been supported by any affidavit and does not appear to have been even suggested at the trial.

It appears to us that the conduct of the petitioner in leaving his wife without any just or reasonable cause, without providing for her in any way either in supplying her with money or leaving her in the charge of friends, or in fact making any provision for her, shows that the petitioner was utterly careless of what became of his wife and conduced to the adultery of the wife (if she has been guilty as some of the witnesses say), and that the learned Judge was right under the circumstances proved in dismissing the petition.

We dismiss the appeal.

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22 M. 332=9 M.L.J. 166.

[332] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

PERIANNA SERVAIGARAN (*Defendant*) *Appellant v.*
MARUDAINAYAGAM PILLAI (*Plaintiff*), *Respondent.**
[17th and 27th January, 1899.]

Transfer of Property Act—Act IV of 1882, *Sections* 60, 68, 72, 74, 75, 95—*Advance by mortgagee to pay off prior lien on mortgaged property—Suit against purchaser of property to recover amount so advanced—Charge on the mortgaged property.*

Plaintiff's undivided brother had advanced money on a usufructuary mortgage bond to enable the owners of certain property to obtain possession of it from one in whose favour a lien had been decreed to subsist. The money not having been so applied, the holder of the lien attached the property and applied to the the Court for its sale. To save the property from being sold, plaintiff's said brother further paid the amount of the lien into Court; and at about the same time the mortgagors sold the property to defendant. Plaintiff's brother had never obtained possession of the property, and had since died. Upon plaintiff suing to recover (in addition to the mortgage amount, liability for which was not disputed), the amount of the lien so paid into Court to save the property from sale.

Held, that inasmuch as plaintiff could only succeed by showing that by such payment a charge was created upon the land (the money not having been paid

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* Second Appeal No. 433 of 1898.

(1) L.R. 13 P.D. 11.

1899 JAN. 27.

APPELLATE CIVIL.

22 M. 332= 9 M.L.J. 166.

at the request or for the benefit of the defendant) the suit must fail. There is no provision in the Transfer of Property Act to support the proposition (involved by the plaintiff's suit) that a second mortgagee may, by a transaction between himself and the first mortgagee, without knowledge or concurrence on the part of the mortgagor, acquire a new right over the mortgaged property.

Per SUBRAMANIA AYYAR, J.—That as against the mortgagors, plaintiff would have been entitled to add the sums paid by him to the prior incumbrancer to the mortgage amount. But as the mortgage was usufructuary and plaintiff had never obtained possession, he had acquired no charge on the mortgaged property for the money recoverable by him under Section 68 of the Transfer of Property Act. The amount sought to be added thereto consequently stood on a similar footing, and the plaintiff's contention that a charge in respect of it existed in his favour was unsustainable.

[Rel., 30 C. 794 (799) = 7 C.W.N. 609 (611).]

SECOND appeal against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 133 of 1896, modifying the decree of T. R. Kuppusami Ayyangar, District Munsif of Kulitalai, in original suit No. 890 of 1894.

Suit to recover Rs. 190 due under a usufructuary mortgage deed and Rs. 296-10-0 paid by plaintiff to save the property subject to the said usufructuary mortgage from being sold, and for [333] interest. The defendant had purchased the mortgaged property from the mortgagors; and no question arose as to the payment of the amount due on the mortgage; he, however, disputed his liability in respect of the sum of Rs. 296-10-0. Two persons named Perumal and Muthayyan had, in 1882, sued Marudai and others for possession of the mortgaged land. The Court found that Marudai had a lien on the land, and in February 1883 decreed for possession as prayed, but subject to a payment by Perumal and Muthayyan, of Rs. 100 to Marudai. To enable them to pay this sum, Perumal and Muthayyan mortgaged the land with possession to plaintiff's late undivided brother, Annasami Pillai for Rs. 190—the mortgage amount now sued for and admitted. The money was, however, not utilised for the release of the land, Marudai having appealed. In the course of that appeal, on 12th December 1883, a compromise was effected, under which Perumal and Muthayyan agreed to pay Rs. 285 instead of Rs. 100; time was given for payment till May 1885; and in default of payment, Marudai was to be at liberty to recover the said Rs. 285, with interest, on the liability of the hypothecated property, and to retain possession of the land until payment. Default was made; and Marudai attached the land, and, in July 1885, made an application for its sale. Thereupon plaintiff's said brother, on 3rd August 1885, prayed the Court to receive the money (which, with interest, then amounted to Rs. 296-10-0), from him, and release the land from attachment; which was done on 14th August 1885. On 8th August 1885, Permual and Muthayyan sold the land to the present defendant. Plaintiff's brother had never obtained possession in pursuance of his usufructuary mortgage bond. The question was whether the plaintiff could now recover from defendant, as purchaser of the mortgaged land, the sum of Rs. 296-10-0, which had been thus advanced for the purpose of saving the property from the threatened sale.

The District Munsif held that the plaintiff was entitled to recover Rs. 190 only—the amount admittedly due under the usufructuary mortgage, and he disallowed the rest of the claim.

The Acting District Judge modified this decree by allowing plaintiff the sum of Rs. 296-10-0 in addition to the mortgage amount. The payment had been made, he said, to save the property from sale, and from

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a sale of which the result would have been that the original mortgagors would have lost possession of [334] the land and their vendee (the defendant), would have been unable to take possession. The plaintiff was usufructuary mortgagee, though at the time unable to take possession ; and as such he had paid off the lien holder and saved the property from the threatened sale. He thought the charge was good.

The defendant preferred this second appeal.

Sundara Ayyar, for appellant.

V. Krishnasami Ayyar, for respondent.

JUDGMENT.

SHEPHARD, J.—The appellant derives title to the land from Perumal and Muthayyan by a conveyance of sale, dated the 8th August 1885. In 1883, these persons obtained a decree for the land against Marudai subject to a payment of money to be made to him. Subsequently in the same year, they mortgaged the land to the plaintiff for Rs. 190. As regards that sum, there is no dispute. On the 3rd August 1885, in consequence of action taken under the decree by Marudai, the plaintiff's brother, Annasami, paid into Court the money due to Marudai. Now he seeks to recover it from the appellant, the purchaser of the land. It is not denied that Marudai, in regard to his decree, was practically in the position of a mortgagee holding an ordinary decree for sale. Now, it being clear that the payment was not made at the request or for the benefit of the appellant, the plaintiff can only succeed by showing that he has a charge upon the land which can be enforced against it in the hands of the appellant. Any such charge possessed by the plaintiff must either have existed at the date when the payment was made or it must have been created on that occasion. It does not suit the plaintiff to urge the former view, for the charge which Marudai held rested on the decree which was satisfied by the plaintiff's payment and the plaintiff is not now seeking to enforce the decree. The contention on the plaintiff's behalf, therefore, is that, independently of the pre-existing charge, a charge was created in the plaintiff's favour, when, by his payment into Court, he saved the land from sale under Marudai's decree. Cases were put in which the second mortgagee paying off the prior incumbrances or one of two mortgagors paying off the entire mortgage debt would, owing to the law of limitation or other reasons, practically be without any remedy other than a personal one, unless he could say that a new charge had been created in his favour. The possibility of hard cases does not account for or explain the right which is [335] claimed. The plaintiff's case must be that without knowledge or concurrence on the part of the mortgagor the second mortgagee may, by a transaction between himself and the first mortgagee, acquire a new right over the property. There is nothing in the Transfer of Property Act to support any such proposition. Sections 74 and 75 are concerned with the relations of prior and subsequent incumbrancers. Section 95 relates to the case of one off several mortgagors paying off the whole mortgage money. The language of Section 74 makes it clear that the second mortgagee is, by tender of the mortgage money, to acquire no other right than that possessed by the first mortgagee. In effect, there is deemed to be a transfer of the first mortgage to the second mortgagee. The law secures to the latter the interest which he might have acquired by a conveyance. The same principle, as I conceive, applies in favour of the mortgagor who has paid off the mortgage debt, which his co-mortgagors were equally interested in paying. It is to be observed that Section 95, Transfer of Property Act, does not deal with this case generally. It states that the rule is

to be applied only in the case of the mortgagor, who has paid the money, recovering possession of the property from the mortgagee. The section is evidently taken from Macpherson on Mortgage (see Edition of 1877, p. 145). **1899 JAN. 27.**

That section, as I understand, like the decree which should be framed in the case of redemption by one of two co-mortgagors or a mortgagor interested in part only of the property (see *Pearce* v. *Morris* (1)) does nothing more than preserve to the mortgagor the right which the mortgagee possessed as against the interest of the other parties in the mortgaged property. There is no question in any of these cases of creating a new charge on the property. **APPELLATE CIVIL.** **22 M. 332 = 9 M.L.J. 166.**

It is otherwise where money is expended by a mortgagee in possession for the purposes indicated in Section 72 of the Transfer of Property Act, which provides that money so expended may be added to the mortgage money. That is what the plaintiff in this case is really seeking to do, although it is not pretended that the disbursement made by him is of such a character as to make that provision of law applicable. Even if the plaintiff had been in possession, I think it would be difficult to hold that the provision in the section relating to salvage of mortgaged property applied to the case or that in consequence of the payment by him he acquired **[336]** any further or other interest than that which Marudai might have assigned to him.

Inasmuch as the plaintiff is endeavouring to enforce against the land in the defendant's hands a remedy which he could not have enforced against Marudai, I think the suit must fail. The appeal must therefore be allowed and the respondent must pay the costs throughout.

SUBRAMANIA AYYAR, J.—I have arrived at the same conclusion and will add but a few words with reference to the main question, *viz.*, whether the respondent has a lien on the land in respect of the amount to which this appeal relates. There being no statutory provision giving a charge for the payment made in discharge of the amount due to Marudai and others, according to the decree, whereunder they had a lien on the land for that amount, is there any other foundation for the contention that the respondent has a charge for the sum in question? No doubt, as against the persons who mortgaged the land to the respondent he was entitled to add what was paid by him to the prior encumbrancer, Marudai, to the amount advanced as the consideration for the respondent's mortgage, as will be seen from an observation of the Judicial Committee in *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (2), wherein Lord Romilly points out that the plaintiff there, who is not stated to have been a mortgagee in possession, had a right to take to the mortgage the amount of the revenue paid by her to save the estate. See also *Leslie* v. *French* (3). But as the mortgage to the respondent was purely a usufructuary mortgage and he never obtained possession of the mortgaged property, he has, according to the recent Full Bench decision in *Arunachalam Chetti* v. *Ayyavayyan* (4), no charge on the mortgaged property for the money recoverable by him under Section 68 of the Transfer of Property Act. The amount to be added thereto consequently stands also on the same footing and the respondent's contention that he has a charge for it is, therefore, clearly unsustainable. Compare *Anandi Ram* v. *DurNajaf Ali Begum* (5).

(1) 2 Seton, p. 1728. (2) 11 M. I. A. 241 (259). (3) 23 Ch. D. 552 at p. 560.
(4) 21 M. 476. (5) 13 A. 195.

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[337] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

MAHOMED ROWTHAN (*Plaintiff*), *Petitioner v.* MAHOMED HUSIN ROWTHAN (*Defendant*), *Respondent.**
[10th and 17th January, 1899.]

Stamp Act—Act I of 1879, Sections 5, 11, 18, 34—" Chargeable with duty "—Promissory note executed out of British India—Insufficient stamp.

A suit upon a promissory note which had been executed out of British India was dismissed on the ground that the note was insufficiently stamped, and that it could not be admitted in evidence, on payment of the duty chargeable, under Section 34 of the Indian Stamp Act. On a petition being preferred for the revision of the order of dismissal.

Held, that Section 34 of the Stamp Act did not render the document inadmissible in evidence, that section being applicable only to an instrument which is "chargeable with duty." There is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court, where the holder of the note has not done any of the acts referred to in Sections 5 and 18 of the Act, and, in consequence, the obligation to stamp has not arisen.

PETITION under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the proceedings of B. Virasamayya Garu, District Munsif of Mannargudi, in small cause suit No. 226 of 1898.

Suit for the amount due on a promissory note executed by defendant, out of British India, in plaintiff's favour. The District Munsif held that the document was invalid and inadmissible in evidence for want of a proper stamp, and that the invalidity could not be rectified by payment of stamp duty and penalty under Section 34 of the Indian Stamp Act. He therefore dismissed the suit. Plaintiff had not done any of the acts mentioned in Sections 5 and 18 of the Indian Stamp Act.

The plaintiff preferred this petition.

Natesa Ayyar, for petitioner.

The respondent was not represented.

JUDGMENT.

The instrument sued on is clearly a promissory note. It was executed out of British India, and under Section [338] 11 of the Indian Stamp Act, I of 1879, it must be deemed to be unstamped, inasmuch as the one anna adhesive stamp on it was not cancelled.

The District Munsif refused to receive the document in evidence on the ground that it was not duly stamped, and could not be stamped on payment of penalty, or be admitted in evidence, under Section 34 of the Stamp Act, and he therefore dismissed the suit.

We think that the District Munsif was in error in holding that Section 34 rendered the document inadmissible in evidence. That section only applies to an instrument which is "chargeable with duty," but there is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court.

* Civil Revision Petition No. 844 of 1898.

Section 5 of the Act requires every such promissory note to be stamped if it is "accepted or paid or presented for acceptance or payment, or "endorsed, transferred or otherwise negotiated, in British India," and Section 18 requires the first holder in British India to affix the proper stamp and cancel the same before he presents it for acceptance or payment, or endorses, transfers or otherwise negotiates the same in British India. But in this case the holder has not done any of those things and consequently the obligation to stamp the promissory note has not arisen and Section 34 is no bar to its admission as evidence.

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The same view of the law was lately taken in a very similar case by Shephard, J., in *Ebrahim Rowthan* v. *Abdul Rahiman Mahomed* (1) following the case of *Griffin* v. *Weatherby* (2).

We must therefore set aside the decree of the District Munsif, and as the District Munsif has found, against the defendant's plea, that there was consideration for the note, we give judgment for plaintiff for the amount sued for with costs throughout.

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22 M. 339.

[339] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

JIVANNA PANDITHAR (*Plaintiff*), *Appellant v.*
APPALU (*Defendant*), *Respondent.**
[17th January, 1899.]

Interest post diem —*Provision in bond for annual payments of interest and repayment of principal sum on day fixed.*

A bond, which had been executed in December 1881, contained a stipulation that interest should be paid on 11th April every year, and that the principal sum borrowed should be repaid in December, 1884. Repayment not having been so made, a suit was brought in December 1896 to recover the principal sum together with interest up to the date of plaint:

Held, that inasmuch as the bond contained a stipulation for the payment of interest annually and there was nothing in it to suggest that the liability should cease on the day upon which the principal was repayable, interest could be recovered.

SECOND appeal against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in appeal suit No. 694 of 1887, modifying the decree of B. Virasamayya, District Munsif of Mannargudi, in original suit No. 505 of 1896.

Suit to recover balance of principal and interest due under a registered mortgage bond. The bond, which had been executed on 24th December 1881, stipulated that interest should be paid every year, on 11th April, and that the principal sum borrowed should be repaid on 24th December 1884. The document contained no covenant for payment of interest after the latter date. The principal was not repaid on the date specified, and this suit was brought in December 1896 for the recovery of the said principal sum together wtth interest up to the date of plaint. The defendant contended that, as the bond did not provide for interest *post diem*, such interest could not be recovered. An issue on this point was framed by the District

* Second Appeal No. 414 of 1898.

(1) Civil Revision Petition No. 375 of 1897 (unreported). (2) L.R., 3 Q.B. 753.

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Munsif, who held that interest which had accrued subsequently to the date stipulated for repayment of the principal sum could be recovered at the rate provided for in the bond; and he decreed accordingly. On appeal, the Subordinate Judge held that interest which had accured subsequently [340] to the date fixed for the repayment of the principal sum could be awarded only in the form of damages; he referred to *Rama Reddi* v. *Appaji Reddi* (1), *Badi Bibi Sahibal* v. *Sami Pillai* (2), *Thayar Ammal* v. *Lakshmi Ammal* (3) and *Chajmal Das* v. *Brij Bhukan Lal,* (4) and in awarding such damages the question of limitation had to be considered. The suit having been filed more than six years from the date upon which the principal sum had been due for repayment, he, relying on the cases mentioned, held that, though the plaintiff was entitled to *post diem* interest as damages, the claim was barred under Article 116 of Schedule II to the Limitation Act.

The plaintiff preferred this second appeal.

V. Krishnasami Ayyar, for appellant.

Pattabhirama Ayyar, for respondent.

JUDGMENT.

The bond contains a stipulation for the payment of interest annually and there is nothing in it to suggest that the liability should cease on the day when the principal was made payable. We must reverse the decree of the Subordinate Judge and restore that of the District Munsif allowing, however, three months from this date for payment. The respondent must pay costs in this and the Lower Appellate Court.

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22 M. 340.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

JAGANNATHA PILLAI (*Defendant No.* 1), *Appellant v.* SUBBARAYA PILLAI (*Plaintiff*), *Respondent.** [10th January, 1899.]

Regulation XXIX of 1802 (*Madras*), *Section* 7—*Jurisdiction—Suit for office of karnam —District Munsif's Court.*

A suit to establish plaintiff's right to, and to recover possession of, the office of karnam, and for the restoration of the inam lands, and for damages, was brought in the Court of the District Munsif:

Held, that it was properly so brought.

[341] SECOND appeal against the decree of K. C. Manavedan Rajah, Acting District Judge of North Arcot, in appeal suit No. 62 of 1893, affirming the decree of T. A. Krishnasami Ayyar, District Munsif of Arni, in original suit No. 428 of 1891.

Suit to establish plaintiff's right, under Regulation XXIX of 1802, Section 7, to, and to recover possession of, the office of karnam, and for the restoration of the inam lands and for damages. The defendants, being the karnam in office and the jaghirdar, respectively, objected that the District Munsif's Court, in which the suit was brought, had no jurisdiction. The District Munsif overruled the objection and passed a decree

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* Second Appeal No. 225 of 1898.

(1) 18 M. 248. (2) 18 M. 257. (3) 18 M. 331. (4) 17 A. 511.

in favour of the plaintiff. The Acting District Judge, on appeal, held that the District Munsif's Court had jurisdiction to try the suit. He said: **1899 JAN. 10. — APPELLATE CIVIL. — 22 M. 340.**

"Two decisions, *viz.*, *Venkatanarasimha* v. *Suryanarayana* (1) and "*Venkatanarayana* v. *Subbarayudu* (2) are cited in support of the ground "of want of jurisdiction. The first was a suit for the dismissal of the "karnam. This was held to be exclusively triable by a District Court. "The present suit, however, is not for dismissal. The second case cited "is of the same nature as the present case. But the simple fact that that "suit was tried in the District Court does not show that the subordinate "courts had no jurisdiction."

Defendant No. 1 preferred this second appeal.

Raghavendra Rao, for appellant.

The Advocate-General (Hon. *C. Arnold White*) and Mr. *Joseph Satya Nadar*, for respondent.

JUDGMENT.

The plaintiff claimed that by Section 7 of Regulation XXIX of 1802 he, as heir of the last karnam, was the proper person to have been appointed karnam and not the first defendant, who, not being an heir, had not been properly appointed. He brought his action in the Court of the District Munsif and succeeded. It is argued that the District Munsif had no jurisdiction and that the only Court which had jurisdiction was the Court of the District Judge. Both the Lower Courts held, and we think rightly, that the suit was properly brought in the District Munsif's Court. The only other substantial objection taken before us was that as the plaintiff had stated in the plaint that the emoluments **[342]** of the karnam were the assessment of the lands, he was not entitled to recover the lands themselves, though they were in fact claimed by the prayer of the plaint. Substantially the action was for the office and that which was the proper adjunct of the office. The defendant had got possession of the land as an adjunct of the office of karnam when he was improperly appointed, and it is therefore clear that the statement in the plaint was merely an error, the land, and not the assessment only, passing with the office.

The second appeal is dismissed with costs.

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22 M. 342.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SRINIVASA AYYANGAR (*Defendant*), *Appellant v.*
MUNICIPAL COUNCIL OF KARUR (*Plaintiff*), *Respondent.**
[16th January, 1899.]

Limitation Act—Act XV of 1877, *Schedule II, Articles* 2, 36, 89, 90—*Chairman of Municipal Council—Principal and agent—Liability for embezzlement by manager.*

During the tenure of his office by the Chairman of a Municipal Council, the manager embezzled sums of money. On the council, within three years, but more than two years thereafter, suing its late chairman to recover the amount lost by reason of the embezzlement on the ground that he was liable as its agent :

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* Second Appeal No. 371 of 1898.

(1) 12 M. 188. (2) 9 M. 214.

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Held, that the relation of principal and agent did not exist, and that therefore Articles 89 and 90 of Schedule II to the Limitation Act did not apply; that the case was governed by Article 36 and that the suit was therefore barred by limitation.

[R., 33 M. 308 (309) = 7 Ind. Cas. 898 = 20 M.L.J. 633 = 8 M.L.T. 321.]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Coimbatore, in appeal suit No. 105 of 1897, affirming the decree of A. Sambamurti Ayyar, District Munsif of Karur, in original suit No. 562 of 1896.

Suit by the Municipal Council of Karur against their late Chairman, to recover a sum of money that, during his tenure of that office, had been embezzeled by the ex-manager of the Municipality. It was claimed that defendant, as Chairman, was the agent appointed [343] by the Municipality, and in that capacity was bound to collect the dues and see that proper accounts were maintained and that he was liable to pay the loss which had occurred by the said embezzelment. Defendant denied that his relationship with the council as its Chairman had been that of an agent, and pleaded that the suit was barred by limitation. It was admitted that if the period of limitation were found to be three years, the suit would not be time-barred; but that if it were found to be two years, the suit would be barred. On the question of agency, the District Munsif found that inasmuch as defendant was not appointed by the Municipal Council, and that the latter had no power to remove him, he was clearly not their appointed agent. He however inferred an implied agency from the circumstances of the case. Dealing with the plea of limitation he held that the special period of six months prescribed by Section 261 of the Madras District Municipalities Act, could not apply to defendant's liability under the general law; nor could the case, in his opinion, be governed by Article 2 or Article 36 of Schedule II to the Limitation Act. He held that Article 89 or Article 90 of Schedule II to the Limitation Act applied, and, after considering the evidence, decreed that defendant was liable to make good the loss to the Council. On appeal, the District Judge held that defendant was the agent of the Municipality and that the case was governed by Article 90 of Schedule II to the Limitation Act, under which the period of limitation is three years, and that the suit was therefore not barred. He confirmed the judgment of the Lower Court.

The defendant preferred this second appeal.

Sundara Ayyar, for appellant.

Mr. *E. B. Powell*, for respondent.

JUDGMENT.

We are clearly of opinion that the relation of principal and agent does not exist, and therefore Articles 89 and 90 do not apply.

Article 36 in our judgment is the appropriate one. This being so, the suit is barred by limitation.

The decree must be reversed and the suit dismissed with costs in all Courts.

22 M. 344.

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22 M. 344.

[344] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SUBBAYYA (*Plaintiff*), *Appellant* v. RAMI REDDI (*Defendant*), *Respondent*.* [17th January, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 574—*Contents of judgment in appeal—Duty of Appellate Court to hear appeal after remand for findings, though no memorandum of objections.*

On the hearing of a plaintiff's appeal against an order dismissing his suit, the District Judge, finding the issues that had been framed futile, struck them all out, substituted others, and remanded the suit for findings after evidence had been taken. On the appeal coming on for hearing after the return of those findings, neither party having filed any objections, the District Judge dismissed the suit on the ground that by his failure to file objections, plaintiff must be taken to have consented to the new findings, which were against him :

Held, that the Judge was not absolved from hearing the appeal by reason of the absence of a memorandum of objections.

[R., U.B.R. (1905) 3rd. Qr., C.P.C., 574.]

SECOND appeal against the decree of H. O. D. Harding, Acting District Judge of Kurnool, in appeal suit No. 120 of 1895, affirming the decree of C. Bapayya Pantulu in original suit No. 451 of 1894.

A suit to recover possession of inam land was dismissed by the District Munsif. On appeal, the District Judge considered that the issues framed were futile, struck them all out, substituted others and remanded the suit to the Lower Court for findings after taking evidence. The appeal coming on for hearing after the return of the findings, neither party filed any memorandum of objections, though notices were sent them that objections should be filed by a certain date. It was urged by the defendant that, inasmuch as the plaintiff had not objected to the findings, he had accepted and was bound by them. Plaintiff contended that, having nothing new to put forward in answer to the findings, he had filed no objections. but was entitled to argue his original appeal on the final hearing. The District Judge held that inasmuch as the whole suit had been ordered to be retried on totally new findings, that order terminated plaintiff's original appeal, and that if he failed to file objections to the new findings within the [345] prescribed time, he must be held to consent to the new findings. He found that the plaintiff was not entitled to the land claimed, on the ground that, knowing that the Lower Court had found against him, he had not, when asked to do so, filed his objections to those findings.

The plaintiff preferred this second appeal.

Mr. *J. G. Smith*, for appellant.

Seshagiri Ayyar, for respondent.

JUDGMENT.

The Judge was in error in holding that he was absolved from hearing the appeal by the absence of a memorandum of objections. (See *Kunhi Marakkar Haji* v. *Kutti Umma*(1).)

We must reverse the decree and remand the case for disposal. Costs to abide event.

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* Second Appeal No. 422 of 1898.

(1) 20 M. 496.

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22 M. 345.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

KUPPAYAMMAL (*Counter-petitioner*), *Appellant v.* AMMANI AMMAL (*Petitioner*), *Respondent.** [17th January, 1899.]

Probate and Administration Act—Act V of 1881, *Sections* 35, 43, 62—*Executrix—Letters of administration with will annexed.*

A petitioner prayed for a grant of probate of her deceased son's will. No executrix had been appointed therein, but the petitioner was directed that out of certain property she should pay certain debts:

Held, that such a direction was insufficient to show an intention on the testator's part that for the general purposes of administration the petitioner should be executrix; and that the petition should have been for letters of administration with the will annexed; that the petition should state all assets likely to come to the petitioner's hands; and that proof of execution and of the consciousness of a testator is insufficient, and that it should be further shown that he knew of and understood the contents of the document which he signed.

[R., 6 C.L.J. 453 (460).]

APPEAL against the order of G. T. Mackenzie, District Judge of Coimbatore, in civil miscellaneous petition No. 542 of 1897.

Petition under Section 62 of the Probate and Administration Act, 1881, by the mother of a deceased, praying the Court to grant probate of a will left by her son. The widow of the deceased **[346]** opposed probate. Attesting witnesses were called who deposed to having seen the testator sign while fully conscious. No executrix was appointed by the will, but certian property was left to the petitioner with a direction that she should pay certain debts. Probate was granted by the District Judge to the petitioner as being named executrix by implication.

The widow preferred this appeal.

Kasturiranga Ayyangar, for appellant.

Sivasami Ayyar, for respondent.

JUDGMENT.

It is objected that the respondent is not executrix according to the tenor of the will and we think the objection must prevail.

The direction to the respondent that out of a certain property she should pay certain debts is not enough to show any intention on the testator's part that for the general purpose of administration she should be executrix.

As to the direction to give paddy to Ramayammal there is a similar direction addressed to another person, *viz.*, Malayandi Goundan. There being no executor, Section 35 of the Probate and Administration Act, which probably the parties had in mind, has no application. Section 43 clearly has no application to the case. Under the circumstances, the petition is altogether wrong. There ought to have been a petition for letters of administration with the will annexed, and the petition ought to state all the assets which are likely to come to the petitioner's hands, not merely such part of them as she chooses to name. The petitioner, moreover, if letters are granted, must give security. We think it is right to allow the

* Appeal No. 137 of 1898.

application made on behalf of the respondent to amend the petition. Before any grant of letters is made the Judge must require strict proof of the execution of the will. It is not enough for witnesses to say that they saw the testator sign the will and that he was in his senses. It must also be proved that he understood the contents of the paper to which he was putting his signature, and for this purpose it should be shown that the will, if not written by himself, was read over to him. In the present case, there is no such evidence.

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If letters are granted, the District Judge will of course adopt the form given in the Act, Section 77.

We must reverse the order and send back the case to be dealt with according to law. The respondent must pay the costs of this appeal.

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22 M. 347 = 9 M.L.J. 98.

[347] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

MAYAN PATHUTI AND ANOTHER (*Plaintiffs*), *Appellants v.* PAKURAN AND OTHERS (*Defendants Nos.* 1, 2 *and* 4 *to* 6). *Respondents.** [1st December, 1898 and 9th January, 1899.]

Transfer of Property Act—Act IV of 1882, *Section* 99—*Civil Procedure Code—Act XIV of* 1882, *Section* 244—*Sale by mortgagee in execution of decree.*

Property subject to a mortgage having been sold by the mortgagee as holder of a decree against the mortgagors, a separate suit was brought by the mortgagors to set aside the sale as being in contravention of Section 99 of the Transfer of Property Act. On objection being taken that the suit was not maintainable, the matter being one for determination in execution proceedings under Section 244 of the Code of Civil Procedure:

Held, (1) that although the sale was contrary to the provisions of Section 99 of the Transfer of Property Act, that section being for the benefit only of a particular class of persons, namely, those concerned with a right to redeem mortgaged property, such a sale was not void but voidable;

(2) that the question being one arising between the parties to the suit wherein the sale was made, and relating to execution, could not be raised and decided in a suit, but should be raised and tried only in execution proceedings taken under Section 244 of the Code of Civil Procedure, and the sale set aside if such relief were not, for any reason, barred;

(3) that the sale having been confirmed, such confirmation was final, and precluded the mortgagors from seeking the relief to which they would otherwise have been entitled; and

(4) that, notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale.

[**F.**, 22 A. 121 (123); 33 C. 283 (286); **Appr.**, 27 A. 517 (523) = 2 A.L.J. 210 = A.W.N. (1905) 80 (82); 23 M. 377; **R.**, 35 C. 61 (69) = 6 C.L.J. 320 (**F.B.**) = 11 C.W.N. 1011 (1018); 34 M. 417 (418) = 8 Ind.Cas. 429 = 21 M.L.J. 928 (931) = 9 M.L.T. 152 = (1910) M.W.N. 662; 5 Bom.L.R. 1036 (1041); 12 C.L.J. 574 (578) = 14 C.W.N. 579 = 6 Ind.Cas. 47; 17 C.P.L.R. 178 (182); 3 Ind.Cas. 429; 4 Ind.Cas. 1082 = 19 M.L.J. 737; 9 Ind.Cas. 939 = 9 M.L.T. 261 = (1911) 1 M.W.N. 147; 8 O.C. 327 (336); 3 S.L.R. 17 (19); **D.**, 30 M. 313 (315) = 17 M.L.J. 163 (164) = 2 M.L.T. 181 (182).]

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 313 of 1897, reversing the decree

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* Second Appeal No. 22 of 1898.

1899 JAN. 9. — APPELLATE CIVIL. — 22 M. 347 = 9 M.L.J. 98.

of P. T. Itteyerah, District Munsif of Cannanore, in original suit No. 161 of 1897.

Suit to set aside a sale of property held in execution of a decree obtained by first defendant against plaintiff and others in a prior suit. First defendant had been plaintiff in that suit and the present plaintiffs, defendants. Plaintiffs contended that the sale was invalid, in that it contravened the provisions of Section 99 of the Transfer of Property Act, the property having been sold **[348]** subject to a mortgage in first defendant's favour. First defendant pleaded that the suit was not maintainable, the matter being one for determination in execution under Section 244 of the Code of Civil Procedure. It was admitted that the sale had been confirmed. The District Munsif considered that the question whether an execution sale is liable to be set aside or not is not one directly relating to the execution, discharge or satisfaction of a decree, within the meaning of Section 244, and held the suit to be maintainable. As it was admitted by defendants that the property had been sold by the decree-holder subject to a mortgage right in his favour, the District Munsif set the sale aside under Section 99 of the Transfer of Property Act. The District Judge, on defendants' appeal, held on the authority of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1), that a separate suit could not be brought by a party to a former suit to set aside an auction sale held in execution of the decree in that suit, and he accordingly reversed the decree and dismissed the suit.

Plaintiffs preferred this second appeal.

Mr. *C. Krishnan*, for appellants.

Govinda Menon, for respondent No. 1.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The sale which is impeached is doubtless contrary to the provisions of Section 99 of the Transfer of Property Act. The first point for determination is whether, as contended for the appellants—the mortgagors—the sale is altogether null and void. The argument that in allowing the sale to take place against the provisions of the said section the Court acted without jurisdiction is obviously unsustainable. Still, if the above section were enacted for the protection of public interests and the law were to be regarded as laying down a rule of general policy rendering the prohibition absolute, the sale would be void; but if the section in question has been introduced for the benefit only of a particular class of persons the sale would be but voidable(compare Hardcastle on the 'Construction of Statutes,' 2nd edition, pages 285-7, and the cases cited therein ; see also Maxwell on 'Interpretation,' 3rd edition, pages 544-9). That it is of the latter description is apparent, the object being to protect only persons concerned with the right to redeem mortgaged property. The sale cannot therefore be held to be void. The next **[349]** point for determination is whether the appellants are now entitled to the relief claimed, *i.e.*, to have the sale set aside. The question, being one arising between the parties to the suit wherein the sale was made and relating to execution, cannot be raised and decided in a suit. It should be raised and tried only in execution proceedings taken under Section 244 of the Code of Civil Procedure. However, as the Court in which this suit was brought is the tribunal wherein the execution proceedings should be taken, we can,

(1) 19 C. 683.

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following *Biru Mahata* v. *Shyama Churn Khawas* (1), allow the plaint to be treated as an application under Section 244, Code of Civil Procedure, and set aside the sale if it be possible to do so now. But it is not. The sale has been confirmed. The order confirming the sale is final and concludes the appellants from seeking the relief to which they would have been otherwise clearly entitled. As regards *Durgayya* v. *Anantha* (2), I observe that there the purchaser did not take the point that the order confirming the sale if allowed to become final, debars the judgment-debtors from subsequently impeaching the sale altogether. In my view, therefore, the appellants are not entitled to the relief which they seek. I should, however, not omit to say that I am not to be understood to lay down that they will be precluded from redeeming the property or taking proceedings for that purpose. For, notwithstanding the confirmation, it may be that the sale in question cannot affect that right of the appellants owing to the impossibility of the respondent, as the mortgagee, freeing himself by such a sale and purchase from the liability to be redeemed (*Martand* v. *Dhondo* (3)). It may be added that while the respondent may, notwithstanding his purchase, have to submit to be redeemed, he would be entitled to claim at the time of redemption, payment of what he gave credit for out of the decree debt due by them in consideration of the purchase in question. Neither of these questions arises in the present suit.

The second appeal, in my opinion, fails, and I would dismiss it but without costs.

DAVIES, J.—I concur.

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22 M. 350.

[350] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SRIDEVI (*Defendant*), *Appellant v.* VIRARAYAN (*Plaintiff*), *Respondent.** [27th January, 1899.]

Kanom—Suit for sale of mortgaged property—Rights of kanomdar.

A kanomdar having sued to recover the amount of his kanom and for sale of the mortgaged property in default of payment:

Held, that such a suit is unsustainable; that a kanom, in the mortgage aspect of it, is a usufructuary mortgage; and there is no authority to support the contention that it is a simple mortgage apart from an observation in *Ramunni* v. *Brahma Dattan* (15 M. 366 at p. 379).

SECOND appeal against the decree of O. Chandu Menon, Acting Subordinate Judge of South Malabar, in appeal suit No. 54 of 1898, affirming the decree of A. Srinivasa Ayyangar, Acting Additional District Munsif of Calicut, in original suit No. 403 of 1897.

Suit to recover the amount due on a kanom, and for sale of the mortgaged property in default of payment. Defendant contended that a kanomdar had no right to bring the property to sale, and that the suit was a novel one and not maintainable. The District Munsif relying on *Narayana* v. *Narayana* (4) and *Ramunni* v. *Brahma Dattan* (5) cited for the

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* Second Appeal No. 771 of 1898.

(1) 22 C. 483. (2) 14 M. 74. (3) 22 B. 624.
(4) 8 M. 284. (5) 15 M 366 (379).

1899 JAN. 27. — APPELLATE CIVIL. — 22 M. 350.

plaintiff, held that a kanom is a simple mortgage, and that the kanomdar is entitled to recover the kanom amount just as any other simple mortgagee can recover. He ordered the defendant to pay into Court within three months the kanom amount; and, in deafult of such payment, the property to be sold.

The Acting Subordinate Judge following the judgment of Muttusami Ayyar, J., in *Ramunni* v. *Brahma Dattan* (1) held that plaintiff could sue for sale, as he had done, and confirmed the decree.

The defendant preferred this second appeal on the ground, among others, that plaintiff, as kanomdar, was not entitled to institute a suit to recover his kanom from the jenmi by sale of the mortgaged property.

[351] *Sundara Ayyar*, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

In the instrument sued upon there is no covenant to pay, nor was there any evidence that a promise to pay was one of the incidents of a "kanom" according to usage. It has been uniformly held that a "kanom" in the mortgage aspect of it is a usufructuary mortgage, and except an observation of the late Muttusami Ayyar, J., in *Ramunni* v. *Brahma Dattan* (1) that it is both a simple and a usufructuary mortgage, there is no authority in support of the view that it is a simple mortgage; nor do we see anything in the character of the transaction or its incidents to make it a simple mortgage. We are, therefore, unable to hold that it is so. In this view, the present suit for the recovery of money and sale of the mortgaged property in default of payment was unsustainable. We must, therefore, reverse the decrees of both the Courts below, and dismiss the plaintiff's suit but without costs as the point is a novel one.

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22 M. 351.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

RATHNA MUDALIAR (*Defendant No.* 3), *Appellant v.* TIRUVENKATA CHARIAR (*Plaintiff*), *Respondent.** [19th January, 1899.]

Limitation Act—Act XV of 1877, *Schedule II, Articles* 120, 144—*Emoluments of hereditary Office—Interest in immoveable property.*

A suit to recover a sum of money due by custom as an emolument of all hereditary office is not one for the possession of an interest in immoveable property.

In 1888 a sum of money became payable, as marriage dues, to the holder of certain offices connected with a temple. Upon a suit being brought more than six years thereafter, namely in 1895, to recover the amount, it was objected that the claim was barred by limitation;

Held, that such a claim is governed by Article 120 of Schedule II to the Limitation Act, and must, in consequence, be enforced within six years of the accrual of the right.

[R., 34 B. 349=2 Bom. L.R. 157=5 Ind. Cas. 869.]

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* Second Appeal No. 467 of 1898.

(1) 15 M. 366 (379).

1899 JAN. 19. — APPELLATE CIVIL. — 22 M. 351.

[352] SECOND appeal against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 140 of 1896, affirming the decree of A. David Pillai, District Munsif of Srirangam, in original suit No. 80 of 1895.

Suit to recover a sum of money due to plaintiff as fees or emoluments of certain hereditary offices held by him. The offices in question were connected with the temple of Srirangam, and entitled the holder thereof to receive marriage dues. Payment of the marriage dues sued for had become due on 24th May 1888, and this suit had been filed in 1895. Upon a plea of limitation being raised, the District Munsif held that Article 144 of Schedule II to the Limitation Act applied, and that the plaintiff, having twelve years in which to bring his suit, was not barred.

The District Judge, on appeal, upheld that ruling. He thought that, inasmuch as the allowances were customarily attached to plaintiff's office, they must be held to form an interest in immoveable property, and that the claim was therefore governed by Article 144.

Defendant No. 3 preferred this second appeal.

Rangachariar and *Tirunarayanachariar*, for appellant.

Narayana Ayyangar, for respondent.

JUDGMENT.

This suit is not one to establish the plaintiff's right to receive the customary dues of an hereditary office, but to recover a specific sum of money alleged to have become due and payable to the plaintiff in 1888 as a fee due to him as the holder of an hereditary office.

We have not been referred to any decision in support of the conclusion of the District Judge that the period of limitation in such a suit is twelve years under Article 144 of the second schedule of the Indian Limitation Act, but the respondent's vakil refers us to the decision in *Chhaganlal* v. *Bapubhai* (1). That was a decision under the former Act XIV of 1859, and it was dissented from in *Raoji* v. *Bala* (2). We do not think that such a suit as the present can be brought within the terms of Article 144. It cannot be called a suit for the possession of an interest in immoveable property. It is a suit to recover a certain sum of money which became due and payable more than six years ago as an emolument [353] of the office due by custom. We do not think that it is a suit provided for by any other article of the Limitation Act, and it therefore falls under the general Article No. 120. The period of limitation is therefore six years and the suit is barred. We set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

(1) 5 B. 68. (2) 15 B. 135.

1899
JAN. 20.

APPEL-
LATE
CIVIL.

22 M. 353.

22 M. 353.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

RAJAH ESWARA DOSS AND ANOTHER (*Defendants*), *Appellants* v. BABU RAJAN (*Plaintiff*), *Respondent.* [20th January, 1899.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Section* 4—*Validity of patta—Omission to sign by landholder.*

A suit was brought to set aside a sale of lands on the ground, among others, that a patta which had been tendered was illegal. One of the clauses objected to in the patta contained an erroneous reference to punja lands which had inadvertently not been erased: another provided only in an indirect manner for the rent payable in respect of any other land that might be cultivated. The patta was not signed or sealed:

Held, that the clauses referred to were unobjectionable: and the fact that the patta tendered had not been signed by the landlord, did not necessarily render it invalid.

SECOND appeal against the decree of J. Hewetson, District Judge of Chingleput, in appeal suit No. 418 of 1896, affirming the decree of T. T. Ranga Chariar, District Munsif of Poonamallee, in original suit No. 100 of 1895.

Suit to set aside a sale of certain lands brought by the pattadar against the landholder thereof. Plaintiff claimed that defendant had caused the lands to be sold fraudulently and without tendering a patta or other notice of demand for arrears due; and that the sale was liable to be set aside. It appeared that a patta had been tendered, but it was contended that it was illegal, the following clauses, in particular, be objected to:—

"3. If wet crops should be raised on the undermentioned dry lands, you should continue to pay excess tirwa therefor according [354] to the last class tirwa of wet land fixed in the respective kuppams.

"4. If garden crops should be raised on the undermentioned lands, you should continue to pay excess tirwa for each fasli in respect of such garden land as follows:—nanja beriz including the tirwa in respect of nanja karinilam (uncultivated land) and second crop for the nanja land—and uncultivated land tirwa of fourth class nanja prevailing in the respective kuppams for the dry land.

"5. If you cultivate any other land than those mentioned below, you should continue to pay the cash beriz according to the class now fixed therefor.

"7. You should besides the aforesaid merai, &c., continue to pay then and there the other swatantram, &c., pertaining to tookiri (village watchman) and vetti."

Dealing with paragraphs 3 and 4 the District Munsif said that the reference therein to punja lands being erroneous (as plaintiff held no punja land), should have been erased from the printed forms; that the omission to erase them was due to inadvertence, and that such defects were not fatal to the validity of the patta. He also regarded the condition in paragraph 4 unobjectionable. Referring to paragraph 5 the District Munsif accepted the evidence of the karnam of the village, as to the existence of a record containing the classification of soil and the appropriate rents fixed for each class,—which removed all uncertainty respecting the conditions contained in that clause. He referred to *Alagirisami Naiker*

* Second Appeal No. 573 of 1898.

v. *Innasi Udayan* (1) which he understood to decide that any provision in a patta making the tenant liable for lands not held by him was illegal, on the ground that it did not contain the local description and extent as contemplated by Section 4 of the Rent Recovery Act. But he considered that decision inapplicable to the present case. He also decided that paragraph 7 of the patta was unobjectionable, as, though the rates of payment were not therein referred to, they were fixed by long-standing custom. But inasmuch as the patta was not signed or sealed, and on that ground alone, he held it to be invalid, and that the plaintiff was not bound to accept it. He, therefore, set aside the sale as prayed.

[355] The District Judge, on appeal, held that Section 4 of the Rent Recovery Act does not require a patta to be signed by the landholder, but he upheld the District Munsif's judgment on other grounds. He found the patta bad in two other respects. He said:—" In paragraph 5 it is laid down that plaintiff is to pay rent according to the taravari beriz if he cultivates lands other than those included in the patta. There is evidence that the assessment has been fixed on waste lands in the village ; in *Alagirisami Naiker* v. *Innasi Udayan* (1) this very point was raised but not decided by the High Court though from the head-note it would appear to have been expressly decided ; the High Court assume that the patta tendered was not a proper one in order to answer the question put by the District Munsif and expressly say that the Munsif has not decided the question as to the propriety of the patta. *Ramanjulu* v. *Ramachandra* (2) and *Ramasami* v. *Rajagopala* (3) proceed rather on the ground that the rent to be paid was left uncertain and at the pleasure of the landholder ; that ground does not apply in the present case, but I think that the point raised in this and in *Alagirisami Naiker* v. *Innasi Udayan* (1) is a good objection, for, as regards lands to be taken up at a future date, it is impossible to give the local description and extent or the amount of the rent. As regards the merais too, no rate is entered ; the Munsif says this is not material as the rate depends on usage but the landlord and tenant may differ as to the usual rate; and to prevent this the rates should be entered in the patta. The patta is also vague in that, after specifying the merai to two village officers, it goes on to speak of ' other merais ' which are not defined in any way."

He accordingly confirmed the order setting the sale aside.

The defendants preferred this second appeal.

Mr. *N. Subramanyam*, for appellants.

Rama Rao and *Sivasami Ayyar*, for respondent.

JUDGMENT.

We cannot see that Clause 5 of the patta is objectionable or that anything of the sort was decided in *Alagirisami Naiker* v. *Innasi Udayan* (1) and with regard to the other objections to the various clauses of the patta, we agree with the view of the District Munsif. So far as paragraph 7 of the patta is **[356]** concerned, it does not provide for any payment to the landlord, but merely leaves the tenant to deal with the village officers. As to the objection that the patta tendered was not signed by the landlord, we agree with the District Judge that that fact does not necessarily make the patta bad.

We must allow the appeal and reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

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(1) 3 M. 127. (2) 7 M. 150. (3) 11 M. 200.

1899
JAN. 17.

APPEL-LATE CIVIL.

22 M. 356.

22 M. 356.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SAMINATHA PILLAI AND ANOTHER (*Petitioners and Defendants Nos. 1 and 2*), *Appellants v.* MANIKASAMI PILLAI (*Counter-petitioner and Assignee-Plaintiff*), *Respondent.**
[17th January, 1899.]

Hindu Law—Decree for mesne profits of her late husband's land in favour of his widow—Assignment of decree—Execution proceedings by assignee—Validity of assignment.

The widow of a deceased Hindu, having been kept out of possession of land forming portion of her late husband's estate, obtained a decree for possession thereof and for mesne profits. She assigned the decree for mesne profits and subsequently died. Upon the assignee attempting to execute the decree in respect of mesne profits the reversionary heirs contended that he had no right to do so on the ground that his assignor, the widow could not alienate the mesne profits so as to enure beyond her lifetime:

Held, that the right to mesne profits under a decree is not immoveable property and that the decree was validly assigned.

APPEAL against the order of C. G. Kuppusami Ayyar, Subordinate Judge of Tanjore, in civil miscellaneous petition No. 1724 of 1897, in the matter of original suit No. 12 of 1893.

Application under Section 244 of the Code of Civil Procedure praying the Court to order that the counter-petitioner had no right to execute a decree for mesne profits arising from certain land. The decree in question had been assigned to the counter-petitioner by a Hindu widow, since deceased. The petitioners, who were the reversionary heirs and against whom the decree had been **[357]** passed, contended that the deceased, as a Hindu widow could not alienate the mesne profits so as to enure beyond her lifetime, and that the assignment could not therefore take effect as against the petitioners. For four years subsequent to the death of her husband the deceased had been kept out of possession of the lands forming a portion of his estate and was entitled, under the decree, to possession thereof and to mesne profits. It was the decree for these mesne profits that had been assigned by her to counter-petitioner. There was no evidence that she had treated the accretions as part of her husband's estate. On these grounds, the Acting Subordinate Judge held that the counter-petitioner was entitled to execute the decree.

The petitioners preferred this appeal.

Sundara Ayyar, for appellants.

Pattabhirama Ayyar, for respondents.

JUDGMENT.

The right to mesne profits under a decree is not immoveable property. It was validily assigned. The appeal is dismissed with costs.

* Appeal against Order No. 21 of 1898.

1899
FEB. 7.

APPELLATE CIVIL.

22 M. 357.

22 M. 357.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

SESHAYYA (*Defendant*), *Appellant v.* NARASAMMA (*Plaintiff*), *Respondent.** [25th and 26th January and 7th February, 1899.]

Hindu Law — Will — Disposition in favour of a widow and an adopted son—Nature and extent of widow's interest thereunder.

By his will a Hindu testator, after providing for various bequests, dealt with the residue of his estate as follows :—" My daughter-in-law and granddaughters shall receive half of my whole estate, and my wife and my adopted son shall receive the other half." On the question as to what was the nature and extent of the interest to which the testator's widow was entitled thereunder :

Held, that having regard to the rule of construction which has been repeatedly applied to gifts by Hindus in favour of their wives, the intention of the testator was not that his wife should take an absolute estate. The supposition [358] is that a Hindu donor intends to act in accordance with the ordinary notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of his family. Though it was competent for the testator to provide for his wife in such a way that she should have absolute control over the property given her, that is not the provision which the Hindu Law makes for a widow. The language of the will was not inconsistent with an intention on the part of the testator that the son, with his adoptive mother, should take a moiety with the incidents attaching to property held by an undivided family. Upon the true construction of the will, therefore, the widow was not intended to take any other estate than she would have taken if there had been an intestacy.

[R., 14 Ind. Cas. 148 (150) ; 1 S.L.R. 211 (217) ; D., 27 M. 493 (502).]

APPEAL against the decree of U. Achutan Nayar, Acting Subordinate Judge of Nellore, in original suit No. 66 of 1897.

Suit by a widow to recover from the adopted son of her late husband a fourth share of the self-acquired property left by the deceased. By his will, Gurumurti, plaintiff's late husband, after providing for various bequests, dealt with the residue of his estate as follows :—" My daughter-in-law and granddaughters shall receive half of my whole estate, and my wife and my adopted son shall receive the other half." Defendant having taken possession of the property, plaintiff claimed that she was entitled under the will to a moiety of the half share of the residue. Defendant resisted her claim and denied the right of the testator to create in his widow a right to a share contrary to the principles of Hindu Law. The Acting Subordinate Judge considered that there was nothing in the will to show that the testator intended that his widow should remain under the defendant's protection and control, and that she should not claim anything more than maintenance; and held, on the authority of *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1), that plaintiff was entitled to a half of the moiety.

The defendant preferred this appeal.

Hon. *Bhashyam Ayyangar*, for appellant.—The Court should not have held, on the true construction of this will by a Hindu testator, that the widow is entitled to a distinct and separate share of the deceased's estate.

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* Appeal No. 87 of 1898.

(1) 23 C. 670.

1899 FEB. 7. — APPELLATE CIVIL. — 22 M. 357.

Having regard to the Hindu Law and usage to which the testator was subject, it ought not to be said that his intention was to bequeath to his widow such distinct and separate share. It must have been the testator's intention that plaintiff should live with, and under the protection [359] of, the adopted son (the defendant) and that she should be maintained out of the residuary estate dealt with by the will. If that were the intention, then plaintiff had no right to the share claimed by her. Even if it were held that such a share did pass under the will, plaintiff's interest in it ought to be held to be no more than the estate of a Hindu widow in her husband's property, namely, an estate for life. Having regard to the custom obtaining among Hindu testators that must be taken to have been the intention of the deceased and the will should be construed accordingly.

Pattabhirama Ayyar, for respondent.—The effect of the construction urged by the appellant would be that the widow would take no more under the will than she would have taken if her husband had died intestate. Had the testator intended that his widow should be benefited only to the extent that she could have claimed as of right without a will, he would not have included the specific directions relating to the disposal of the residuary estate in her favour. The directions must be taken to have some object and meaning, and, in the absence of any limitation to the disposition in the widow's favour, the will must be construed as conferring absolutely an equal share upon her and upon the adopted son, respectively, in the moiety of the residue which had been left to them.

Hon. *Bhashyam Ayyangar*, in reply.

JUDGMENT.

The plaintiff is the widow, and the defendant the adopted son of one Gurumurti, who died leaving a will dated the 19th October 1891. The defendant appeals against the decree which is in the nature of a decree for partition. An objection was taken on the defendant's behalf as to the non-joinder of persons interested in the property to which the decree refers. We did not think that objection could be allowed to prevail, nor do we think that there is any doubt as to the correctness of the finding regarding the defendant's adoption. The real question in the case is as to the construction of Gurumurti's will. The family of Gurumurti at the time when the will was made consisted of his wife, his adopted son, aged about eighteen, the widow of a deceased son and her two daughters, and some other female relations. By the will he gives legacies to various persons and then directs that the whole of his estate shall, after his death, be kept in the possession of his son and the amount due to each of them shall be given.

[360] This direction apparently refers as well to the legacies as to the gift of the residue which comes in the earlier part of the will. The residue is to go, one moiety to his daughter-in-law and his granddaughters, the other moiety to his widow and adopted son. What is the nature and extent of the interest taken by the widow—is the question.

Having regard to the rule of construction which has been repeatedly applied to gifts by Hindus in favour of their wives, we think it is quite clear that the testator did not intend his wife to take an absolute estate (*Mohomed Shumsool* v. *Shewukram* (1)). But the reasons for the rule

(2) 16 M. 201.

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22 M. 357.

suggest in the present case the further conclusion that he did intend his widow and son to enjoy the property after the manner of an ordinary Hindu family. The supposition is that a Hindu donor intends to act in accordance with the ordinary notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of his family. It was competent to the testator to provide for his wife in such a way that she should have absolute control over the property given to her, or that she should for her lifetime enjoy a separate share of his estate. But that is not the provision which the Hindu Law makes for a widow. For his daughter-in law and her children, if he desired that they should have a part of the property to themselves, it was requisite that he should make special provision, and it was natural that he should do so, although it may be that, according to Hindu Law, they would have been entitled to maintenance. We are asked to say that the testator's intention must have been to place his widow with regard to one moiety in the position in which the daughter-in law was to stand with regard to the other moiety, and it is argued that, on the construction advocated on the defendant's behalf, the testator might as well have made no disposition at all in favour of his wife and son.

It is apparent that the testator desired to make his daughter-in-law quite independent of his wife and son, but we do not think it follows that he meant his wife to hold property independently of the son. It would be quite unnatural for a Hindu who set himself to make a will deliberately to contemplate an intestacy as to a portion of his property or to omit mention of persons on [361] whom he wished it to devolve. He was obliged, as he would think, to name at least his adopted son, and the association of his wife with the son was only natural. In the normal condition of things they would live together, and there is no evidence to show that they were not likely to do so. The language of the will is certainly not inconsistent with the intention that the son with his adoptive mother should take the moiety with the incidents attaching to property held by an undivided family. In Malabar cases this Court has held that a gift by a man to his wife and children must be considered as a gift to the group of persons forming a tarwad or taveli (*Kunhacha Umma* v. *Kutti Mammi Hajee* (1)), and that the property of the tarwad being impartible, no member of the group can claim a share of the property so given. The present case is, in our opinion, not dissimilar. Upon the true construction of the will we think the widow was not intended to take any other estate than that which she would have taken if there had been an intestacy, and that therefore the suit should have been dismissed. The appeal is allowed and the suit and the memorandum of objections dismissed with costs throughout.

(1) 16 M. 201.

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APPEL-
LATE
CIVIL.

22 M. 361.

22 M. 361.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

TIRUVENGADATH AYYANGAR (*Defendant No.* 3), *Appellant v.* SRINIVASA THATHACHARIAR (*Plaintiff*), *Respondent.**
[12th, 16th and 27th January, 1899.]

Religious Endowments—Devastanam Committee—Grounds for removal from office—Errors of judgment on part of committeeman.

Mere error in judgment on the part of a member of a devastanam committee is not sufficient to disqualify him from continuing to hold such office. To justify the removal of such an office-holder, it must be shown that the further holding by him of the office is incompatible with the interests of the temple under the charge of the committee of which he is a member.

[362] The duty of a devastanam committee consists, primarily, in seeing that its endowments are appropriated to their legitimate purposes and are not wasted. It is not a part of the duty of such a committee to interfere with the trustees in matters relating to rituals.

APPEAL against the decree of R. D. Broadfoot, District Judge of Tinnevelly, in original suit No. 1 of 1894.

Suit by a vadagalai Brahman to remove the third defendant from the Vishnu devastanam committee, on grounds of alleged misfeasance and non-feasance as a member of such committee. Issues Nos. 4,5 and 9, framed by the District Judge, related to disputes between the tengalais and vadagalais at Srivilliputtur. Plaintiff, as a person interested in the proper management of the temple, complained that defendant had sanctioned expenditure from temple funds in payment of fines and costs of tengalais in disputes between the two factions, that the festival of Desikar had been stopped for several years, and that the vadagalais had been excluded from the temple unless they had first undertaken not to recite certain hymns therein. It was admitted that the disbursements complained of had been made, and the District Judge held that they were not legitimate charges on the temple funds. The stoppage of the festival to Desikar was also admitted, the defence being that the trustee and the committee had always been ready and willing to perform it if the vadagalais would consent to a tengalai namam being affixed to the forehead of Desikar. The District Judge found that, in sanctioning the enforcement of this condition by the trustee, defendant had acted improperly and had committed misfeasance ; and that his contention that he had acted *bona fide* could not protect him from the consequences of his mistake. He held that these findings on issues Nos. 4, 5 and 9 justified the removal of defendant from office, though he acquitted him of moral blame. Plaintiff further complained that three of defendant's fellow committeemen had contracted loans from the temple funds with a view to misappropriating the same, while the temple had been under the management of one Kumarasami. There was no direct evidence of connivance on defendant's part, but a suit to recover the deficit had, upon the death of the said Kumarasami, been instituted against his sons, when the true nature of these transactions had been exposed. It was complained that defendant had taken no steps to recover from his fellow committeemen the sums so advanced even after the facts

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* Appeal No. 84 of 1898.

were [363] exposed, and on this charge the District Judge held defendant technically guilty of non-feasance. He passed a decree removing third defendant from office.

The third defendant preferred this appeal.

Mr. *E. Norton* and *Sadagopachariar*, for appellant.

V. Krishnasami Ayyar, for respondent.

JUDGMENT.

The District Judge has found, with reference to the fourth, fifth and ninth issues, that the appellant has been guilty of misconduct or breach of duty so grave as to involve his removal from office.

The charge relating to Kumarasami's dealings with temple funds the District Judge does not consider a very grave one. He thinks, however, that the appellant's conduct in the matter shows that he took no interest in the welfare of the temple and that, therefore, he is guilty of non-feasance. The evidence on this point has been discussed before us, and though there is no doubt that Kumarasami made improper use of the temple funds and some of the appellant's colleagues received advances from them, we can see no sufficient evidence to prove any connivance on the appellant's part. It is not shown that the appellant became aware of his colleague's dealings with Kumarasami till the latter's son put in his defence. Nor is it shown that the temple suffered by any negligence on the appellant's part. The fourth and the ninth issues relate to the eternal disputes between tengalais and vadagalais. In this matter, we think that the appellant went beyond the duties which devolve upon him as a member of the committee. It is not part of the duty of the committee to interfere with trustees in matters of rituals. The business of the committee is primarily to see that the endowments are appropriated to their legitimate purposes and are not wasted.

The appellant cannot be seriously blamed for mistaking the scope of his duties, but his conduct in the matter is open to the charge of partiality towards the trustee of his own sect. His sanction of the expenditure of temple funds for the liquidation of a fine inflicted on the trustee is certainly censurable.

Although, however, we think the appellant cannot be altogether acquitted, there is, in our opinion, an entire absence of proof of such misconduct as to render his removal from office necessary in the interests of the institutions which the committee controls.

[364] We cannot agree with the District Judge in the view that mere error in judgment is sufficient to disqualify an office-holder in the position of the appellant. To justify removal from such an office, it must be shown that the further holding of it is incompatible with the interests of the temple under the charge of the committee.

We therefore reverse the decree, but we allow no costs.

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APPELLATE CIVIL.

22 M. 364.

22 M. 364.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard and Mr. Justice Benson.

PARAMESHRAYA (*Defendant No. 4*), *Appellant v.* SESHAGIRIAPPA AND ANOTHER (*Plaintiff and Defendant No. 1*), *Respondents.**
[6th March, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 206—*Finding in judgment not embodied in decree—Amendment of decree — Appeal against amended decree— Time how calculated.*

In a suit for a declaration of title to land and for possession, which was based upon a will alleged to have been made in plaintiff's favour, the Subordinate Judge, finding the document to be a forgery, dismissed the suit. The fourth defendant had been made a party inasmuch as he claimed a portion of the land as alienee. Though the case for the plaintiff failed, the Subordinate Judge, on the above finding, dealt in his judgment with an issue which had been framed regarding the validity or otherwise of the alleged alienation to the fourth defendant. He held that it had been made for no consideration and found the issue against the fourth defendant. The decree dismissing the suit, which bore date the 22nd of June 1896, contained no reference to the finding against the fourth defendant on that issue. The fourth defendant applied for a review of the judgment, complaining that as the suit had been dismissed, the reference in the judgment to the alleged alienation in his favour was unnecessary, and might, if permitted to stand, operate against him as *res judicata* in any subsequent suit that might be brought; and praying that the finding might be either expunged or modified in his favour. Upon this being refused, fourth defendant applied, under Section 206 of the Code of Civil Procedure, that the decree might be brought into conformity with the judgment, and an order was made on 27th October 1896 adding to the decree a clause to the effect that the issue referred to had been found against the fourth defendant. On 12th December 1896 fourth defendant preferred an appeal against the decree of the Subordinate Judge, but the District Judge rejected it as being out of time:

[365] *Held*, that the decree being in conformity with the judgment, the Subordinate Judge had no power to vary it; and that the words which had been added must be expunged, and the decree restored to its original state. Also, that the finding on the issue against the fourth defendant was, in fact, no finding except with regard to the question of consideration.

Per SUBRAMANIA AYYAR, J.—That where a decree which is at variance with the judgment is brought into conformity with the latter under Section 206 of the Code of Civil Procedure, the date of the rectification is immaterial with reference to the calculation of the time in which any appeal may be preferred against such decree. But where a decree is wrongly varied, a party affected by such variation should be entitled to calculate the time during which an appeal may be preferred as commencing from the date of the variation.

[F., 3 C.L.J. 188 (191); R., 39 C. 265 (274) = 14 C.L.J. 481 = 12 Ind. Cas. 151; D., 4 Ind. Cas. 231 = 5 N.L.R. 159.]

SECOND appeal (No. 1709 of 1897) against the proceedings of H. G. Joseph, District Judge of South Canara, in the appeal presented by defendant No. 4 against the revised decree of U. Achutan Nayar, Subordinate Judge of Mangalore, in original suit No. 24 of 1891.

Suit for a declaration of plaintiff's title to certain properties and for possession thereof and mesne profits. Plaintiff's claim was based upon a will alleged to have been duly made in his favour. The first defendant, widow of the alleged testator, denied the genuineness of the will; and an

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* Letters Patent Appeal No. 74 of 1898.

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issue having been framed on that point, the Subordinate Judge found the document to be a forgery. The sixth issue framed by the Subordinate Judge related to the validity of an alienation (Exhibit IX) of a portion of the land alleged to have been made by the first defendant in favour of the fourth defendant, who had, in consequence thereof, been made a party to the suit. The Subordinate Judge in his judgment held that there was no consideration for this alienation, and found this issue against the fourth defendant. The plaintiff having failed to prove the will, the suit was dismissed. The decree, which bore date the 22nd of June 1896, comprised a simple order of dismissal, no reference being made to the finding against the fourth defendant on the sixth issue. On 14th September 1897 the fourth defendant filed an application for a review of the judgment under Section 623 of the Code of Civil Procedure. In this he contended that inasmuch as the suit had been dismissed on the sole ground that the will sued on was a forgery, any finding in the judgment on the sixth issue as to the validity or otherwise of his alleged title as alienee under the said Exhibit IX was unnecessary ; that he could not prefer an appeal against such finding since the decree, as drawn up, was in his favour ; but that the finding that his title [366] under Exhibit IX was invalid might, if allowed to stand as a portion of the judgment, operate against him as *res judicata* in any subsequent suit that might be brought. He therefore prayed that the finding on the sixth issue might either be expunged from the judgment or modified in his favour. The Subordinate Judge passed an order stating that findings on all issues had been recorded to obviate any necessity for a remand, and that they could not be expunged simply because there was no appeal ; and he rejected the petition. The fourth defendant then applied under Section 206 of the Code of Civil Procedure that the decree might be amended so as to be in conformity with the judgment. The Subordinate Judge, on 27th October 1896, passed an order adding the following clause to the decree :—"The sixth issue relating to the validity "or otherwise of Exhibit IX is found against the fourth defendant." In doing this he followed *Niamat Khan* v. *Phadu Buldia* (1) and *Jamaitunnissa* v. *Lutfunnissa* (2).

On 12th December 1896 the fourth defendant appealed to the District Court against the decree of the Subordinate Judge dated 22nd June 1896, contending that his notice of appeal was in time inasmuch as the time for its presentation should be reckoned from the date of the order amending the decree, which bore date the 27th of October 1896. The District Judge held that the contention was not good. Referring to *Joykishen Mookerjee* v. *Ataoor Rohoman*(3) he said it was apparent from the judgment (at page 24) that had the amendment in that case been made under Section 206 of the Code, the time for limitation could not have been held to be extended by the order which had been made. He also held that an order of a Subordinate Court (after refusing a review), making an amendment of its decree under Section 206 for the express purpose of rendering an appeal already long barred by limitation admissible, was not justified. He rejected the appeal as being out of time.

Defendant No. 4 preferred this second appeal.

Narayana Rao, for appellant.

Ramachandra Rao Saheb, for respondents.

SUBRAMANIA AYYAR, J.—In this case the first respondent (plaintiff) sued for the recovery of certain property alleged to have [367] been left to

(1) 6 C. 319. (2) 7 A. 606. (3) 6 C. 22.

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him by a will of the late husband of the second respondent (first defendant) and made the appellant (fourth defendant) a party, as he claimed some of the property sued for as a vendee under a conveyance executed by the second respondent after her husband's death. The first respondent being a reversioner might as such have impeached the sale under the Hindu Law. But he has made no such claim in the present suit. The Subordinate Judge found the alleged will to be a forgery and dismissed the suit. With reference to the title on which the suit is entirely based, it was not necessary for him to enter into the question whether the sale to the appellant is valid or not. Nevertheless he expressed it as his opinion that the sale was invalid; but this opinion was not inserted in the decree. Subsequently, however, on the application of the appellant himself, the Subordinate Judge altered the decree by adding such a declaration. It is clear that even upon the authority of the cases, *Niamut Khan* v. *Phadu Buldia* (1) and *Jamaitunnisa* v. *Lutfunissa* (2), that declaration ought not to have been inserted in the decree. The appellant's appeal to the Lower Appellate Court against so much of the decree as related to the alienation was rejected on the ground that it was presented out of time. In so rejecting it the Lower Appellate Court held that the decree, even in so far as it affected the appellant, was not to be taken as of the date on which the alteration was ordered to be made. No doubt, where a decree which is at variance with the judgment is brought into conformity with it under Section 206 of the Code of Civil Procedure, the date on which the decree is so rectified is immaterial with reference to the calculation of the time for appeal against such decree. But here the decree, as it was framed first, was in conformity with the judgment, notwithstanding that the latter contained an expression of opinion upon the question of the validity of the sale—an opinion absolutely irrelevant to the case and therefore, as already stated, rightly excluded originally from finding a place in the decree. In these circumstances the Subordinate Judge was not empowered under Section 206 to alter the decree as he did. And as against the party affected by the alteration, it would be manifestly unjust and unwarranted to treat the decree except as of the date on which it was so altered; (compare *Joykishen Mookerjee* v. *Ataoor Rchoman*(3)). Taking the decree to be of that date, the [368] appeal to the Lower Appellate Court was in time, and the order rejecting the appeal cannot be sustained, and must, in my opinion, be set aside. How then is the case to be disposed of? The question whether the opinion of the Subordinate Judge as to the validity of the sale is right or wrong, cannot, of course, be gone into as the point does not rightly arise here. At the same time we would not, I think, be justified in declining to interfere altogether, though the erroneous order of the Subordinate Judge was passed in accordance with the prayer of the appellant himself. For he and the Subordinate Judge both intended that the alteration should enable the former to seek for a reversal on the merits of the finding against him if he can claim such remedy in appeal. That relief, no doubt, cannot be given to him. But he ought not to be allowed to be prejudiced by the error of the Subordinate Court as he would be if the decree be left as it stands. I would therefore set aside the order of the Lower Appellate Court and the order permitting the alteration of the decree and direct that it be restored to what it was before the alteration, the appellant, however, being made to bear his own costs, and to pay those of the first respondent

(1) 6 C. 319. (2) 7 A. 606. (3) 6 C. 22.

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incurred from the date of the application for the alteration of the decree till now.

MOORE, J.—On the 22nd June 1896, the Subordinate Judge of South Canara dismissed original suit No. 24 of 1891 on his file. In the judgment it was held on the sixth issue that a certain sale-deed relied on by the fourth defendant was not valid or genuine, but in the decree, as it originally stood, nothing was entered as to this. The plaintiff's suit was simply dismissed with costs. The fourth defendant applied, under Section 623 of the Civil Procedure Code, for a review of the judgment, but his application was dismissed on the 14th September 1896. He then requested that the finding on the sixth issue might be expunged or modified in his favour, but his application was rejected. He then applied under Section 206, Civil Procedure Code, that the decree should be brought into conformity with the judgment by the insertion in the former of the finding on the sixth issue. The Subordinate Judge on the 27th October directed that this should be done on the authority of the rulings in *Niamut Khan* v. *Phadu Buldia* (1) and *Jamaitunnissa* v. *Lutfunnissa* (2), and the following clause was added to the decree :—**[369]** "The sixth issue "relating to the validity or otherwise of Exhibit IX is found against the "fourth defendant." The fourth defendant then appealed against the decree as thus modified, but the District Judge decided that his appeal was out of time, and against that decision he has appealed here.

It is now urged that the application on which the order of the 27th October 1896 was passed should be held to have been an application for review under Section 623, that the order amending the decree should be considered to have been passed under Chapter XLVII of the Code, and that consequently the decree bears date from the order amending it and is therefore in time. This is not, in my opinion, a valid contention. The application under Section 623 was rejected. The petition on which the order of the 27th October was passed was put in under Section 206, and the prayer there made was that the decree should be brought into conformity with the judgment—a relief which can be granted under that section only. The Calcutta decision quoted by the Subordinate Judge does, no doubt, permit of a decree being amended as in the present case, but on reference to that judgment it will be seen that the learned Judges were of opinion that this should be done on an application made to the Court to bring the decree into conformity with the judgment, and it must be presumed that, although no section is mentioned in the judgment, the intention of the learned Judges must have been that the amendment should be made under Section 206, there being no other section under which it could be made. In *Jamaitunnissa* v. *Lutfunnissa* (2) also mentioned by the Subordinate Judge, the view taken by a majority of the Court is that in cases such as the present the only remedy is to apply under Section 206 to have the decree brought into conformity with the judgment. On the ground therefore that the present appellant's application for review under Section 623 had been rejected, that his application to make the decree in accordance with the judgment was presented under Section 206, and that that section was the only one under which the relief prayed for could have been granted, I must hold that the Subordinate Judge's order of the 27th October 1896 was passed under Section 206 of the Code of Civil Procedure, and that he by it did not and could not alter the date of the original decree, and that consequently the appeal to

(1) 6 C. 319. (2) 7 A. 606.

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[370] the District Judge was long out of time and was therefore rightly rejected.

This appeal should, in my opinion, be dismissed with costs.

[The judgment of Mr. Justice Moore prevailing under Section 575 of the Code of Civil Procedure, the decree of the Lower Appellate Court was confirmed and the second appeal was dismissed with costs.]

Defendant No. 4 having then appealed under Section 15 of the Letters Patent, the case was set down for re-argument before the Bench constituted as above, the parties being represented as before.

Narayana Rao, for appellant.—Defendant No. 4, claiming as an alienee from the first defendant, was made a party to the suit. The plaintiff's claim was, however, based upon a will, and the Subordinate Judge having found against him on the will dismissed the suit solely on that ground. On the suit so failing, it became unnecessary for the Subordinate Judge to record any finding in his judgment relating to the validity or otherwise of the alleged alienation to the fourth defendant. But the finding having been recorded, the fourth defendant desired to have it set aside. He therefore applied for a review of the judgment, and, upon that being refused, that the decree might be amended so as to be in conformity with the judgment, so that he might appeal. The Subordinate Judge ultimately ordered that the finding relating to the alleged alienation to fourth defendant should be embodied in the decree, and this was done. [COLLINS, C.J.—The portion of the judgment which you objected to was inserted in the decree on your application.] The course pursued is suggested by *Niamut Khan* v. *Phadu Buldia* (1). See also *Jamaitunnissa* v. *Lutfunnissa* (2). [SHEPHARD, J.—The decree bears two dates; is it contended that there are different periods during which appeals could be presented by the different parties?] Section 623 of the Code of Civil Procedure contemplates a necessity such as this arising for the review of a judgment by any person considering himself aggrieved. [SHEPHARD, J.—What power had the Subordinate Judge to alter the decree?] Sections 206 and 623 give him power. The finding against the fourth defendant should have been included in the original decree and so rendered it subject to appeal; otherwise [371] the question might have become *res judicata*, although the fourth defendant had no power to appeal; see *Avala* v. *Kuppu*(3) which sanctions the procedure which has been taken; also *Nanda Lal Rai* v. *Bonomali Lahiri*(4), in which the High Court expunged such findings from the record where the suit was dismissed for misjoinder. In the latter case, as in this, the suit had been dismissed, and the appeal was preferred by one of the defendants. Upon fourth defendant preferring his appeal against the amended decree, the District Court held that it was out of time. The time should be computed as from the date when the finding was inserted in the decree; in other words, from the date upon which the decree was altered so as to become operative as against the fourth defendant. The application on which the order varying the decree was passed may be treated as one under Section 623, and the order amending the decree may be taken to have been passed under Chapter XLVII of the Code of Civil Procedure, in which case the amended decree would properly bear the date of the order amending it. The applications for review and for rectification of the original decree were filed within the time allowed for appeal. *Joykishen Mookerjee* v. *Ataocr Rohoman*(5), which will be cited against my contention,

(1) 6 C. 319. (2) 7 A. 606. (3) 8 M. 77.
(4) 11 C. 544. (5) 6 C. 22.

does not affect the position. I submit that the appeal preferred by the fourth defendant to the District Court was filed in time.

Ramachandra Rao Saheb, for respondents.—It is a question of limitation. [COLLINS, C. J.—The Subordinate Judge had no power to add the words to the original decree, and we can expunge them.] [SHEPHARD J.—No doubt the time for appealing must be reckoned from the date of the original decree, and not from the date of the amendment; but we can strike out the words which were added; no petition for revision is necessary.] *Suppayya Konar* v. *Appusami Konar* (1) clearly lays down the time from which the period of limitation should be computed; see also *Pydel* v. *Chathappan* (2). It is not a case for revision; an appeal being allowed, that is the proper remedy.

JUDGMENT.

Although it is said that the sixth issue was found against the fourth defendant, there was in fact no finding except with regard to the question of consideration. We are of opinion that the decree was in conformity with the judgment and that [372] therefore the Subordinate Judge had no power to vary the decree in the manner suggested by the appellant's vakil. This being so, the words added must be expunged, and the decree restored to its original state. In other respects this appeal is dismissed with costs.

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22 M. 372=9 M.L.J. 113.

APPELLATE CIVIL.

Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Davies.

MUTHURAMAN CHETTI (*Defendant No.* 4), *Appellant v.* ETTAPPASAMI AND OTHERS (*Plaintiff and Defendants Nos.* 1 *to* 3), *Respondents**. [9th and 12th December, 1898 and 9th, 23rd, and 24th January, and 14th February, 1899.]

Transfer of Property Act—Act IV of 1882, *Section* 99—*Civil Procedure Code—Act XIV of* 1882, *Section* 244—*Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share—Hindu Law—Rights of Hindu debtor's son after attachment and sale.*

In 1848 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878, plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought, in 1889, in respect of them, and a decree obtained, which contained a provision that the right to the annuity should be liable to be proceeded against for the amount so due. Plaintiff was born in 1891. In 1893 an application was made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity:

Held, (1) that if there was in fact a decree for sale, plaintiff, as son of the judgment-debtor, born after the date of the decree though before the sale, could not question the sale; nor would any right of redemption be left to the plaintiff;

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* Second Appeal No. 82 of 1898.

(1) Appeal No. 256 of 1897 (unreported). (2) 14 M. 150.

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APPELLATE CIVIL.

22 M. 372 = 9 M.L.J. 113.

(2) that inasmuch as the decree was, on its true construction, not a decree for sale, the case was one of attached property being sold at the instance of the mortgagee in execution of a money decree, and so within the prohibition of Section 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale; and in the absence of such decree the sale is prohibited;

(3) that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained;

[373] (4) that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of Section 99;

(5) that the suit was not barred by Section 244 of the Code of Civil Procedure; and that plaintiff was entitled to a decree for the redemption of his share.

[F., 30 M. 362 (366) = 17 M.L.J. 325 (329); 4 A.L.J. 787 (789); 2 P.R. 1907 = 157 P.L.R. 1906; R., 35 C. 61 (69) = 6 C.L.J. 320 (F.B.) = 11 C.W.N. 1011 (1018); 15 C.L.J. 446 = 17 C.W.N. 219 (223) = 14 Ind. Cas. 845 (848); 8 O.C. 327 (336); 30 M. 279 (280) = 17 M.L.J. 373 = 2 M.L.T. 388; 12 C.L.J. 146 (154); D.. 29 M. 421 (423) = 15 M.L.J. 445 (446); 9 Ind. Cas. 549 = 15 P.R. 1911 = 30 P.L.R. 1911 = 109 P.W.R. 1911.]

SECOND appeal against the decree of R. D. Broadfoot, District Judge of Tinnevelly, in appeal suit No. 301 of 1896, affirming the decree of U. Ittinikanda Panikar, District Munsif of Satur, in original suit No. 336 of 1895.

Suit to set aside a Court-sale, or for a declaration that such sale did not affect plaintiff's share under the right sold. In 1848, the brother of the zemindar of Vadimitta sued for and obtained a decree for the partition of the zemindari, and other properties. Pending an appeal by the zemindar against the said decree a settlement was arrived at, whereby the younger brother renounced, on behalf of himself and his heirs, his rights under the decree in consideration, *inter alia*, that an annual payment should be made to him and his heirs of Rs. 950, charged on the revenue of certain specified villages belonging to the zemindari. The aforesaid agreement had ever since been acted upon. In 1878, the plaintiff's paternal grandmother, his father, and the mother and guardian of his uncle, then a minor had executed a bond (as persons beneficially entitled under the agreement of 1848), for moneys due by them, mortgaging the right to the Rs. 950 payable annually under the said agreement. Some of the instalments of the debt due under the bond having fallen into arrears, a suit was instituted for the recovery thereof, and a decree passed in 1889, against plaintiff's father, which contained a provision to the effect that the right to the allowance should be liable to be proceeded against for the amount due. Of the allowance of Rs. 950, an uncle of the male judgment-debtors was entitled to Rs. 280, and with regard to the balance an application was, in 1893, made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff, who was born in the early part of 1891, brought this suit, praying either that the whole sale might be set aside or that his share of the allowance might be exonerated therefrom. The District Munsif cancelled the entire sale; and, on appeal, the District Judge, though for different reasons, upheld the decree.

[374] The decree-holder preferred this second appeal.

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The appeal having been heard by SUBRAMANIA AYYAR and DAVIES, JJ., *and there being a difference of opinion between their Lordships, and neither conclusion being in accordance with that of the Lower Courts, SHEPHARD, J., was appointed, under Rule No. 2 of the High Court, to hear and decide the point in question, and the case came on for re-hearing before the Court constituted as above.

* Their Lordships' judgments, though omitted in I. L. R., are given here *in extenso*, for facility of reference.—ED.

JUDGMENTS.

[SUBRAMANIA AYYAR, J.—Muthu Vencatachala Maniagar, who was about the year 1846—48 the zemindar of Vadimittah in the Tinnevelly District, and the plaintiff's great grandfather Sundaravala Kumarasami Maniagar were undivided sapindas. The brothers of the zemindar sued in the Tinnevelly District Court apparently for the partition of the zemindari and other properties. By the decree, passed by that Court, Sundaravala Kumarasami was held entitled to a moiety of the estate. The zemindar appealed against the decree to the Sadr Court in A.S. No. 20 of 1846. But pending the appeal he and Sundaravala Kumarasami entered, on the 12th December 1848, into a razinama adjusting their disputes. By the razi it was provided that Sundaravala Kumarasami having renounced the rights which the decree under appeal gave him, he and *his heirs* were (i) to enjoy some lands, situated in the zemindari as his own farm, subject to the payment to the Zemindar of a quit-rent of Rs. 50 ; (ii) to receive one-third of the net income of certain *pannai* lands in the possession of the Zemindar ; and (iii) to receive annually for maintenance, out of the rents payable to the Zemindar by the raiyats of certain specified villages of the zemindari, Rs. 950 (1,000 *minus* 50, the abovementioned quit-rent). The razi has ever since been acted upon. In 1878 the plaintiff's paternal grandmother, his father and the mother and guardian of his uncle, then a minor, executed a bond for moneys, due by them, mortgaging the right to the Rs. 950 payable annually under the said razi. Some of the instalments of the debt due under the bond having fallen into arrears, original suit No. 15 of 1889, on the file of the Court of the District Munsif of Srivilliputtur was, instituted for the recovery of the amount in arrear and a decree was passed for Rs. 790, with a provision to the effect that the right to the allowance under the razi should be liable to be proceeded against for the amount. The right to receive Rs. 670 out of the allowance (950 *minus* 280 stated to be payable to Vencatasami Maniagar, junior paternal uncle of the male judgment-debtors in the case) was in 1893 put up to sale and knocked down to the decree-holder. The sale was confirmed and a sale certificate was issued to him.

The first point for determination is whether the right to the allowance was incapable of being sold by virtue of Clause (l) of Section 266 of the Code of Civil Procedure, the words whereof are "a right to future maintenance." In *Graves* v. *Dolphin* (1) (Simon 66) it was held that an annuity, given by a father to his son for his personal maintenance during his life, though expressly stated to be not liable for his debts, nevertheless passed, on the son's bankruptcy, to his assignees. The ground of the decision was that the policy of the law did not permit property to be so limited that it should continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy. In *Green* v. *Spicer* (1 Russ. and Myln. 395) the same point was decided in favour of assignees under the Insolvent Act. Whether the right to annuities, under arrangements similar to those in question in the above cases, will be protected by Clause (l) of Section 266 from attachment and sale in execution of decrees in this country is perhaps not altogether clear. *Diwali* v. *Apaji Ganesh*, 10 B. 342. See also *Gulab Kuar* v. *Bansidhar*, 15 A. 371. But be that as it may, the word "maintenance" in the clause means nothing more than personal sustenance—the right to which must, of course, under any circumstances cease with the life of the party entitled thereto. But the right to an annuity payable to a man *and his heirs*, though described as payable for maintenance is not a personal and limited right of that character. According to the English law, for example, the right to an annuity payable to a man and his heirs is a personal fee—and incorporeal hereditament—assignable and bequeathable, and if it is made chargeable on land it is a rent charge descendible as real property. (Kent's Commentaries, 13th edition, Vol. III, p. [656] 460). How can such an interest be taken to come within the words of the clause in question? To hold that even such interests come within the clause would be to recognise that private individuals can, in this country, now create an *absolute* interest in

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property and at the same time prevent its being subject to the natural and usual incidents of such an absolute interest in so far as the rights of creditors are concerned. That so great a departure from the settled policy of the law in favour of creditors was intended to be introduced by the clause under consideration, there is nothing whatever in it to show. In my opinion, therefore, the right to the allowance in the present instance was liable to be sold in execution.

The next and the remaining point is as to the effect of the sale as regards the plaintiff. The right to the allowance being under the Hindu law ancestral property of the plaintiff (who was born in the beginning of 1891) and his father, each of them possessed, at the date of the sale, equal interest in the right. So far as the father's share goes the sale cannot, of course, be impeached by the plaintiff. But, notwithstanding that the debt for which the sale took place has not been shown to be an immoral debt, the conclusion to be arrived at in regard to the share of the plaintiff must, I think, be different. Now, as already stated, there was, under the bond on which suit No. 15 of 1889 was brought, a mortgage of the right to the allowance. It involved an interest in immoveable property, the allowance being one charged on the incomes of the villages mentioned in the razi. And the plaintiff, by his birth, became one of the persons entitled to redeem the mortgage. No doubt, if an order absolute had been passed before the right to redeem came to be vested in him jointly with others, the sale would have been binding on him in respect of his share. But the decree passed in 1889 was only a decree *nisi*. It did not even give to the mortgagors, as it should have done, a fixed time within which they were to pay the decree amount. No application for an order absolute was made and no order purporting to be such passed in the case. Assuming that the order which directed the sale of the right to the allowance can properly be treated as an order absolute within the meaning of the provisions of the Transfer of Property Act (see *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra*, 18 C. 139) still the order does not conclude the plaintiff from questioning what was due under it, inasmuch as he was in existence when it was passed and could have been made a party to the proceeding, but was not. (Compare *Rhambat* v. *Lakshman Chintaman Mayalay*, 5 B. 630). The plaintiff must therefore, notwithstanding the sale, be held to be entitled to redeem his right and interest in the subject of the mortgage on payment of his proportion of the debt. According to the admission of the purchaser (appellant) (paragraph 6 of the written statement) the plaintiff's father was entitled to receive Rs. 430 out of the total amount of the allowance. The plaintiff should, therefore, in the absence of evidence to show that the amount payable to him and his father was larger, be taken to be entitled to receive Rs. 215 per annum. He sought, therefore, to have a decree allowing him to redeem to that extent on payment of his portion of the debt, that is, 215/617 thereof, credit being given to him for his share of the sum received by the purchaser from the Zemindar since the sale. I would, therefore, substitute for the decree of the Lower Courts a decree to the effect just stated and direct each party to bear his costs throughout.

Davies, J.—It is clear to my mind that the case has proceeded thoughout upon the erroneous assumption that what was mortgaged under Exhibit C in 1878 and sold in the Court-auction in execution of the decree upon that mortgage was a right to receive Rs. 670 every year for all time out of the annuity or maintenance allowance of Rs. 950 payable yearly to the plaintiff's family, under Exhibit E. A reference to the terms of the contract Exhibit C, will, however, at once show all that was mortgaged or pledged under it was a right to receive a total sum of Rs. 800 with interest out of the said annuity. The sum of Rs. 800 was borrowed under Exhibit C, and it was stipulated that that sum should be repaid in five annual instalments, the 1st and 2nd instalments being Rs. 100 each and the other three Rs. 200 each, and these several instalments were charged upon the fund of Rs. 950 payable annually to the plaintiff's family. The lien or charge thus extended only to the total sum of Rs. 800 *plus* the interest accruing thereon. The time for repayment of this money expired on the 30th of December 1883, but the debt was evidently not fully discharged by them, for in 1889 the suit (Exhibit A) was brought for the recovery of Rs. 790 still remaining due under the bond C, and a decree was given for that sum with a declaration that the sum of Rs. 800 hypothecated in the bond was liable for the amount of the decree. The right to collect the annuity of Rs. 950, or any part of it every year, is naturally not given by that decree, because no such right had been pledged. In execution of that decree, the application, Exhibit B, was made for a sale proclamation in respect of the "right to receive Rs. 670 out of the total of

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SHEPHARD, J.—In 1889 the plaintiff's father was indebted to a certain Chetti in respect of a bond under which money was payable by annual instalments "out of the Rs. 950 which we (the executants) annually receive "from generation to generation under the razinama, &c." A question is raised as to the construction of this bond, as to the nature and extent of the security which it created. In May 1889, a decree was obtained on this bond against the plaintiff's father. A second question arises upon the construction of this decree. In 1893 application was made for the issue of a proclamation of sale and a question has been raised as to the meaning of the words used by way of description of the property to be sold. A sale ensued and the certificate given to the purchaser, who was the decree-holder, is another document as to the construction of which doubts have been raised.

A careful translation of the two last-mentioned documents having been made, I believe we are agreed that the intention was to effect a sale outright of the judgment-debtor's right to receive the annuity mentioned in the bond. That is to say, in satisfaction of a claim not exceeding Rs. 1,200, it was intended to sell an annuity the capital value of which could

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Rs. 950 a year less Rs. 280 payable to Venkatasami Manaigar Avergal, junior paternal uncle of the defendants, which the defendants are entitled to receive from generation to generation under the terms of " Exhibit E, and it is here that the error has crept in, if the words I have quoted are to be taken as meaning the right to receive annually Rs. 670 out of the annual allowance of Rs 950. But if the words "a year" only relate to the Rs. 950 and not to the Rs. 670 also, the true interpretation will be that the Rs. 670 was a lump sum payable once for all out of a particular fund, that is, the annual allowance of Rs. 950. But any doubt upon the subject is cleared up by the sale certificate which plainly shows that the words 'every year' used therein govern only the annuity, the fund out of which the lump sum of Rs. 670 is to be recoverable and do not refer to the Rs. 670. There is no doubt therefore, on the construction of the various documents referred to, that all that was sold was the right to receive a total sum of Rs. 670 chargeable upon a certain fund. That this was so is also proved by the amount fetched at the sale. The decree-holder himself bought in the right for Rs. 1,200, the reason for his paying more than Rs. 670 being that the actual amount due under the decree had reached the sum of the Rs. 1,190 on the date of the sale. If the right to receive Rs. 670 annually for all time out of a well-secured fund had been sold, it would have been worth many years' purchase, and the fact that it did not fetch more than a small fraction of its true value is proof positive that such a right was never sold in the contemplation of any of the parties to the decree or the sale. The further fact that under the decree the right to receive a total sum of Rs. 800 was all that was mortgaged and was all that could be sold is another plain indication that nothing more was sold. It would indeed be preposterous to suppose that in order to discharge the decree debt of Rs. 790 the right to receive a secured sum of Rs. 670 per annum for all future time would have been put up for sale. I have therefore no hesitation in finding that all the defendant bought was the right to receive a lump sum of Rs. 670, and that being the case, I must find that the suit of the plaintiff is founded in misconception. He wants a declaration that the sale is not binding upon him and for the recovery of the Rs. 670 which the 4th defendant has received on his purchase. In the view I take of what the sale really was, no question as to its illegality or invalidity can be raised by the plaintiff. His family contracted a debt of Rs. 800 for the re-payment of which they pledged their family allowance to that extent, many years before the plaintiff was born or thought of, and it is not open to the plaintiff in any way to object to what his ancestors were capable of doing. The plaintiff cannot, therefore, have a declaration that the sale is not binding on him, nor can he get a decree for the recovery of the sum of Rs. 670 rightly received by the 4th defendant who is entitled to keep it as being what he legally purchased in court-sale. The only declaration which, in my opinion, the plaintiff is entitled to is a declaration that under the sale in question which is sought to be set aside nothing further is recoverable by the purchaser or his representatives. I would, therefore, set aside the decrees of both the Courts below and grant the plaintiff a declaration to the effect above stated, and would further direct the parties to bear their own costs throughout.]

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hardly be less than Rs. 10,000. I suppose it did not occur to the District Munsif or the pleaders who represented the judgment-debtor that this sacrifice of property could be avoided by the simple expedient of appointing a receiver, and that it did not occur to the officer who conducted the sale to adjourn it and report matters to the District Munsif before knocking down the property to the decree-holder at the absurd price of Rs.1,200. The case is a striking instance of the manner in which, in consequence of carelessness in the conduct of proceedings after decree, the property of judgment-debtors is sacrificed. Several points were [375] raised on behalf of the plaintiff. In particular, it was urged that as he was in existence before the application for sale was made he ought to have been made a party or had notice of it and could not otherwise be prejudicially affected by the sale. Assuming that the decree directed a sale of the annuity, I do not think the plaintiff, as son of the judgment-debtor, born after the date of the decree but before the sale, could question the sale. As at present advised I see no reason to alter the opinion expressed by me in *Ramasamayyan* v. *Virasami Ayyar* (1), but here the facts are stronger because before the birth of the son the mortgage had been executed for a pre-existing debt and *ex hypothesi* a decree for sale had been passed. Under these circumstances I think it is impossible to hold that any right of redemption is left to the plaintiff. The question remains whether in reality there was a decree for sale and whether, if there was no such decree, the actual sale has any efficacy as against the plaintiff. There have certainly been instances in which decrees somewhat similar to the present in language have been treated as decrees for sale. It may have been right at a time when the provisions of the Transfer of Property Act were novel and unfamiliar to the Courts to put an indulgent construction on their decrees. But the decree in the present case was made as late as May 1889, and the wording of it is singularly defective if the intention of the Court was that a sale of the annuity should take place. The elements which are requisite to make a proper decree for sale at the suit of a mortgagee are wholly wanting. There is not a word about sale in the decree, no time for payment is given and even the designation of the property is obscure. The decree rather resembles a decree declaring a charge. I see no reason for putting on it an interpretation favourable to the party whose business it was to see that he got a proper decree.

From the petition in pursuance of which the proclamation was issued it does not appear whether the property sold had been attached or not. But the proclamation itself refers to the attachment. It was attached property that was advertized for sale. This is consistent with the view that the decree was not treated as a decree for sale. The case thus being one of attached property sold at the instance of the mortgagee in execution of a money decree is clearly within the mischief at which Section 99 of the Transfer of [376] Property Act was aimed. It may be that the deed of hypothecation and the plaint would have justified a decree for sale. That, I think, it is unnecessary to consider. It appears to me that the conditions under which, according to Section 99, the sale of mortgaged property is permissible, are not satisfied unless there is a decree for sale, and that in the absence of such decree the sale is prohibited (*Chandra Nath Dey* v. *Burroda Shoondury Ghose* (2). It follows that the sale of October 1893 was made in contravention of the law. It is argued that any such objection ought to have been raised as a question relating to the

(1) 21 M. 222. (2) 22 C. 813.

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execution of the decree and could not be made the subject of a separate suit. The object of the section no doubt was to prevent the confusion and uncertainty which arose in cases in which mortgaged property was put up for sale by the mortgagee in execution of a decree for money. The cases reported before the Act came into force show what complications could arise in cases in which there were several mortgages of the same property or the property was sold at execution sales more than once. The Courts were not agreed as to the position of the purchaser as against incumbrancers subsequent to the one who had caused the property to be sold (see cases collected in Macpherson on Mortgages, page 482 and see Commissioner's report, page 35, and Introduction to the Act in Stokes' Anglo-Indian Codes, Substantive Law). Moreover, the practice of selling mortgaged property otherwise than under a mortgage decree was open to the objection that it deprived the mortgagor of his rightful privileges regarding the equity of redemption (*Martand* v. *Dhondo* (1)). The remedy devised by the Legislature was to insist on the mortgagee bringing a mortgage suit, in which all persons interested in the property should be joined, as a condition precedent to any sale by the Court of the mortgaged property. Such being the purpose of the Legislature I think it is clear that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained. It was for their benefit as much as for that of the mortgagor himself that the section was enacted and they could not be prejudiced by any waiver on his part. In several cases decided in this Court it has been considered that the section has the effect of invalidating a sale as against persons who, **[377]** while not parties to the decree, would otherwise be bound by it (*Sathuvayyan* v. *Muthusami* (2); *Durgayya* v. *Anantha* (3); *Vigneswara* v. *Bapayya* (4). In those cases no reference is made to Section 244 of the Civil Procedure Code; but in a more recent Bombay case, where that section must have been present to the mind of the Court, it was also held that the plaintiff, a member of the mortgagor's family, bound by the decree obtained against the manager, was notwithstanding the sale of the property and purchase by the mortgagee, entitled to assert his right of redemption (*Martand* v. *Dhondo*(1).) According to the judgment of Farran, C.J., it would be correct to say that the effect of the section was to preserve the right of redemption to a person circumstanced as the plaintiff was in that case, in the same way as it is preserved to a person interested in the equity of redemption who is not made party to a suit in other respects properly instituted under Section 67 of the Transfer of Property Act and is not, as the member of a Hindu family, bound by the decree made against the father or manager. The rights of the Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of Section 99. In this view of the law it seems clear that it cannot rightly be said that the present suit is barred by the provisions of Section 244 of the Code.

To hold that the plaintiff is precluded from bringing a suit because his father might have taken the objection in the course of the execution of the decree, would be to defeat one of the main objects of the Section 99, and it is not explained how, in the circumstances of this case, it would have been legally possible for the plaintiff to intervene.

(1) 22 B. 624 (628). (2) 12 M. 325. (3) 14 M. 74. (4) 16 M. 436.

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For these reasons I think the appeal must be allowed except to the extent of the plaintiff's share. I agree to the terms of the decree proposed by Mr. Justice Subramania Ayyar.

SUBRAMANIA AYYAR, J.—Nothing put forward on behalf of the appellant at the second argument in this case has led me to change the view that the suit fails even with regard to the first respondent's share of the annuity. As to that share, though what [378] was urged on behalf of the appellant convinces me that the reasons given in my former judgment for the conclusion that the said respondent is entitled to redeem the share are not sustainable, yet the conclusion itself is sustainable for the reasons stated in the judgment of my learned colleague SHEPHARD, J. I agree, therefore, that the appeal be allowed and the suit dismissed except as to the first respondent's share and that as to that share the respondent should have a decree for redemption on the terms stated in my previous judgment, the costs being borne by each party throughout.

DAVIES, J.—At the re-hearing of this appeal, amended and correct translations of the application for sale and the sale certificate were put in, and from these it is clear that what was actually sold (however irregularly) was the annually recurring right to receive Rs. 670. My former judgment must therefore be cancelled, and I now concur in the conclusion of my learned colleagues.

The time for redemption should be on the day six months from date of our judgment.

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22 M. 378.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

RANGA RAO AND OTHERS (*Defendants Nos.* 1 *to* 3), *Appellants v.* RAJAGOPALA RAJU AND OTHERS (*Plaintiffs Nos.* 1 *and* 2 *and Defendants Nos.* 4, 5, 10, 11 and 13 *to* 18), *Respondents.**
[3rd and 6th February, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 462—*Compromise of suit by guardian* ad litem—*Leave of Court not obtained—Withdrawal from compromise by guardian—Inability of Court to enforce it.*

The guardian *ad litem* of three minors having agreed to compromise a suit and having signed a petition embodying the terms arrived at, undertook to present the petition at the next sitting of the Court. Leave of the Court had not been obtained; and at the time appointed the guardian declined to present the petition and opposed a decree being passed in its terms. Upon the plaintiff seeking to have the compromise enforced:

Held, that inasmuch as leave of the Court had not been asked for, and the guardian had objected to the Court passing a decree in terms of the compromise, [379] the Court had no power to enforce the compromise, even though the terms of it might appear to be beneficial to the minors.

APPEAL against the decree of M. D. Bell, District Judge of Godavari, in original suit No. 12 of 1896.

Suit to enforce an alleged arrangement under which a certain estate was agreed to be apportioned, and, in the alternative, for partition. The estate in question was formerly owned by four brothers, of the eldest

* Appeal No. 126 of 1898.

of whom the first three defendants were the minor children. Plaintiffs alleged that the guardian of the said three minors had by letter, prior to the suit, agreed to a division of the property on their behalf. This was denied by the guardian and by the minor defendants, all of whom opposed the proposed division. During the pendency of the suit several adjournments were granted, to enable the parties to arrive at a compromise, with the result that a petition was drawn up embodying the terms of a compromise, which was signed by the guardian *ad litem* of the minor defendants Nos. 1, 2 and 3. The guardian retained this petition, undertaking to present it to the Court at the next hearing of the suit. When that time arrived, however, she declined to present the petition. Leave of the Court had not been asked for or obtained by the guardian under Section 462 of the Code of Civil Procedure. The plaintiffs sought to have the terms of the compromise enforced, but the guardian objected to a decree being passed in terms thereof. Additional issues were accordingly framed as to whether such a compromise had in fact been effected, and if so, whether it was valid and binding on the first three defendants. The District Judge found that the compromise had been effected. Dealing with the question of its validity he said :—" The grounds put forward by defendants Nos. 1, 2 and 3 for declaring the alleged compromise to be not binding upon them are :—(1) That the permission of the Court was not obtained and the compromise is accordingly invalid under Section 462 of the Code of Civil Procedure ; and (2) that the alleged compromise is contrary to their interests. Section 462 of the Code of Civil Procedure lays down that the sanction of the Court is necessary to the compromise. It does not mean that the fact of sanction not having been obtained before the compromise was effected renders the compromise null and void. Before according sanction the Court must have the terms of the compromise before it. I see no reason to suppose that the arrangement is not a fair one . . . . **[380]** I find the compromise is valid and binding on defendants Nos. 1, 2 and 3." He decreed for the plaintiffs in the terms of the compromise.

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Defendants Nos. 1 to 3 preferred this appeal.

Rama Rao and Hon. *Bhasham Ayyangar*, for appellants.

V. Krishnasami Ayyar, *Seshagiri Ayyar*, *Ramachandra Ayyar* and *Nagabhushanam*, for respondents.

JUDGMENT.

Assuming that the appellants' guardian did, as urged for the respondents, agree to compromise the suit on the terms alleged was it competent to the Court in the circumstances of the case to enforce the compromise as against the appellants ? Now, leave to enter into such compromise was never asked for on behalf of the appellants, and their guardian *ad litem* has all along been objecting to the Court passing a decree according to the compromise. In the face of such opposition on the part of the person representing the appellants in the litigation the Court had clearly no power to enforce the compromise, even though it appeared to the Court that the terms of the compromise were beneficial to the appellants (compare *In re Birchall, Wilson* v. *Birchall* (1).)

The appeal must therefore, be allowed, the decree of the District Court reversed and the suit remanded for disposal according to law.

The costs will abide and follow the result.

(1) L. R. 16 Ch. D. 41.

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CIVIL.

22 M. 380.

22 M. 380.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

PALLAMRAJU AND ANOTHER (*Defendants Nos.* 2 *and* 3), *Appellants v.* BAPANNA (*Plaintiff*), *Respondent.**
[17th February, 1899.]

Succession Certificate Act—Act VII *of* 1889, *Section* 4—*Hindu Law—Suit by person claiming property of undivided family by right of survivorship—Succession Certificate.*

Where a plaintiff claimed by right of survivorship to recover money due on a mortgage bond which had been executed by the defendants in favour of the former managing member of the plaintiff's undivided family :

[381] *Held*, that the Succession Certificate Act did not apply and that plaintiff need not produce a succession certificate under that Act.

[R., 7 C.L.J. 658 (664) = 12 C.W.N. 145 (150).]

APPEAL against the decree of P. S. Gurumurti Ayyar, Acting Subordinate Judge of Cocanada, in original suit No. 39 of 1897.

Suit for money due under a mortgage bond which had been executed by the first and second defendants in favour of plaintiff's late junior paternal uncle as managing member of the joint family to which plaintiff belonged. The defence chiefly relied upon was that inasmuch as plaintiff's late uncle had left two sons him surviving, plaintiff had no right to the mortgage sued upon ; and further that plaintiff could not maintain the suit without obtaining a succession certificate in respect of the debt. The Acting Subordinate Judge found that plaintiff had taken the suit bond at a division of the family property and was therefore entitled to maintain the suit ; and he held that as the relief sought was against the mortgaged property no succession certificate was necessary.

Defendants Nos. 2 and 3 preferred this appeal.

Hon. *Subba Rao*, *V. Krishnasami Ayyar* and *Gopalasami Ayyangar*, for appellants.

Sundara Ayyar, for respondent.

JUDGMENT.

We see no reason to differ from the Subordinate Judge on the facts.

As to the certificate of heirship, seeing that the family was admittedly undivided and that the plaintiff claimed by survivorship, we do not think the Succession Certificate Act applied. We follow the decision in *Subramanian Chetti* v. *Rakku Servai* (1). The same view was adopted in *Kuppa Thevan* v. *Rathnasami Nadar* (2) and *Haji Yacoob Khadir Diva Sait* v. *Ismail Sait* (3).

The appeal is dismissed with costs.

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* Appeal No. 190 of 1898.

(1) 20 M. 232.
(2) Second Appeal No. 1212 of 1891 (unreported).
(3) Civil Revison Petition No. 25 of 1892 (unreported).

22 M. 382.

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[382] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

SMITH (*Plaintiff*), *Appellant* v. COELHO AND OTHERS (*Defendants*), *Respondents*.* [27th January, 1899.]

Suit on foreign judgment—Judgment not for an ascertained sum of money—Maintainability of suit.

Plaintiff, having obtained a decree in a District Court in the province of Mysore, applied to that Court, in execution of the said decree, for an account of certain proceeds alleged to be due to him under the decree. The application having been refused, and the refusal being upheld by the Chief Court of Mysore, plaintiff now brought a suit for an account in the District Court of South Canara:

Held, that as the foreign judgment on which the action purported to be brought was not a judgment for an ascertained sum of money, it constituted no foundation for an action.

APPEAL against the decree of H. G. Joseph, District Judge of South Canara, in original suit No. 82 of 1897.

Suit for an account. Plaintiff had, in 1890, filed a suit against a person since deceased (of whom the defendants were executrix, executor and widow, respectively) in the District Court of Shimoga in the Nagar division of the Province of Mysore, for foreclosure. A decree was passed therein in 1891, in terms agreed upon by the parties, plaintiff obtaining an order for foreclosure and it being declared that the proceeds of a crop of coffee for the years 1890 and 1891 should belong absolutely to him. In 1894, plaintiff presented an application in execution of the said decree praying the Court at Shimoga for an account of the proceeds of the crop of coffee for the year 1890. That petition was dismissed; as also was an appeal to the Chief Court of Mysore at Bangalore from the order of dismissal, though the Appellate Court disagreed with the Lower Court as to the meaning of the expression "crop of 1890 and 1891." Plaintiff now sued the executors and other representatives of the defendant in the former suit for an account of the crop which was gathered in 1890, contending that both the Courts in Mysore had misconstrued the consent decree; and that since the latter was merely declaratory, neither Court could have legally [383] decided the question in execution proceedings; and that their judgments were therefore no legal bar to this suit.

The District Judge held that plaintiff was precluded from now questioning the jurisdiction of the Mysore Courts; that the question raised was one that should be decided in execution, and the suit was therefore barred; and that the subject-matter of it was *res judicata*.

The plaintiff preferred this appeal.

Mr. *K. Brown*, Mr. *R. A. Nelson* and *Narayana Rao*, for appellant.

Pattabhirama Ayyar, *K. P. Madhava Raw*, *Ayya Ayyar* and *Srinivasa Ayyangar*, for respondents.

JUDGMENT.

The action purports to be brought on a foreign judgment. The judgment on which the plaintiff proceeds is not a judgment for an ascertained sum of money and therefore affords no foundation for an action (*Sadler* v. *Robins* (1)).

The appeal must be dismissed with costs.

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* Appeal No. 113 of 1898.

(1) 1 Camp. 253.

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PRIVY COUNCIL.

PRESENT:

The Lord Chancellor, Lord Hobhouse, Lord Macnaghten, Lord Morris and Sir R. Couch.

[*On appeal from the High Court at Madras.*]

SRI RAJA RAO VENKATA SURYA MAHIPATI RAMA KRISHNA RAO BAHADUR (*Plaintiff*), *Appellant* v. THE COURT OF WARDS AND VENKATA KUMARI MAHIPATI SURYA RAO (*Defendants*), *Respondents.*

[23rd and 24th November, 1898 and 24th February, 1899.]

Hindu Law—Impartible zamindari—Alienation by the owner by his will—Adopted son's claim—False description of the legatee—Designated person.

A zamindari in Madras, by custom descending to a single heir by primogeniture, and impartible, is not inalienable in virtue only of its impartibility, in the absence of proof of a custom having the force of law, or of some tenure attaching to the zamindari, rendering it inalienable. *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R. 10 All., 272), a case which is applicable in Madras decides that where there is an impartible estate descending by primogeniture, and in other respects the Mitakshara governs the rights of the parties, the **[384]** eldest son does not become a co-sharer with his father; and decides that the inalienability of the estate would depend upon custom which must be proved, or in some cases upon the nature of the tenure attaching to the zamindari:

Held, that there was no proof in this case of a custom which the Courts could recognize, as having the force of law, not resting on the Mitakshara, but argued to have been established by a long course of decision in the Madras Courts, against the validity of absolute alienation of an impartible zamindari:

Held, also, that this was not a case to which should be applied the doctrine that where there is a long course of decision that course should be supported, and the law not altered:

And *held*, that, inasmuch as here there was no coparcenary subsisting between the zamindar and any member of his family, in the estate, the zamindar had power to alienate it; and that he might exercise that power by will.

A Hindu adopting a son does not thereby deprive himself of any power that he may have to dispose of his property by will. There is no implied contract, on the part of the adopter, in consideration of the gift of his son by the natural father, not to make a will.

A bequest was made to a person whom the testator falsely described as his "aurasa" or "naturally-born" son. This false description, not involving any condition that the legatee should be the testator's son, did not invalidate the bequest to the designated person. *Fanindra Deb Raikat* v. *Rajeswar Dass*, L.R. 12 I.A., 72; I.L.R. 11 Calc., 463) distinguished.

[F.—36 C. 943=6 A.L.J. 847=11 Bom. L.R. 901=10 C.L.J. 233=13 C.W.N. 1013=4 Ind. Cas. 2=19 M.L.J. 567 (575)=6 M.L.T. 68; 22 M. 538 (549); 6 C.W.N. 879 (881); 8 C.L.J. 274=13 C.W.N. 163 (164)=12 C.W.N. 668 (670); Rel., 11 Bom. L.R. 901=13 C.W.N. 1013=6 M.L.T. 68; R., 34 A. 79=8 A.L.J. 1251=12 Ind. Cas. 915; 29 B. 51 (58)=6 Bom. L.R. 268 (271); 24 M. 429 (437); 27 M. 131 (P.C.)=6 Bom. L.R. 7 (10)=8 C.W.N. 186=31 I.A. 1=8 Sar. P.C. J. 568; 29 M. 453=16 M.L.J. 339=1 M.L.T. 272; 29 M. 484=16 M.L.J. 499=1 M.L.T. 287; 30 M. 454=17 M.L.J. 367; 32 M. 429=2 Ind. Cas. 18=19 M.L. J. 401 (411); 1 C.L.J. 557 (561); 4 C.L.J. 537=11 C.W.N. 147; 17 C.L.J. 38=17 C.W.N. 280 (287); 15 Ind. Cas. 412=23 M.L.J. 79=12 M.L.T. 245=(1912) M.W.N. 790; 22 M.L.J. 85 (103)=10 M.L.T. 463=(1911) 2 M.W.N. 593; 23 M.L.J. 658=12 M.L.T. 571=(1913) M.W.N. 86 (87); 24 M.L.J. 592 (603)=13 M.L.T. 469=(1913) M.W.N. 453; 4 O.C. 6 (12); D., 31 C. 224 (226); 35 C. 823=8 C.L.J. 124=12 C.W.N. 958; 9 C.W.N. 309.]

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APPEAL from a decree (3rd November 1896) (1), reversing a decree (21st December 1894) of the District Judge of Godavari.

The plaintiff, appellant, was the adopted son of Gangadhara Rama Rao, late Raja of Pittapur zamindari in the Godavari district, which had been granted to his ancestor in 1647 A.D. by the ruling power, and of which a sannad had been granted by the British in 1802. The zamindari was an impartible estate descending by lineal primogeniture on a single heir. The Raja, who had succeeded on the death of an elder brother in 1854, died on the 22nd July 1890. On the 28th September 1873 he adopted the appellant, who was one of the sons of the Raja of Venkatagiri; and on the 1st October following he executed a document to the latter stating the adoption, and that he had constituted the adopted son heir to the zemindari and all his other properties. On the 5th October 1885 it was announced that the senior of the Raja's wives, whom he had married in 1861, had given birth to a son. This alleged son, Venkata Kumari, a minor, was the second defendant, by his guardian.

The Raja afterwards executed four wills set forth in the report of this case on appeal below. The last of them was dated the 17th [385] March 1890. They were to the effect that all his property should go to his "aurasa," or natural son, the adopted son receiving an allowance in money. In 1890, on the death of the Raja, the Court of Wards took possession of his estate, and having declined to recognize the title of the adopted son became the first defendant in this suit. This was brought on the 1st April 1891 for a declaration of the plaintiff's title as the adopted son, denying that the second defendant was the late Raja's son or was entitled to inherit, or to take as legatee.

The Court of Wards answered that they were not necessary parties to the suit. The minor, admitting the adoption, alleged himself to be the Raja's son, and set up title under the Raja's will, as well as by inheritance.

There was no special family custom, as was admitted, rendering the inheritance inalienable. Except as to the impartibility, or descent to a single heir, the parties were governed by the Mitakshara law as prevailing in Southern India.

The principal question was whether the zamindari could be alienated by the Raja by his will. With this was connected whether the law declared in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (2) was applicable to Madras. Also whether there was a custom, in regard to impartible zamindaris, effective to restrain the zemindar from alienating for more than the period of his own life. Other points were in dispute,—whether the adoption of the plaintiff had precluded the Raja from bequeathing as he had done; and whether it was a condition in the will that the legatee should have been the Raja's son to enable him to take.

The District Judge found on the evidence that the minor defendant was not the son of the late Raja, nor of his wife. He was of opinion that the Raja was precluded by the adoption, and the deed accompanying it, from bequeathing his estate away from the adopted boy; that the will was conditional on the legatee being his son; and that the will was ineffectual to confer the impartible estate held by the Raja which was inalienable. He decreed that the plaintiff was entitled to possession.

On appeal, the High Court (SHEPHARD and DAVIES, JJ.) reversed that decision; but the finding that the second defendant was not the son of the late Raja was not impugned before them. [386] They were of

(1) 20 M. 167.

(2) 15 I.A. 51 = 10 A. 272.

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opinion that, independently of that, there was an effective disposition in the Raja's will in his favour. Their judgment is set forth in full at page 179 of I. L. R. 20 Mad.

Following *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1), they held that the estate being impartible there was no right in any one to restrain the Raja from exercising his power to alienate it. As he was capable of making a gift of the estate in his lifetime, so also he could make a disposition of it by will.

On this appeal, preferred by the plaintiff, Mr. *J. D. Mayne* and Mr. *J. H. A. Branson* for the appellant:—The effect of the adoption of the appellant, and of the contract with his natural father, contained in the deed of the 1st October 1873, was to constitute the adopted son the Raja's heir, whose right of succession was to be subject only to the rights of such son as might afterwards be born to the Raja. The bequest of the testator's immoveable property to the second respondent was an attempt to deprive the appellant of his lawful claim to inherit; and was invalid, also, as being in breach of the contract made with the father of the adopted boy. Reference was made to Sir F. Macnaghten, ' Considerations on Hindu Law,' page 228; *Purshotam Shama Shenvi* v. *Vasudev Krishna Shenvi* (2).

It was argued, next, that the High Court Judges were wrong in the construction of the will. They should have construed the will not merely as one in favour of a designated person, but as a will containing a conditional bequest to the "aurasa son." The legatee not in fact answering that description, on that account the bequest should have been held void. Reference was made to *Fanindra Deb Rajkat* v. *Rajeswar Dass* (3). The essence of the bequest was that it was made in favour of a legitimate natural-born son, and there being no one who could fulfil that condition, there was therefore no one who could take under the will.

On the principal question it was argued that this zamindari could not be alienated by the will of the zemindar. In *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1) the decision was upon an appeal from the North-West Provinces, relating to the law of the Mitakshara as there administered. The High Court of Madras, in judgments which preceded the decision now appealed from, had [387] expressed the opinion that in reference to the Mitakshara, the unity of family rights was not altogether broken up where a joint and undivided estate was combined with the fact of the family inheritance being subject to customary impartibility. The view had been taken that, although only one member could hold the estate, others had an interest in it, as instanced by the succession to which each had a chance of becoming entitled as a survivor. Reference was made to *Pareyasami* v. *Saluqkai Tevar* (4). In the present case the High Court had followed the Allahabad decision, and it was submitted to be still a matter open to argument whether the law in the two provinces was so far identical as to render it right that the latter decision should give the law to Madras without a further judgment applying it thereto. However, reliance was mainly placed on there having existed in Madras a custom having the force of law, and not resting on the Mitakshara, to the effect that the ancient, impartible zamindari of the province was inalienable by the holder except under restrictions. This custom had been upheld by a series of decisions in the Madras Courts, forming the best evidence of its prevalence.

(1) 15 I.A. 51 = 10 A. 272.
(2) 8 B. H.C.R. (O.C.J.), 196.
(3) 12 I.A. 72 = 11 C. 463.
(4) 8 M.H.C.R. 157.

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To pass on the estate with no permanent detriment to the interest of his successor was incumbent. The series commenced with two cases in 1804, referred to in *Rajah Enooguntу Sooriah* v. *Rajah Vencata Neeladry Rao* (1) decided in 1821. The latter case was reported in a note to *Raja Vencata Niladry Row* v. *Vutchavoy Vencataputty* (2). It was true that the case of 1821 proceeded upon the Regulation XXV of 1802; but, in that case a grant made by the owner of an impartible zamindari was treated as valid as against himself, with an opinion expressed in the judgment that the grant would not be valid as against his successors. The regulation was thus regarded as protecting the previous usage.

Afterwards followed *Viswasu Ramaya* v. *Vahidally Beg* (3), *Sree Sree Ramachendra Sur Harishendana* v. *Jaganada Gajapati Narraina Deo* (4), *Subbarayulu Nayak* v. *Rama Reddi* (5), *Chintalapati Chinna Simhadriraj* v. *Zemindar of Vizianagram* (6), *Syed Ali Saib* v. *Zemindar of Salur* (7), *Muttu Viran Chetty* v. *Rani Kattama Natchiyar* (8), **[388]** *Gavuridevamma Garu* v. *Ramandora Garu* (9), *Vitla Butten* v. *Yamenamma*(10), *Pareyasami* v. *Saluckai Tevar*(11), *Naraganti Achammagaru* v. *Venkatachalapathi Nayanivaru* (12). And lastly a decision which followed the Allahabad case was arrived at in *Beresford* v. *Ramasubba* (13). The list showed a continuous course of decision from the year 1804 to 1881 in favour of the view which the committee was now asked to take.

As to the effect given in the English Courts to a long series of judgments maintaining a view of the law in some degree contrary to later opinion reference was made to *Davidson* v. *Sinclair*(14), *Sailing Ship "Blairmore" Company* v. *Macredie* (15), and as showing how a different course of decision might long be pursued in different Presidencies of India to *Thumbasawmy Mudelly* v. *Mahomed Hossein Rowthen* (16). It was not contended for the appellant that an authoritative ruling like that issued in reference to the Mitakshara in the Allahabad case should be set aside, but the contention was that effect should be given to a custom in another province.

As to what constituted a valid custom reference was made to *Perumal Sethurayar* v. *Ramalinga Sethurayar* (17), *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (18), *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh* (19). Lastly, it was contended that, even if the decision in the Allahabad case should be considered binding in Madras, it only applied to alienations for, and during, the life of the holder, and not to the devise of an impartible estate by him. The property might be impartible, and according to that decision alienable, yet it would remain joint family property of the type as to which the right by survivorship would take priority over a title derived under a bequest. It was submitted that the succession would be regulated by the law of survivorship; and that presupposed a joint and undivided interest in the members of the family, which would give a title taking precedence over a title under a will. The true doctrine was that separate property went to heirs whose title a will might defeat; but joint

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(1) 3 Knapp., at p. 27 Note.
(2) 3 Knapp., 23.
(3) Mad. Dec. (Sud. Ad., (1849) 51.
(4) Mad. Dec., (Sud. Ad. (1861) 162.
(5) 1 M.H.C.R. 141.
(6) 2 M.H.C.R. 128.
(7) 3 M.H.C.R. 5.
(8) 4 M.H.C.R. 463 (471).
(9) 6 M.H.C.R. 93 (105).
(10) 8 M.H.C.R. 6.
(11) 8 M.H.C.R. 157.
(12) 4 M. 250 (266).
(13) 13 M. 197 (203, 208).
(14) L.R. 3 App. Cas. 765 (787).
(15) [1898] App. Cas. 593 (605).
(16) 2 I.A. 241 = 1 M. 1.
(17) 3 M.H.C.R. 75.
(18) 14 M.I.A. 570.
(19) 17 I.A. 128 = 18 C. 151.

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property, even where impartible, went [389] by survivorship, a right which prevailed over the testamentary one, as it took effect before the latter could operate. Reference was made to *Vitla Butten* v *Yamenamma* (1), and *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2). Also to *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh* (3), *Periasami* v. *Periasami* (4), *Stree Raja Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (5).

Mr. *A. Cohen, Q. C.*, and Mr. *A. Phillips*, who appeared for both the respondents, were not called upon.

JUDGMENT.

The suit in this appeal was brought by the adopted son of the late Raja of Pittapur against the Court of Wards and the second respondent, who is the minor son of the late Raja. The plaint stated that the second respondent was not the son of the late Raja or of his wife; it also disputed his title to succeed under any wills left by the late Raja and alleged that a will said to have been made by him in favour of that defendant as his natural born son contravened the contract made at adoption; that the will was void by law and custom; and that the properties dealt with by it were inalienable and could not pass by it. The plaint prayed for a declaration that the second respondent was not the son of the late Raja and that the will was invalid. The Court of Wards in its answer denied that the plaintiff had a cause of action against it, and said that it was not liable to be sued. The second respondent admitted the adoption, asserted that he was the begotten son of the late Raja, that the will was absolute and unconditional, that certain property left by the Raja was impartible descending to the begotten son alone, and that the plaintiff as the adopted son was entitled only to one-fifth share of the self-acquired property. The suit was tried by the District Judge of Godavari, who made a decree which declared that the second respondent was not the son of the late Raja and that the will in his favour was wholly ineffectual and invalid. The defendants appealed to the High Court which reversed the decree of the District Court and dismissed the suit. The present appeal is from that decision. The conclusions which the High Court came to in favour of the appellant on the other [390] questions in the appeal to it made it unnecessary for it to decide the issue whether the second respondent was the son of the late Raja, and that question was not determined by the Court.

As to the contention that there was a contract which prevented the Raja from making a will which would defeat the rights vested in the appellant by the adoption, their Lordships do not feel any difficulty. The agreement relied upon after stating that the Raja had adopted the appellant and given him the name which he now has and constituted him heir to his zamindari of Pittapur, &c., and to all other properties moveable and immoveable, says:—"I (the Raja) agree in compliance with your request "to your retaining with my adopted son the thirty servants you have been "retaining and changing them from time to time and to permit you or "any one of your family to see him whenever you or they may come to "see him." There is nothing about the Raja not exercising any power which he might have by law of making a will. Saying he had constituted

(1) 8 M.H.C.R. 6. (2) 7 I.A. 181 = 5 B. 48. (3) 17 I.A. 128 = 18 C. 151.
(4) 5 I.A. 61, (70); *sub nom Sivagnana Tevar* v. *Periasami*, 1 M. 312.
(5) 13 M.I.A. 333.

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the appellant heir to his property means only that he had given him the same right of inheritance as a natural son would have. Mr. Mayne's argument, if their Lordships rightly understood it, that there was an implied contract not to make a will, the consideration for it being the giving of the son by the natural father is a novel one and without any authority to support it. If it were right an adopted son would be in a higher position than a natural son. A Hindu would be unable to adopt a son without depriving himself of any power which he might have by law of alienating his property or at least of disposing of it by a will.

Another contention for the appellant was that the will could not have effect in favour of a person who was not the natural son of the Raja. On the 16th February 1889 he made two wills—one in the Telugu language and the other in English. The difference between the translation in the record of the former and the English will is of no importance and the former may be used. Its terms are :—"Though it is not specially necessary according to Hindu law that (property) should be passed to the "aurasa son by means of a will, I have written this will to declare my "opinion to all people that I have according to Hindu law passed the "property to my aurasa son without (property) being disturbed. It is "hereby settled that my entire property should go to my aurasa son "Kumara Mahipati Venkata Surya Rao and that cash (allowance) settled "already to be paid to my adopted son Venkata Mahipati [391] Surya "Rama Krishna Rao, the second son of the Raja of Venkatagiri, according "to his desire should continue to be paid." On the 7th September 1889 the Raja made another will by which, after saying it had been his intention to give all his moveable and immoveable property to his aurasa son (again naming him), he gave him his self-acquired properties and other immoveable property which he had got in pursuance of the will of his paternal aunt and also the whole of his moveable property. On the 17th March 1890 he made another will by which he confirmed the gifts to his aurasa son and the allowance to the adopted son. As the District Court decided that the second respondent was not the natural son of the Raja, and the High Court deemed it unnecessary to determine this issue, it must, for the present purpose, be assumed that he is not. Their Lordships are of opinion that there is a gift by the will to the second respondent and that the false description which must at present be assumed does not vitiate it. The case of *Fanindra Deb Raikat* v. *Rajeswar Dass* (1), which was referred to in the argument for the appellant, is distinguishable. The words of the angikarpatra, upon which the decision was given, are stated at page 89 and differ materially from the words in the Raja's will.

The third and really important question in the appeal is whether the Raja had power to alienate the impartible estate. It is stated in the case for the appellant that for the purposes of this appeal the appellant admits that the property was not inalienable by virtue of any special family custom or tenure attaching to the zamindari.

In *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (2), a suit was brought by the respondent to set aside a deed of gift, which the Raja appellant had executed, of seventeen villages, part of an ancestral impartible raj descendible to a single heir by the rule of primogeniture, in favour of his younger wife on the ground that, according to the provisions of Hindu law and the prescriptive and recognised usage, the Raja had no right under

(1) 12 I. A. 72=11 C. 463.

(2) 15 I. A. 51=10 A. 272.

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any circumstances except to enjoy the estate during his lifetime and use its income, leaving the whole estate at his death to his successor. The respondent was the mother and guardian of the minor son of the Raja. The Courts below held that the estates of the raj though impartible were in the [392] nature of joint family property, and were therefore, according to the law of the Mitakshara, inalienable except for necessary objects, that the evidence did not establish the customary right alleged by the Raja of alienating, and consequently the alienation in question was void and must be set aside. Whether the alienation would be valid during the lifetime of the Raja does not appear to have been considered. It was held to be wholly void. The defendant appealed to Her Majesty in Council. In the judgment given in the appeal their Lordships, after referring to the passages quoted by the Judges of the High Court in support of their view, referred to other decisions of this Committee on the same subject and also to *Thakoor Kapilanauth Sahai Deo* v. *The Government* (1), where the plaintiff alleged that the descent of the estate was governed by Mitakshara law, that the estate was impartible and descendible according to the law of primogeniture to the male heirs of the original grantee, and it was held that the estate was not on the case stated shown to be inalienable. They then held this to be the correct view and that where the Mitakshara law prevails and there is the custom of primogeniture the eldest son "does not become a co-sharer with his father in the estate, "the inalienability of the estate depends upon custom which must be "proved or it may be in some cases upon the nature of the tenure."

Mr. Mayne, in his able argument for the appellant that this decision should not be held to be binding in the Madras Presidency, contended that there was a custom co-extensive with the province of Madras with regard to every impartible zamindari, and that a long course of decisions in the Courts of that province, not resting on the Mitakshara law, had established a custom of inalienability. It is therefore necessary to examine these decisions.

The earliest reported case is a judgment of the Sudder Adawlut in *Rajah Enoogunty Sooriah* v. *Rajah Vencata Neeladry Rao* (2). The marginal note to it is:—" A grant made by a zamindar in 1804 of part of his "zamindari which he held at that time under an eight years' lease and "which was afterwards confirmed to him upon the permanent settlement "is valid as against himself. *Semble* such a grant would not be valid against "his successors or against Government." The judgment is founded on Section 8 of Regulation XXV of 1802. It says :—" Section 8 provides for "the [393] payment of the public assessment on all separated portions of "a zamindari by a grantee if the transfer be regularly made and, if other-"wise, by the grantor, and as a protection to the heirs the validity of the "transfer is made to depend on its being conformable to the law of the "parties and the regulations of the Government;" and by Section 12 zamindars are declared absolutely incompetent without the previous consent of Government to make any appropriations intended for the purpose of effecting a permanent reduction of the permanent assessment on their zamindaries. It is then said by the Court:—" The clear and "obvious intent of the restriction in question as well as of the corres-"ponding legislative enactments being to defeat improper alienations to "the prejudice of the rights of the Government or of the successor to the

(1) 13 B.L.R. 445.

(2) 3 Knapp, 27, Note.

"estate, it follows by a common rule of construction that such alienations are voidable on the determination of the interest of the person who "makes them." This is right if it applies only to alienations, which are not "conformable to the law of the parties or the Regulations of the Government "or not made with its consent." If it goes beyond that, it is in their Lordships' opinion erroneous and not justified by the sections referred to, the object of the regulation being apparently to keep the assessment permanent. There is no rule of construction which authorises it. This judgment was given in 1822. The next was in 1849. It is *Viswasu Ramaya* v. *Vahidally Beg* (1). It was in a special appeal from a decision of the Civil Judge of Nellore, heard by one Judge of the Sudder Court. The claim in the suit was for the recovery of an allowance under two grants originally made by the defendant's grandfather and subsequently renewed by the succeeding inheritors. The Civil Judge had reversed the decision of the Munsif in the plaintif's favour and the Sudder Court confirmed his decision saying:—"In a somewhat similar claim"—which appears from the note in the margin to be the case before noticed—"to the one under consideration, "in which the same principle was involved, the Court of Sudder Adawlut "decided that as the obvious intent of the laws in force was to defeat "improper alienations of land or the produce of land to the prejudice of the "rights of the Government or of the successor to the estate it follows by a "common rule of construction that such alienations are voidable on the [394] "determination of the interest of the person who makes them." There is a similar decision in *Sree Sree Ramachendra Sur Harishendana* v. *Jaganada Gajapati Narraina Doe* (2)). In 1862 the question came before the High Court of Madras in a special appeal (*Subbarayulu Nayak* v. *Rama Reddi* (3). The Court, after considering Sections 8 and 12, decided it in the same way, saying that this construction of the Regulations was supported by the observations of the Court in *Rajah Enoogunty Sooriah* v. *Rajah Vencata Neeladry Rao* (4) in giving judgment on the point for decision in that case which was different from the present. There are two other cases in the same volume (*Malavaraya Nayanar* v. *Oppayi Ammal* (5) and *Narayana Devu* v. *Harischendana Devu* (6)) in which the decision was followed, the whole appearing to rest upon the supposed rule of construction. The next case is *Chintalapati Chinna Simhadriraj* v. *Zamindar of Vizianagram* (7). In that it was held by the High Court of Madras that the *ratio decidendi* of all the cases down to the two latest clearly was that a zamindar under the permanent settlement had really an estate analogous to an estate tail as it originally stood upon the statute *de donis*. This was introducing into the law of the Madras Province what is said in *Juttendromohun Tagore* v. *Ganendramohun Tagore* (8) to be "a novel mode of inheritance, inconsistent with "the Hindu law." In the next case (*Syed Ali Saib* v. *Zamindar of Salur* (9)) it was held (Holloway, J,, *dissentiente*) that, where a zamindar alienated a part of the zamindari and the terms of Regulation XXV of 1802, Section 8, were not complied with, the alienation was invalid against his grandson. Mr. Justice Holloway said, with reference to the decisions of Sudder Court, that they professed to be based upon the decision of 1821 (1822?) and that the Court held the settlement to be in the zamindar for his life with remainder to his heirs and successors in perpetuity. "They held the 'words heirs,

(1) Mad. Dec. (Sud. Ad.) (1849) 51.
(2) Mad. Dec. (Sud. Ad.) (1861) 162.
(3) 1 M.H.C.R. 141.
(4) 3 Knapp. at p 27, Note.
(5) I M.H.C.R. 349.
(6) 1 M.H.C.R. 455.
(7) 2 M.H.C.R. 128.
(8) I.A. Sup. Vol. 47 p. 74.
(9) 3 M.H.C.R. 5.

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"and successors,' as an English real property lawyer would say, to be words "of purchase and not of limitation." The next case referred to by Mr. Mayne (*Muttu Viran Chetti* v. *Rani Kattama Natachiyar* (1) was a case of self-aquired property, and has no applicationto the present. After this the doctrine of the estate [395] tail seems to have been abandoned, for in the next case, decided in 1867 (*Gavuridevamma Garu* v. *Ramandora Garu* (2)) the High Court held that it was clearly the law that the usage of succession to zamindaris in the Presidency of Madras by a single heir by primogenitureship did "not interfere with the general rules of succession "further than to vest the possession and enjoyment of the corpus of "the whole estate in a single member of the family subject to the legal "incidents attached to it as the heritage of an undivided family—that "being all that the purpose of the usage, namely the preservation of the "estate as an impartible raj, renders necessary. The unity of the "family right to the heritage is not dissevered any more than by "the succession of co-parceners to partible property, but the mode "of its beneficial enjoyment is different." This was taking a very different ground from what was taken in the previous cases. According to it, the holder of the zamindari, has not a life estate in it, the zamindari, although he is in sole possession of it, being by a kind of legal fiction the property of the family and each member of it having a share in the property although he can do no act as proprietor. The next case is *Pareyasami* v. *Saluckai Tevar* (3) where a similar opinion is stated. It is said (page 177) of the holder of an impartible estate descending to a single heir who was a member of an undivided family subject to the law of the Mitakshara, that the estate held by him, although subject to the peculiar incidents of such an estate and possessed by him free from co-parcenary rights in others, was not entirely at his disposal; that "he should be regarded as possessing only the qualified powers of "disposition of a member of a joint family with such further powers or it "may be with such restrictions as spring from the peculiar character of "his ownership and that these powers fall short of a right of absolute alien-"ation of the estate." It is to be noticed that here the estate is said to be possessed free from co-parcenary rights in others. This is not consistent with the view in the former case that the estate, whilst in the possession and enjoyment of one person, is still the property of the family in which each member of it has a share. There is a remarkable divergence of views in these judgments which, their Lordships think, deprives them of much authority. In the case of *Beresford* v. *Rama Subba* (4) the alienability of an impartible zemindari came [396] again before the Madras High Court on appeal from the decision of a Judge sitting on the original side. He had followed the decisions in *Muttu Viran Chetty* v. *Rani Kattama Natchiyar* (1) and *Gauvridevamma Garu* v. *Ramendora Garu* (2) and made a decree declaring a mining lease by the owner of an impartible zamindari void. The two Judges of the Appellate Division of the High Court held that they were bound by the decisions of this committee in *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (5), and *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (6) and remanded the case to try whether by family custom the zamindari was inalienable for purposes other than those warranted by the Mitaksbara law. This decision was in 1889. In the present case the High Court has said it is bound to act upon the doctrine

(1) 4 M.H.C.R. 463. (2) 6 M. H. C. R. 93. (3) 8 M.H.C.R. 157.
(4) 13 M. 197. (5) 8 I.A. 248 = 5 C. 113. (6) 15 I.A. 51 = 10 A. 272.

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laid down by the Judicial Committee and refers to the distinction made by the Judicial Committee between a matter of succession by inheritance and a question of alienability It is not necessary now to dwell upon this as in the argument of this appeal an entirely new view of the question was taken. Mr. Mayne said that there was a custom co-extensive with the province of Madras with regard to every impartible zemindari, that a course of decisions had established a custom, a long series of decisions not resting upon the Mitakshara law. Their Lordships have felt a difficulty in appreciating this argument. It assumes that throughout the province of Madras the law laid down in those decisions which, until they were reversed by the higher authority, were the law of Madras, was obeyed. The supposed custom followed the law. Their Lordships were referred to *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1) as showing what was a valid custom. There it is said in the judgment with reference to long established usages existing in particular districts and families in India that it is of the essence of special usages modifying the law of succession that they should be ancient and invariable. This custom now relied upon did not modify the law. It had no force independently of the law. There is no proof here of any custom or usage against alienation, which the Courts in India should recognise as having the force of law.

One more question remains. It was argued that the decision in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (2) did not extend to a [397] will and *Vitla Butten* v. *Yamenamma* (3) was referred to. That was a case of an admitted co-parcenary between the maker of the will and his adopted son and the latter would take as the surviving co-parcener, a title which was held to be a prior title to that by devise. It is not applicable here, where co-parcenary between the Raja and the adopted son is not admitted but the contrary is held. In the present case, according to the decision in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (2) the appellant did not become a co-parcener with the Raja. If the Raja had power to alienate he might do it by will, and the title by the will would have priority to the title by succession. In *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh* (4) referred to by Mr. Branson it was a question of succession by an illegitimate son to the legitimate son of his father. There was no question of the power of alienation. The language used was intended to apply only to the succession to the estate. It is true that prior to 1889 there was a series of decisions in the Madras Courts beginning, as far as appears, in 1822, but the reasons given for them are not consistent. At first they were made to depend upon the construction of Regulation XXV of 1802, afterwards upon the rights of the members of an undivided family under the Matakshara law. In 1889 the Madras High Court held itself to be bound by the decision of this Committee, and overruled those decisions. The contention for the appellant now is that the decision of the High Court in 1889 should be overruled, and it should be held that the decision in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (2) should not be held to be the law in the province of Madras. In their Lordships' opinion this is not a case to which they should apply the doctrine that where there is a long course of decisions they ought not to be reversed and the law be thus altered. The argument for the appellant has failed to convince them that the judgment appealed from ought not to be affirmed, and they will

(1) 14 M.I.A. 570 (585).
(2) 15 I.A. 51 = 10 A. 272.
(3) 8 M.H.C.R. 6.
(4) 17 I.A. 128 = 18 C. 151.

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humbly advise Her Majesty to affirm it and to dismiss the appeal. The appellant will pay the costs of the second respondent, the Court of Wards not asking for their costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Frank Richardson & Sadler.*
Solicitor for the respondents: *The Solicitor, India Office.*

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22 M. 398 (P.C.) = 21 A. 460 = 1 Bom.L.R. 226 = 3 C.W.N. 427 = 9 M L.J. 67 = 26 I.A. 113 = 7 Sar. P.C.J. 330.

[398] PRIVY COUNCIL.

PRESENT AT THE HEARING OF THE APPEAL FROM MADRAS:

Lords Hobhouse and Macnaghten and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

SRI BALUSU GURULINGASWAMI (*Plaintiff*), *Appellant v.* SRI BALUSU RAMALAKSHMAMMA AND OTHERS (*Defendants*), *Respondents.* [11th, 15th and 16th February, 1898, and 11th March, 1899.]

PRESENT AT THE HEARING OF THE APPEAL FROM THE NOTH-WESTERN PROVINCES:

Decided in the same judgment with the above: Lords Herschell, Watson, Hobhouse and Macnaghten and Sir Richard Couch.

[*On appeal from the High Court for the North-Western Provinces at Allahabad.*]

RADHAMOHUN (*Representative of Beni Prasad, deceased Plaintiff*), *Appellant v.* HARDAI BIBI AND ANOTHER (*Defendants*), *Respondents.* [6th and 18th July, 1898, and 11th March, 1899.]

Hindu Law—Validity of the adoption of the only son of his natural father.

On the general question as to the validity by Hindu Law of the adoption of an only son of his natural father, decided in one judgment upon these two appeals:

Held, that such an adoption is not contrary to Hindu Law, but valid.

The authority of a widow, in reference to adoption, not being identical in different schools of Hindu Law, it was *held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widowed mother that unless there has been some express prohibition by the husband, the wife's power, with the concurrence of sapindas, where that is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband.

[F., 24 B. 367 (F.B.); 25 B. 537 (641); Rel. on, 19 Ind. Cas. 254 (255); R., 30 A. 197 = 5 A.L.J. 200 = A.W.N. (1908) 79; 23 B. 789 (795); 32 B. 619 = 10 Bom. L.R. 948 (961); 30 C. 965 (971); 26 M. 291 (308); 31 M. 446 (450); 7 C. W.N. 871 (875); 3 Ind. Cas. 207 (219).]

NOTE.—An abridged report is here given of the appeal from the North-Western Provinces. The full report of it will be found in its place in the I.L.R., 21 All. for 1899 (at p. 460.—ED.)

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THE first appeal heard on the 11th, 15th and 16th February 1898, was from a decree (20th September 1894) of the High Court at Madras (1), affirming a decree (20th September 1893), of the District Judge of Godavari.

[399] The decree from which this appeal was preferred affirmed a decree of the original Court which dismissed the suit of the plaintiff-appellant. The suit was brought to have set aside an adoption made on the 10th November 1888 by the first defendant, respondent, Ramalakshmamma, who was the childless widow of Butchi Savarayudu, then deceased, without a son. He was the last male owner of villages in which the plaintiff-appellant claimed an interest as reversioner and collateral relation of the deceased.

The adopted son was the second respondent, Pattabhiramayya. He was the only son of a kinsman of the deceased husband of the adopting widow, the first respondent, who made this adoption with the assent of her late husband's sapindas, several of whom assented in writing. The natural father had died when the son was a few months old. It was found below that he had expressed his approval of this adoption.

The first and principal question raised in both the appeals was whether the adoption of an only son was valid by Hindu Law. In the appeal from Madras further questions related to the power of a widowed mother to give in adoption, and to the power of the other widow to take, under the circumstances, with legal effect.

An appeal from the judgment of the first Court that the adoption was valid, was heard by a Division Bench of the High Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.). Their judgments are reported at length in *Gurulingasawmi* v. *Ramalakshmamma* (1). They followed a course of decisions in Madras in favour of the validity of an only son's adoption, but did not examine those judgments of the High Courts in Bengal and Bombay which were to the contrary.

On this appeal, Mr. *J. D. Mayne*, for the appellant, argued that the adoption of an only son of his natural father was prohibited by the Hindu Law, and was void. The different schools of that law were in accord upon the texts, but the Courts were not agreed as to whether the injunction was a positive law on the subject, or was only addressed to the moral sense. All the early authorities on this cited a text of each of the three ancient sages, Baudhayana, Vasishta, and Saunaka. He referred, with reference to the first two texts, to Volume XIV of the 'Sacred Books of the East,' edited by Sir F. Max-Muller, pages 334 and 75. These smritis were all **[400]** to the same purport, that no man should give or accept an only son in adoption, "since he must remain for the obsequies of his ancestor"; Colebrooke's 'Digest of Hindu Law,' Volume II, page 387, Book V, Chapter IV, Section VIII, pl. cclxxiii and the Dattaka Mimamsa, Section IV, Clause 1, in Stokes' 'Hindu Law Books,' page 571, were referred to. The third text, Saunaka's, was quoted in the Vyavahara Mayukha, Chapter IV, Section V, pl. 9, to be found in Stokes' 'Hindu Law Books,' page 61, where also were the Dattaka Mimamsa and Dattaka Chandrika. The above texts were all three cited in *Lakshmappa* v. *Ramava* (2). Reference was made to page 307 of Colebrooke's 'Translation of the Mitakshara on Inheritance,' Chapter 1, Section XI, Verses 9 to 12; 'Sarasvati Vilasa.,' Verses 368, 369; 'the Viramitrodaya', translated by Golap Chandra Sarkar, Chapter II, Part II, Section 8, at page 115.

(1) 18 M. 53. (2) 12 B. H. C. R. 364 (371).

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The opinions of modern English writers were referred to, including Colebrooke and Ellis, quoted in the Appendix, in Strange's 'Hindu Law,' Volume II, page 105, and Chapter IV of Volume I, where the validity of such adoptions was discussed; Strange's 'Manual of Hindu Law,' Chapter III, Verses 93, 94, page 23; Sutherland's 'Synopsis on the Hindu Law of Adoption'; Sir W.H. Macnaghten's 'Principles and Precedents of Hindu Law,' Volume I, Chapter VI, and Volume II, at pages 178 and 179; Sir F. W. Macnaghten's 'Considerations on Hindu Law,' page 147; Steele's, 'Law and Custom of Hindus in the Deccan,' page 183; West and Buhler's 'Hindu Law,' 3rd edition, pages 908, 909 and 1040; H. H. Wilson's observations in note at page 809 of the last.

Judicial decisions were in *Lakshmappa* v. *Ramava*(1); *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*(2); *Ganga Sahai* v. *Lekhraj Singh*(3); *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra* (4). On the maxim, "factum valet," some of the decisions relied; but, as was shown in *Lakshmappa* v. *Ramava*(1), above cited, that expression was inapplicable. In the case of an only son being adopted in contravention of the sacred texts there could be no factum, for such an adoption was void and of no effect.

A course of decisions in Madras from the beginning of the century down to 1888 upheld the legality of the adoption in question.

[401] They were *Veerapermall Pillay* v. *Narrain Pillay* (5), a case commented on by Sir T. Strange, Chapter IV of Strange's 'Hindu Law,' Volume I, page 102; *Arnachellum Pillay* v. *Iyasamy Pillay*(6); *Permaul Naicken* v. *Pottee Ammal*(7), this last being the case of an eldest son; *Chocummal* v. *Surathy Amay* (8), another case of an eldest son. Then the important case of *Chinna Goundan* v. *Kumara Goundan*(9), where Scotland, C. J., regarded the question of the legality of the adoption when made as concluded by authority; *Narayanasami* v. *Kuppusami* (10); *Sri Ammi Devi* v. *Sri Vikrama Devu*(11).

In the North-Western Provinces, judgments in favour of this adoption were given in the Full Bench decision in *Hanuman Tiwari* v *Chirai* (12). Though Turner, J., had differed, in regard to the prohibition on the father to give and in regard to the religious object of the adoption, the opinion of the majority appeared to be based on *Chinna Goundan* v. *Kumara Goundan*(9). In 1889 doubts were expressed in *Tulshi Ram* v. *Behari Lal*(13). However, the unanimous judgment now appealed from followed the judgment of the majority in *Hanuman Tiwari* v. *Chirai* (12), though the reasons given by Edge, C.J., and Knox, J., were more elaborate. Their judgments referred to what was called Jaimini's rule of construction, which seemed never before to have been referred to by the Courts as a governing authority. This was that where the sacred texts of the Rishis assign reasons, their direction was not imperative, but only admonitory; but that where a rule was pronounced without reasons given it was of binding force, and an obligation having the force of law. As to this, reference was made to Mandlik's 'Vyavahara Mayukha,' Appendix IV, Section II, page 499.

(1) 12 B.H.C.R. 364 (371).
(2) 3 B. 273 (293).
(3) 9 A. 253, (296).
(4) 5 J.A. 40.
(5) (1801) 1 Notes of Cases at Madras, p 78.
(6) (1817) Mad. Sel. Dec. 154 (156).
(7) (1851) Mad. Sel. Dec. 234.
(8) (1854) Mad. Sel. Dec. 31 (32, 36).
(9) 1 M.H.C.R. 54.
(10) (1886) 11 M. 43 (4).
(11) 15 I.A. 176 = 11 M. 486 (489).
(12) 2 A. 164.
(13) 12 A. 328 (331).

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It was submitted that the supposed conclusion of the question in Madras by a course of judicial decisions, a result stated in *Chinna Gaundan* v. *Kumara Gaundan* (1), was a mistake. However, the adoption of an only son did not arise again till 1886, the question in that year coming before Collins, C. J., and Muttusami Ayyar, J., when the Court declined to depart from the previous [402] course. The High Court in the North-Western Provinces had come to a similar decision that such an adoption was legal when it had been made.

The argument was that the prohibition of the adoption of the only son, though directed against the giving, not against the receiving, was of equal effect against the receiving, for, if there could be no lawful giving, there could be no lawful acceptance. Hence the true view was that the whole transaction was a nullity. The giving was prohibited; see Manu, Chapter IX, Verses 141, 142, 159, 168. The review of the cases in the judgment of Edge, C.J., in *Beni Prasad* v. *Hardai Bibi* (2), now appealed from, was referred to, and then Bengal cases were mentioned. *Nundram* v. *Kashee Pande* (3), *Debee Dial* v. *Hur Hor Singh* (4); *Sreemutty Joymony Dosee* v. *Sreemutty Sibosoonderi Dossee* (5), which was mainly based on Strange's 'Hindu Law,' Volume I, page 86; *Mussamut Tikdey* v. *Lalla Hueelall* (6), *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (7).

In the case of *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (8), which preceded the last cited, the adoption was held to be invalid, that of an only son having been peremptorily prohibited by the texts. This was the judgment of Dwarkanath Mitter, J., and of Louis Jackson, J.; the former arriving at that opinion without referring to Jaimini's rule, and declining to apply the maxim "factum valet." This was followed by a judgment in which the authorities were well examined by Markby, J., and in this latter judgment Garth, C. J., had concurred, see *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (7).

The Bombay decisions dealing with this question were as follows:—*Huebut Rao Mankur* v. *Govind Rao Mankur* (9); *Bhashkar Trimbak Acharya* v. *Mahadev Ramji* (10); *Lakshmappa* v. *Ramava* (11); *Rangubai* v. *Bhagirathibai* (12); *Somasekhara Raja* v. *Subhadramaji* (13); *Kashibai* v. *Tatia* (14); *Waman Raghupati Bova* v. *Krishnaji* [403] *Kashiraj Bova* (15). In the last case a Full Bench judgment delivered by Sir C. Sargent, C. J., declared such an adoption to be invalid, following the decision of the Calcutta Court in the case of the *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (8), and disagreeing with the Madras and Allahabad decisions.

In *Basava* v. *Lingangauda* (16) the adoption of an only son was upheld on the ground that special custom allowing it was proved, and in *Raiji Jadav* v. *Bai Mathura* (17) it was decided that the adoption of one who at the time was an only son was contrary to law, and his adoption was not rendered valid by other sons being afterwards born to his parents.

Lastly, with regard to this adoption having purported to be effected by a widow, it was without doubt in violation of an injunction contained

(1) 1 M.H.C.R. 54. (2) 14 A. 67.
(3) (1823) 3 S.D.A. 232 = 4 S.D.A. 70. (4) (1828) 4 S.D.A. 320.
(5) (1837) Fulton's Rep. 75. (6) (1864) Suth. W.R. 133.
(7) 3 C. 443. (8) 1 B.L.R. 221. (9) (1821) 2 Borr. 75, 79, 85.
(10) 6 B.H.C.R. (O.C.J.) 1 (4). (11) 12 B.H.C.R. 364 (376).
(12) 2 B. 377 (379). (13) 6 B. 524. (14) 7 B. 221.
(15) 14 B. 249. (16) 19 B. 428. (17) 19 B. 658.

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in the shastras and morally binding upon a Hindu. Could the assent of sapindas be legally sufficient to give authority to the widow in such a case, where direct authority from the deceased husband was wanting? It was submitted that such an assent by sapindas when the objects of the adoption, the spiritual benefit to the deceased husband, are regarded, could hardly be sufficient to complete indirectly the widow's authority to adopt. With reference to the character of the assent by sapindas, were cited, *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1), *Lakshmappa* v. *Ramava* (2), *Somasekhara Raja* v. *Subhadramaji* (3) and *Nilmadhub Doss* v. *Bishumber Doss* (4).

Mr. *J. H. A. Branson* and Mr. *A. Phillips*, for the respondents, argued that the judgment of the High Court was right. The adoption of an only son was no violation of Hindu Law, and was valid in the Madras Presidency. This had been established by the cases in the Madras Court, referred to in the argument for the appellant to show exactly what the course of decision had been; and whether the point had been concluded by authority or not in 1862, at all events it was concluded by subsequent decisions, affirming what had been, at that day, the better opinion. The course of decision extending back for about a century had recognized that the texts of the Rishis on this subject were an admonition [404] which was not binding in law. In *Veerapermall Pillay* v. *Narrain Pillay* (5) decided in 1801, reference was made to a still earlier case of the Raja of Tanjore in which it was held that the adoption of an only son, though reprehensible, was yet a legal adoption according to the usage of Hindus. They referred to the decision in *Hanuman Tiwari* v. *Chirai* (6), and to the decisions cited in the judgment now appealed against, and submitted that the decisions in Madras and the North-Western Provinces arriving at the same result outweighed the decision in Bombay in *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (7). The grounds for departing from the long course of decision in Madras would be insufficient. Sir J. W. Colvile's words in *Thakoorain Sahiba* v. *Mohun Lall* (8) were appropriate, "to alter the law of succession as established by a uniform course of decision, or even by the dicta of received treatises, by some novel interpretations of the vague and often conflicting texts of the Hindu commentators, would be dangerous, inasmuch as it would unsettle existing titles." *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (9) was also cited, where the same authority explained that the duty of a European Judge in regard to the Hindu Law was not so much to inquire whether a disputed doctrine was fairly deducible from the earlier sources, as to ascertain whether it had been received by the particular school with which that Judge was dealing and had there been sanctioned by usage. The importance of the latter was marked by the observation that "by the "Hindu system, clear proof of usage would outweigh the written text of "the law." The judgment of Edge, C.J., was then referred to, and it was submitted that his reasons, to which was added by Knox, J., a knowledge of the Sanskrit, should preponderate over the Full Bench judgment in Bombay High Court above mentioned.

The second of these two appeals was from a decree (18th March 1892) (10) of the High Court for the North-Western Provinces at Allahabad,

(1) 12 M.I.A. 397 (442). (2) 12 B.H.C.R. 364 (376). (3) 6 B. 524.
(4) 13 M.I.A. 85 (100). (5) (1801) 1 Notes of Cases at Madras, 78 (91, 126).
(6) 2 A. 164. (7) 14 B. 249 (255).
(8) 11 M.I.A. 386 (403). (9) 12 M.I.A. 397. (10) 14 A. 67.

affirming a decree (21st November 1887) of the Subordinate Judge of Benares. 1899 MARCH 11.

The decree appealed from affirmed a decree which dismissed the suit of the plaintiff-appellant for a declaration that the adoption [405] by the first defendant, respondent, of the second defendant, respondent, was invalid and void on the ground that the latter was the only son of his father, and could not be given and received in adoption.

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The Subordinate Judge in his judgment followed the Full Bench decision of the Allahabad High Court in *Hanuman Tiwari* v. *Chirai* (1), decided by a majority of the Judges (Sir R. Stuart, C.J., and Pearson, Spankie and Oldfield, JJ.) Turner, J., dissenting. That decision was that the adoption of a boy who was the only son of his natural father was lawful and valid.

On an appeal by the plaintiff to the High Court the question of the validity of such an adoption was referred by a Divisional Bench (Mahmood and Young, JJ.) to the Full Court. Their order of reference mentioned the dissent of Turner, J., and stated that there had been since 1879 no reported case showing that the judgment of that year had been followed, but that in two unreported cases there had been references of this question to a Full Bench. These cases, however, had been disposed of on grounds other than the point referred.

The following were the questions referred by the order to a Full Bench, which was composed of Sir JOHN EDGE, C.J., and STRAIGHT, MAHMOOD and KNOX, JJ.:—

First, the adoption of an only son having taken place in fact, is such adoption null and void under the Hindu Law? *Second*, if so generally, does the subsequent birth of sons to the natural parents of the son given in adoption have a retrospective effect of validating it? *Third*, does the circumstance that the adopted son is the sagotra, or descended from one common ancestor with the adoptive father, render his case an exception to the general rule of prohibition against adoption of only sons?

The answer of the Full Bench to these questions was given by the Chief Justice with the concurrence of all the Judges to the effect that the adoption of an only son was valid by Hindu Law, and that it was unnecessary for the disposal of this suit to answer the other questions referred.

The judgments of the Chief Justice and all the Judges of the Full Bench are reported at length in *Beni Prasad* v. *Hardai Bibi* (2).

[406] This appeal having come on for hearing on the 29th June and the 6th and 18th July, 1898, Mr. *C. W. Arathoon*, for the appellant, argued that there was an error in the judgment of the Full Bench. The judgment should have been that the adoption of an only son was altogether null and void according to the Hindu Law. The I.L.R., 21 All., for 1899, contains the report of his argument, with references to the authorities, and the decided cases.

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the second respondent, Ram Parshad, argued in support of the decision of the Full Bench. Their arguments are reported in that volume of the I.L.R.

Mr. *C. W. Arathoon* replied.

The second of these two cases having been heard, their Lordships' judgment was afterwards given on the 11th March 1899 by LORD HOBHOUSE:—

(1) 2 A. 164. (2) 14 A. 67.

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JUDGMENT.

The first of these two cases, which comes from Madras, was argued in February 1898, but the judgment was postponed for the hearing of the second, which comes from Allahabad. The reason was that each case raises a question of general importance on which different views have been taken by different High Courts, and it was agreed on all hands to be advantageous that the two litigations should be under consideration at the same time. The Allahabad appeal was argued in the month of July last, and their Lordships are now prepared to state their opinions on both cases.

In the Madras case, the plaintiff sued as one in the line of succession to the last owner of an estate who had died without issue. The principal defendant was a boy who had been adopted by the last owner's widow with the consent of the family gnaties or sapindas. The plaintiff claimed a declaration that the adoption was invalid. His main ground was that the adopted boy was the only son of his father. The defendants showed that the natural father of the boy authorised his widow to give him in adoption in the way which was actually effected between the two widows, and that the plaintiff himself in his character of sapinda was a party to the transaction. In addition to asserting the legal validity of the adoption, they pleaded that the plaintiff was estopped by his concurrence in it.

The District Judge gave no opinion on the point of estoppel. He found that the law in Madras was settled, and he gave judgment in the following terms:—

[407] "The case illustrates how the people of this Presidency have "settled down under the law as enunciated by the Madras High Court so "long ago as 1862 (1), and re-affirmed in 1887 (2), and it is impossible to "say how many adoptions of only sons may have been made during the "last thirty years on the faith of such enunciation of the law, and what "innumerable rights might be disturbed by any contrary decision after "such a lapse of time."

The case was heard on appeal before the late Judge Sir T. Muttusami Ayyar and Mr. Justice Shephard who affirmed the decree below. The learned Judges did not express any original opinion of their own on the main question. They thought that there was no estoppel because at the date of the adoption nobody thought of its being illegal. As to its legal validity they found that all the Madras decisions had been in its favour and that the Madras Courts were right in following an unbroken current of authority in that Presidency notwithstanding differences of view in other Courts.

At this Bar two points have been taken: *first*, that the gift or reception of an only son in adoption is invalid in law; and *secondly*, that, if not invalid when the boy is received by the adoptive father or given by the natural father, it is so improper that, in the absence of express authority given by a husband, his widow has no power to effect it.

In the Allahabad appeal it is not necessary to make any statement of facts because the decree appealed from depends entirely on the answer given to a question referred by a Division Bench of the High Court to a Full Bench. That question is as follows:—

"The adoption of an only son having taken place in fact, is such "adoption null and void under the Hindu law?" That abstract question

(1) *Chinna Gaundan* v. *Kumara Gaundan*, 1 M.H.C.R. 54.
(2) *Narayanasami* v. *Kuppusami*, 11 M. 43.

is the only one raised in the case lodged by the appellant and the only one argued at this Bar. The High Court answered it in the negative. Mr. *Arathoon* has contended in a learned argument that it ought to be answered in the affirmative.

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As regards the second question raised in the Madras case, which is peculiar to that case, their Lordships feel no difficulty. The only authority for the argument of the appellants is the opinion of the late Sir Michael Westropp delivered in the case of **[408]** *Lakshmappa* v. *Ramava* (1) which was decided in the High Court of Bombay in the year 1875. That learned Judge held that, assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. Now the authority of a widow to give or take in adoption differs in different schools of Hindu Law. Their Lordships are not re-trying this Bombay decision. In Madras it is established, as the learned Judge Muttusami Ayyar shows, that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule and it seems to their Lordships most consistent with principle. The distinction taken by Westropp, C.J., appears to have been quite novel, and also at variance with a decision by his predecessor Sir Matthew Sausse. There may be some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordships' notice ; but if there is any such, it does not apply to these parties in Madras. On this point therefore their Lordships agree with the learned Judges below.

What remains to them is the difficult task of deciding the more general question which is common to both the appeals. The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which, during the last quarter of a century, have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified, and by the intrusion of special, local or tribal customs. And the original authorities on which all the conflicting opinions alike are based are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people, which hardly any of those who have been called to judgment have understood, the translations of which are more or less disputed, and of which it is averred, probably with truth, that its exact phases of meaning cannot be caught except by those who have studied closely and **[409]** as a whole the language and the works of the particular writer under consideration. Their Lordships have however one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit has brought with it more translations of the sacred Hindu books, and closer examinations of texts previously translated. And in the Allahabad case especially, the appellant's side was argued in the High Court by Mr. Banerjee who is stated by the Court to be familiar with Sanskrit, and it is the subject of a very elaborate judgment by Mr. Justice Knox who is a student of Sanskrit and, as he tells us, has paid special attention to the books of Manu and Vasishta. Perhaps the most convenient course will be to set out the

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(1) 12 B.H.C.R. 364.

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more important texts which have been brought into discussion, then to see how they have been treated by recent commentators and by judicial decisions, stating finally the conclusions to which their Lordships have, with these aids, been brought.

The most revered of all the Rishis or sages is Manu, who, though he says nothing specific on the point now in issue, is referred to as favouring one side or the other. The passages cited are as follows. They are in Chapter IX :—

" By the eldest son, as soon as born, a man becomes the father of " male issue, and discharges his debt to his pitris or progenitors. That " son alone, by whose birth he discharges his debt to his fore-fathers and " through whom he attains immortality, was begotten from a sense of " duty." He adds sentences to affirm the powers, privileges and duties of the first-born, and his great importance in the family.—Verses 106—109.

" By a son a man obtains victory over all people ; by a son's son he " attains immortality. Then by the son of that son he reaches the region of Brahma."—Verse 137.

" Since the son delivers the father from the region called ' put ' he " was therefore called ' putra ' by Brahama himself."—Verse 138.

" Whom the mother or the father give, with 'water,' a son, in distress " similar, endowed with affection, he is to be deemed a dattrima, one " brought forth."—Verse. 168.

In the three last quotations their Lordships have followed the words of Mr. Justice Knox who says that he has attempted to follow the text word by word without interpolating or taking away any particle, and that on that account his style is rough. (See record *) and Golap Chandra Sarkar's 'Treatise on Adoption,' page 282.)

[410] Near to Manu in point of antiquity and of authority comes Vasishta, around whose utterance on the point in issue the greater part of subsequent comments has clustered. His writings have been translated by Dr. Buhler and published in the work entitled 'Sacred Books of the East', Volume XIV, which has been edited by Professor Max Muller. The passage in that translation is as follows, Chapter XV, page 75 :—

" (1) Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause.

" (2) (Therefore) the father and the mother have power to give, to sell, and to abandon their (son).

" (3) But let him not give or receive (in adoption) an only son.

" (4) For he (must remain) to continue the line of ancestors.

" (5) Let a woman neither give nor receive a son except with her husband's permission."

On the record † Mr. Justice Knox gives his own translation which does not appear to differ substantially, though it does slightly in form, from that of Dr. Buhler.

Another ancient sage is Saunaka, of whom a text is quoted in Dattaka Mimamsa of Nanda Pandita as follows :—

Section IV, Paragraph 1 :—" In reply to the question as to the " qualification of the person to be affiliated, Saunaka declares :—" 'By no " ' man having an only son (eka putra) is the gift of a son, to be ever made ; " 'by a man having several sons (bahu putra), such gift is to be made, on " ' account of difficulty (prayatnatas).' "

* [IX, 247, 248. ED.] † [P. 249-ED]

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Next in time is Yajnavalkya whose writings, with comments by Vijnanesvara, constitute the Mitakshara, a work of very high authority all over India. The material passages are as follows in Mr. Colebrooke's translation, Chapter I, Section XI :—

Paragraph 9 :—" So Manu declares:—' He is called 'a son given " ' (dattrima), whom his father or mother affectionately gives as a son, being alike [by class] and in a time of distress ; confirming the gift with water.' "

Paragraph 10 :—" By specifying distress, it is intimated, that the son " should not be given unless there be distress. This prohibition regards " the giver [not the taker]."

Paragraph 11 :—" So an only son must not be given [nor accepted]. " For Vasishta ordains ' Let no man give or accept an only son.' "

[411] Paragraph 12 :—" Nor, though a numerous progeny exist, " should an eldest son be given, for he chiefly fulfils the office of a son, " as is shown by the following text :—' By the eldest son as soon as born a " man becomes the father of male issue.' "

The above-mentioned writings are all classed among the smritis, which are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like the sruti in the very words uttered by that Being, but still in the language of inspired men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations and has been and is the subject of much dispute, which must be determined by ordinary process of reason. The Dattaka Mimamsa stands on a different footing. It is not older than the 17th century A. D. and does not claim any but human origin. Indeed its translator, Mr. Sutherland, says that it is " as its name denotes, an " argumentative treatise, or disquisition, on the subject of adoption ; " and though, from the author's extravagant affectation of logic, the work " is always tedious, and his arguments often weak and superfluous, and " though the style is frequently obscure, and not unrarely inaccurate, it is " on the whole compiled with ability and minute attention to the subject, " and seems not unworthy of the celebrity which it has attained (1)." Moreover it was written during Muhammadan rule and cannot be the work of a lawgiver or Judge. The date of the Dattaka Chandrika is not certain but it is at all events very much later than the smritis and it stands only on the footing of a work by a learned man. Messrs. West and Buhler in their valuable work on 'Hindu Law,' 3rd Edition, page 11, speak thus :—" The Dattaka Mimamsa and the Dattaka Chandrika, the latter " less than the former, are supplementary authorities on the law of adoption. Their opinions however are not considered of so great importance " but that they may be set aside on general grounds, in case they are " opposed to the doctrines of the Vyavahara Mayukha or of the Dharmasindhu and Nirnayasindhu." This is spoken with special reference to Bombay or Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their [412] Lordships cannot concur with Mr. Justice Knox in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would

(1) Preface to the Dattaka Mimamsa, Madras Reprint, 1879.

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not allow for the effect, which long acceptance of written opinions has upon social customs and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they deviate from or add to the smritis their Lordships are prepared to concur with the learned Judge.

The passages in the Dattaka Mimamsa are as follows: They are contained in Section IV. Paragragh 1 is that which gives the saying of Saunaka already quoted. Paragraph 2:—"He, who has one son only, is "'eka-putra,' or one, having an only son: by such a one, the gift of that "son must not be made; for, a text of Vasishta declares 'an only son let no "man give, &c.'" Paragraph 6:—The writer comments on the word "ever" as used by Saunaka thus,"In a time of calamity, accordingly, "Narada says:—'a deposit, a son, and a wife, the whole estate of a "'man who has issue living, the sages have declared unalienable, even by "'a man oppressed by grievous calamities: although the property be solely "'that of the man himself.' This text also regards an only son; for it is "declaratory of the same import, as the texts of Saunaka and Vasishta." Paragraph 8:—The writer comments on Saunaka's words "by no man "having an only son" thus:—"From this prohibition, the gift, by one "having two sons, being inferrible, this part of the text ('By one having "several sons, &c.') is subjoined, to prohibit the same, by one having two "sons also."

The Dattaka Chandrika, Section 1, Paragraph 27, only repeats Vasishta's saying, and couples it with the obligation to adopt a brother's son if there is one.

Their Lordships do not propose to spend much time in a close examination of the recent commentators. They have been very carefully sifted in the Indian Courts, and naturally so, seeing what was the paucity and obscurity of judical authority until within the last thirty years or so. The principal effect which they have on the mind is to show the great variety and uncertainty of opinion on the question now in issue. The earliest of those referred to is Jagannatha, a learned Hindu lawyer employed by Sir W. Jones to compile a digest. He thought that the prohibition in the smrities is only moral and not legal. That also is the opinion of [413] the two latest writers, both deeply versed in the Sanskrit language, Mr. Mandlik who appears to have translated the texts of Saunaka, and Mr. Golap Chandra Sarkar who has written a treatise on adoption. Sir Thomas Strange, writing in the year 1830, expresses an opinion in the body of his treatise that the prohibition is monitory only, Volume 1, page 87. On the other hand the weighty opinions of Mr. Colebrooke, Sir Francis Macnaghten and Mr. Sutherland are thrown into the scale; and that of Mr. Justice Strange is also cited to the same effect, and is supposed by some to express the latest opinions of his father Sir Thomas Strange. But it may be observed that Sir Francis Macnaghten and Mr. Justice Strange found their opinions on the wickedness of the act in question, and that the adoption, of an eldest son is placed by Mr. Justice Strange on precisely the same footing as that of an only son, and is ranked by Sir F. Macnaghten as a heinous crime though not so heinous as the adoption of an only son. Their Lordships think that the authority of recent text writers must not be stated more favourably to the present appellants than is stated in the book of Messrs. West and Buhler. Expressing no opinion of their own, those learned writers say at page 908, "If he have but one "son the gift of that one is everywhere reprobated as a grave spiritual crime.

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"By most the gift is thought invalid." Their Lordships turn now to the more solid ground of judicial decision.

In Madras the course of decision has been very simple. In 1862 the High Court decided that the adoption of an only son, however sinful, was valid in law. It has been shown by Mr. Mayne that a previous decision then relied on was misapprehended by the learned Judges. But that was not the sole ground of their decision; they also relied on learned opinions and they agreed with those opinions. And the same High Court has since that time had the same question brought before it more than once; three times, it is stated in one of the judgments below. There has been no fluctuation in their decisions. It must be taken that the law in Madras has ever since been settled in favour of the present respondents.

In Allahabad also the condition of judicial decisions is simple. In 1879 the question was brought before a Full Bench of the High Court consisting of Sir Robert Stuart and Sir Charles Turner, who were English Barristers, and three eminent civilians, Justices Pearson, Spankie and Oldfield. The Court decided in favour of **[414]** the adoption, Sir C. Turner dissenting. In the year 1889 some doubts were expressed on the point by Justices Straight and Mahmood, and that circumstance, coupled with the delivery of adverse opinions by the High Courts of Calcutta and Bombay, led to the rather unusual course of referring the same question to a Full Bench, of which Mr. Justice Mahmood was one The result has been an unanimous decision supported by judgments of the Chief Justice and Mr. Justice Knox which are remarkble for research and fulness of treatment.

In Bengal there has been more fluctuation of opinion. The law was quite unsettled in the year 1868. It would be of little use now to examine the earlier decisions in the Sudder Dewani Adalut and the Supreme Court. That has been done with great care by Sir William Markby in a case about to be mentioned. The first case which raised the exact question in the High Court was heard in the year 1868 before Justices Dwarkanath Mitter and Louis Jackson. The judgment was delivered by Mr. Justice Mitter. After quoting passages from the two above-mentioned Dattaka treatises the learned Judge lays the law down thus:—"The "institution of adoption, as it exists among the Hindus, is essentially a "religious institution. It originated chiefly, if not wholly, from motives "of religion; and an act of adoption is to all intents and purposes a reli-"gious act, but one of such a nature that its religious and temporal aspects "are wholly inseparable. 'By a man destitute of male issue only,' says "Manu, 'must the substitute for a son of some one description always "'be anxiously adopted, for the sake of the funeral cake, water, and "'solemn rites (1).' It is clear, therefore, that the subject of adoption "is inseparable from the Hindu religion itself, and all distinction between "'religious and legal injunctions must be necessarily inapplicable to it." —*Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (2).

There is no doubt that this judgment has exercised very great influence on the controversy; and indeed if the learned Judge's fundamental position were sound, there could be no controversy at all. Let us assume for this purpose, though it is matter of grave dispute, that the learned Judge is right in saying that adoptions originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and names. Still the **[415]** question is whether certain precepts

(1) Dattaka Chandrika, Section I, Clause 3.

(2) 1 B.L.R. 221.

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have a legal or only a religious bearing. What is there in the subject-matter of adoption which makes it clear that all precepts relating to it must bear a legal character? The learned Judge does not discuss that question. He begs it, merely stating that his own inference clearly follows from Manu's text. Their Lordships think that the doctrine propounded by him is equally opposed to a reasonable construction of the books, apart from decision, and to decided cases. Indeed to show how far the doctrine is from being universally applicable it would not be necessary to go further than the passage which the learned Judge himself cites from Manu, though, of course, differences may be suggested between prohibitory and mandatory injunctions. Manu prescribes adoption on the score of religion. According to Mr. Justice Mitter this is necessarily a legal injunction, yet nothing is clearer than that there is no legal compulsion upon a Hindu to adopt a son, however irreligious it may be in him not to do it. There is not even any legal compulsion on his widow to do it, when he is dead and cannot have a natural son. But the principle laid down is so important, goes so deep down to the root of these questions, and has exercised such influence, that their Lordships think it necessary to discuss it at length, for which this will be a convenient place.

Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion, and law in the smritis, *Rao Balwant Singh* v. *Rani Kishori* (1). They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said:—
"All these old text-books and commentaries are apt to mingle religious "and moral considerations, not being positive laws, with rules intended "for positive laws. In the preface to his valuable work on Hindu law "Sir William Macnaghten (2) says: 'it by no means follows that because "'an act has been prohibited, it should therefore be considered as illegal. "'The distinction between the *vinculum juris* and the *vinculum pudoris* "'is not always discernible.'" They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with [416] the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original law-givers.

The late extension of the study of Sanskrit has apparently resulted not in weakening but in strengthening the cited opinion of Sir William Macnaghten. Of course, their Lordships do not presume to form any opinion on questions of Sanskrit grammar, but they observe that Mr. Golap Chandra, who is frequently referred to in the judgments below, contends as a matter of grammar that words (*e.g.*, those of Saunaka) which have been translated in the imperative form of command should take that of recommendation. Mr. Mandlik insist on the same view, and Mr. Justice Knox says that he originally took a contrary view, but has been brought round by the authority of Mandlik and another Sanskrit scholar, Mr. Whitney.

(1) 25 I A. 54 (69).
(2) 'Principles and Precedents of Hindu Law,' Volume I, Preliminary Remarks, page vi.

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Let us see now how Mr. Justice Mitter's principle accords with actual decisions. The controversy respecting eldest sons, whether or no they can be given in adoption, has a strong bearing on the present question. Manu attaches the highest importance to the character of an eldest son. The relevant passages from his Institutes have been quoted above.

No specific prohibition is contained in these passages, but the reasonable inference from them is given in the Mitakshara in Chapter I, Section XI, Paragraph 12, which has been already quoted. This express prohibition has been taken by some to be a legal rule, and has been enforced by modern writers of weight, as before stated, and in legal decisions. It would certainly fall within Mr. Justice Mitter's principle. But it is quite abandoned all over India as their Lordships understand; and the prohibition is held to be a matter for religious consideration only. It was the subject of careful examination and express decision by Justice Markby and Romesh Chander Mitter in the case of *Janokee Debea* v. *Gopal Acharjea* (1).

[417] Again, it is laid down that the giver of a son ought to have more than two sons. The text of Saunaka quoted above says that the gift is to be made by one having several sons (bahu putra). The Dattaka Mimamsa, Section IV, Clause 8, lays it down that the Sanskrit word signifies more than two, and that Saunaka's precept was introduced for the express purpose of excluding the inference that a man with two sons might give one in adoption. The Dattaka Chandrika, Section 1, Clauses 29 and 30, declares the same law. The precepts are precise, and yet their Lordships cannot find that anybody asserts them to be law in any but the religious sense.

Another precept is that a Hindu wishing to adopt a son should adopt the son of his whole brother in preference to any other person. That question came before this Board in the year 1878 in a case in which the Subordinate Judge had held the adoption to be invalid for violation of this precept, and the High Court were of a contrary opinion. This Board held that the terms of the precept were contained in both the Dattaka Mimamsa and the Dattaka Chandrika, and they were founded on the Mitakshara. Nevertheless they held that it is not a precept of law. They referred to the opinions of English text writers to support them. No decision in point was cited and probably there is none in the books.

One of the conditions for adoption laid down by Manu in the passage first quoted from him is that there must be distress. This is emphasised in the Mitakshara, Chapter 1, Section 11, Paragraph 10:—" The son shall not be given unless there be distress," which appears to mean that the giver must be in distress. "This prohibition," it continues, "regards "the giver," and then occur the words "not the taker," apparently interpolated by the learned Benares lady who wrote under the name of Balam Bhatta. The Dattaka Mimamsa, Section IV, Clause 20, says, "no dis- "tress existing, the giver commits a sin, on account of the prohibition." If then the giver commits a sin the taker who enables him to do it cannot be free from sin; and if the commission of a sin makes the transaction void in law there can be no gift and consequently no adoption. And yet nobody contends for the legal force of this prohibition. It does not appear that in cases of adoptions any enquiry is ever made about the distress of the natural father.

(1) 2 C. 365.

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It is clear that the principle laid down so confidently by Mr. Justice Mitter as paramount in cases of adoption is repeatedly repudiated in practice; and in the Bengal case next to be cited [418] the learned Judges, while following the conclusion of their predecessors, dissociated themselves from the fundamental reason assigned for it.

Moreover this sweeping doctrine of Mr. Justice Mitter is not consistent with the prevalence of exceptional customs or other interferences with law. The extent to which the smirtis admit of special customs has not been argued in these cases and their Lordships cannot easily from any judicial opicion about it. But in a discussion about the sources of Hindu Law by Doctor Jolly published in 1883 (see page 33) that learned Sanskrit scholar states ground for holding that customs are only recognised by the smritis when they do not contravene Divine laws.

Mr. Arathoon has impressed upon their Lordships more than once during this argument that the texts he relies on are held to emanate form the Divine Power. If then that Power has said that certain modes of adoption shall be null and void, how can any human practices lawfully limit its operation? And yet the validity of local or tribal customs to adopt only sons is asserted by every jurist. In the Punjab such a custom is received as the general law of that large area, and it governs the relations of the eight millions or so of the Hindus (Jats, Brahmans, Rajputs and others) who live there; and that, though the sources of their law are the same, smritis which are followed in other parts of India. The inference is that among numerous Hindu communities the prohibition of the smritis on this point has not been received as invaliding the transaction.

Again if the religious and legal injunctions were co-extensive, it would place both Courts of justice and legislatures in a very delicate position when dealing with such matters. Suppose that in this Madras case the Court had upheld the plea of estoppel; it would have set up a judicial rule to bar the working of a Divine law. Suppose that the statutory six years had elapsed and that the suit had been barred by time, then the Legislature would be interfering to bar the working of a Divine law. In each case a separation would have been made between those religious and temporal aspects which Mitter, J., declares to be wholly inseparable. Yet the British rulers of India have in few things been more careful than in avoiding interference with the religious tenets of the Indian peoples. They provide for the peace and stability of families by imposing limits on attempts to disturb the possession [419] of property and the personal legal status of individuals. With the religious side of such matters they do not pretend to interfere. But the position is altered if the validity of temporal arrangements on which temporal Courts are asked to decide is to be made subordinate to inquiries into religious beliefs.

No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct or in the disposition of his property, disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affections for him have ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on

a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it the law must be so declared. But the mere fact that a transaction is condemned in books like the smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

It is true that the learned Judges Mitter and Jackson refer to the texts of the Dattaka Mimamsa and Chandrika. But according to the paramount principle laid down by them those texts could only be read in one way. That principle is in fact the sole ground of the decision, and as it cannot be admitted the decision is deprived of weight.

The next case in Bengal was decided in the year 1878 by Chief Justice Garth and Mr. Justice Markby, *Manick Chunder Dutt* v. *Bhuggobutty Dassee* (1). In delivering judgment Sir W. Markby reviews with great care and discrimination the then existing authorities, judicial and non-judicial, and he shows that only in four cases had the point been brought before the Highest Courts of Appeal in India. There had been no decision at that time in Allahabad. The Madras High Court supported the adoption : so apparently did the Bombay High Court, for the judgment of Chief Justice Westropp which threw doubt upon the point, though delivered in 1875, was not reported as early as 1878. The learned **[420]** Judge states the ground of his decision thus :—"It appears to me, "therefore, that the vast preponderance of authority, if not the entire "authority in Bengal, is against the validity of the adoption of an only "son; and if we were to hold the adoption of the plaintiff in this case to "be valid, it would be necessary to over-rule both the carefully considered "decision of Jackson and Dwarkanath Mitter, JJ., and the equally careful "decision of four Judges of the Sudder Court. This of course could only "be done by a Full Bench. But we could only refer the case to a "Full Bench if there is a conflict of authority, or if we ourselves differ "from these decisions. Having gone through all the cases with "great care, I do not think it can be said that there is any such conflict "of authority in Bengal as to justify us in referring the case to a Full "Bench on that ground ; and I am not prepared to refer the case to a "Full Bench upon the ground that I myself think the adoption of an only "son valid. On the contrary, on the best consideration I have been able "to give to the authorities, I think such an adoption ought, in Bengal, to "be held to be invalid, wherever the effect of holding such adoption to be "valid would be to extinguish the lineage of the natural father, and so to "deprive the ancestors of the adopted son of the means of salvation."

This is a very instructive judgment and entitled on all grounds to great respect : and it is with great respect that their Lordships, being obliged to differ either form it or from other High Courts, proceed to note some points which detract from its weight. As to the vast preponderance of authority in Bengal there were only two decided cases. One was before the Sudder Dewani Adalat and is *Nundram* v. *Kashee Pande* (2). The report does not show any examination of the question by the learned Judges themselves. Their decision appears to rest wholly upon the opinion of pundits, who in their turn content themselves with a simple citation of texts. The other decision rests entirely on a principle which is untenable, as Sir W. Markby himself showed the year before in *Janokee Debea v. Gopaul Acharjea* (3). Moreover the Court in 1878 hardly addressed

(1) 3 C. 443 (460, 461).
(2) (1823) 3 S. D. A. Sel. Rep. 232=6 I. D. O. S. 906.
(3) 2 C. 365.

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itself to the question why the injunctions relating to the only son are imperative and legal while those which relate to the eldest son are only monitory or religious. In 1877 Sir W. Markby says that while the latter prohibition is only monitory the former [421] is clear; referring, as their Lordships suppose, to the differences of expression in Colebrooke's translation of the Mitakshara. In 1878 he intimates that the stronger objection to the adoption of an only son is based on religious grounds, on which their Lordships remark that Manu ascribes a character to the eldest son which affords strong religious grounds against his adoption, and that they do not find themselves competent to put such grounds in the balance against one another, so as to decide which is the stronger.

On this point they add that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy; especially in later times. Manu says that by the eldest son as soon as born a man discharges his debt to his progenitors; and it is through that son that he attains immortality. According to him the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so if the boy is adopted? It is true that Manu attributes additional value to the firstborn's son and grandson. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. Vasishta whose text is the fundamental one does not rest his injunction on spiritual benefit at all, but he says that the only son is to continue the line of his ancestors; one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to "put" here, or, if Mr. Justice Knox is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration, it is inexplicable that he should not have said so. Moreover, their Lorships asked during the argument why a man who had given a natural son in adoption could not afterwards if he was so minded adopt another; and neither authority nor reason was adduced to show that he could not.

That is the state of authorities in Bengal. The question has never come before a Full Bench, and it seems to their Lordships that there is only one decision, viz., that of 1878, to which great weight is to be attached.

In Bombay after a Division Bench had decided in favour of validity, the question was discussed before another Division Bench [422] in the year 1875; *Lakshmappa* v. *Ramava* (1). The case was decided on another ground as has been mentioned above. But the Chief Justice, Sir M. Westropp, delivered an elaborate judgment containing his reasons for holding the adoption of an only son to be invalid. Those reasons appear to have been adopted by the Court including Sir M. Westropp himself in a subsequent case which was decided in 1879 but has never been reported. In 1889 the question was referred to a Full Bench who simply followed the unreported case. See *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (2). Sir C. Sarjent, the then Chief Justice, delivered judgment. He pointed out that prior to *Lakshmappa* v. *Ramava* (1), the decisions in Bombay were in favour of validity; that the judgment of Sir M. Westropp in that case was the first that treated the point with due consideration;

(1) 12 B. H. C. R. 364. (2) 14 B. 249.

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and that as the opinion there expressed had been adopted by a Full Bench, it was not proper to review it. The decision was necessarily in favour of invalidity. The law in Bombay therefore rests on the authority of the unreported case of 1879 which itself rests on the reasoning contained in the judgment of 1875.

In that judgment the learned Chief Justice makes more elaborate reference to the smritis than is contained in any judgment earlier than the present Allahabad case. He dwells emphatically on Colebrooke's translation of the Mitakshara, showing that with regard to the only son the expression "must not," and with regard to the eldest the expression "should not," is employed. He adds that the distinction is even more strongly marked in the Mayukha which is received as a high authority in Bombay. On this point their Lordships interpolate again the remark that they are not re-trying the Bombay decision and that the effect of the Mayukha has not been argued before them. He then examines decisions by Bombay Courts prior to the establishment of the High Court, which certainly exhibit a confusion of legal opinion. The authority of the High Court up to 1875, though not perhaps very decisive, was in favour of validity. From this, and from the decision of the Madras Court, the learned Chief Justice differs. He cites the passages of smritis and law books and English text-writers with which we have now been made familiar. And his decision apparently is founded on the language of Colebrooke's [423] Mitakshara and on the judgment of Mr. Justice Mitter. Their Lordships have already stated their reasons for thinking that the latter of these foundations is unsound. The value of the former will be examined presently. They have also stated above that the point actually decided in this case is a novel suggestion of the learned Chief Justice, and is unsustainable in principle, and unsupported by authority unless there be something peculiar to Bombay to support it.

Before leaving this judgment their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of factum valet. That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. Westropp is quite right in pointing out that if the factum, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. Westropp has, not without cause, reduced the ambiguous maxim to its proper meaning.

Such was the state of judicial authority in India prior to the present cases. For as regards the Punjab, it is true that, in the early days of the Chief Court, Judges have pronounced opinions in favour of the adoption under general Hindu law; and in 1874 Melvill and Thornton, JJ., pointed out that the turning point of the controversy was Mr. Justice Mitter's judgment of 1868. But after the first reported case in 1867 the decisions there have turned on the popular customs into which the Government had the prudence to inquire immediately after the annexation, and which they made the foundation of law. The Punjab therefore may be omitted in our estimate of judicial authority. The reasons against the validity of the adoption of an only son are contained in the three judgments

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of the learned Judges Mitter, Markby, and Westropp. The point has never come before this Board for decision. It has been alluded to in two cases but in so indirect a way that though the authority of the Board is relied on by both sides it is not available for either. The foregoing remarks [424] represent all the light which has been thrown on the smritis to which, after all, we must recur to decide the question.

In addition to the remarks already made on the bearing of Manu's texts, those of Mr. Justice Knox upon his silence are worthy of attention. Manu mentions three conditions for a good gift of a boy in adoption. The natural father must be in distress; the boy must be "similar," apparently meaning of the same caste with the adoptive father; and he must be affectionate. Nothing is said about his having brothers, which is now represented as a vital condition the breach of which is a sin, heinous crime as some writers have called it, and as annulling the transaction. It seems very unlikely that Manu should either have viewed it in that light, or with his very high notions of the value of the first-born should have overlooked the point altogether.

The crucial text is that of Vasishta. He first states the parents' power in the most sweeping terms, and derives it from causes affecting every child that is born into the world. The power is to later ideas, whether Hindu or English, an extravagant one; but it accords with what we know of the early stages of other nations and probably did not shock the contemporaries of Vasishta, though the sage Apastamba, who is perhaps of equal antiquity, denies the right to give away or sell a child (Prasna II, Patala 6, Khanda 13, paragraphs 6-11 (1)). A man may sell his son—no restriction of purpose is expressed—or he may even abandon him. But then comes an injunction expressed in terms which may amount to a command or may be only a recommendation; *viz.*, that an only son should not be given or accepted. The first remark to be made upon this is akin to the one just made upon Manu. If Vasishta intended to except an only son from the father's power to give in adoption, why did he not say so? It would have been much more simple. But he first states the power, and far greater powers, in the broadest terms, and then adds a qualification which is, to put it at the highest, in ambiguous terms. That looks much more like an appeal to the moral sense not to exercise the power than a denial of its existence. In this respect the case resembles that of the father's power to alienate family property: which indeed is the light in which Vasishta seems to regard a son. The power is given, while the action is condemned in terms consistent with actual [425] prohibition. After long controversy it has been settled by a great preponderance of Indian authority, culminating in a decision by this Board that the power exists, and that the prohibition, though a solemn warning as to the spiritual responsibility of exercising it, is not efficacious in law.

In examining this question their Lordships are again at great disadvantage in not knowing Sanskrit. In the absence of agreement among Sanskrit students they cannot adopt the representations made, though by learned men, to the effect that as a matter of grammar Vasishta's injunction imports admonition rather than command. So with respect to what has been called Jaimini's rule which is so much relied on by Chief Justice Edge. That author, who wrote in the 13th century, appears to have been received as a high authority in the interpretation of smriti texts.

(1) 'Sacred Books of the East,' Volume II, pages 130, 131.

He lays down the rule that all precepts supported by the assignment of a reason are to be taken as recommendations only. That, if sound, would be conclusive as to Vasishta's text. But it is rather startling, and a very intimate acquaintance with the smritis would be needed before admitting its truth. It has not been brought forward in any case prior to this case from Allahabad. It may, however, fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command but resting on a reason, is addressing himself rather to the moral sense of his hearers than to their duty of implicit obedience. So far Vasishta's reason, founded as it is on temporal and not on religious considerations, gives some, though not very strong, support to the respondent's theory.

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The text of Saunaka is open to two obvious remarks. One is that the injunction not to give an only son is couched in the same terms as the injunction to give a son if there are more than two. The latter of these cannot possibly be obligatory. The other remark is that, as Nanda Pandita in the Dattaka Mimamsa points out, Saunaka in effect prohibits a gift in adoption when there are only two sons; and that is a prohibition which has never been regarded as obligatory. Saunaka does not help the appellants but rather lends weight against them.

Then comes the Mitakshara. We have seen that Sir M. Westropp emphatically, and Sir W. Markby possibly, relies on the difference of expressions in Colebrooke's translation. The passages from their judgments have been quoted above, and so have the [426] passages from the Mitakshara, Chapter 1, Section XI, paragraphs 10, 11, 12. Now it has been brought out in the arguments that precisely the same expressions of injunction are used by the author in these three paragraphs. To fortify their knowledge their Lordships have inquired of one of the most eminent of Sanskrit scholars, Professor Max Muller, and he has courteously informed them that as a matter of fact the three expressions are identical, and as a matter of grammar are, in his judgment, equally capable of expressing obligation or recommendation. Now paragraphs 10 and 12 have been observed on before. It has been placed beyond dispute in point of law that neither is obligatory. It requires some good reason to show why, when the same expression is used in three consecutive sentences, it should be construed one way in the first and third and another way in the middle one. No such reason has been given. It is an unfortunate thing that in translating a law book Colebrooke should have used different English words to represent the same Sanskrit word. He has certainly misled at least one Judge in a leading case. As the matter is now shown to stand, the Mitakshara must be taken to bear strongly against the appellants.

In intimating that Sir M. Westropp was misled by Colebrooke their Lordships have not overlooked the fact that in 1889 Sir C. Sarjent thought that Sir M. Westropp was aware of the state of the Sanskrit text. It seems, however, next to impossible that Sir M. Westropp should have known that Colebrooke's variations of expression were not authorized by the original and should have said nothing about it; seeing that it deprives his emphatic reference to those variations of all meaning. If indeed he knew the state of the Sanskrit text and thought it so immaterial as not to deserve notice, he practically treated Colebrooke as the original authority and his reasoning does not thereby gain but loses in force.

The material passages in the two Dattaka books have been indicated before, and remarks have been made on those which quote and comment

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on Saunaka. It seems to their Lordships that the authors, who bring in the older texts at every turn, did not mean to do more than repeat and enforce them. If they were clearly laying down any additional precepts or authoritative interpretations of ambiguities, then, though as Mr. Justice Knox points out, such comments should be received with some caution, they should [427] also be received with due regard to the authority which the books have acquired. But on this topic the writers seem anxious to found themselves entirely on the smritis and to refer their readers back to them. Certainly on the crucial point now in issue they throw no light at all. They do not touch the question whether the injunction not to adopt only sons is a matter of positive law or only addressed to the moral sense. And yet Jaimini's treatise, written some centuries earlier than the Dattaka Mimamsa, must have made the later of the writers, if not both, familiar with the importance of that distinction.

It is, however, worth while to observe how Nanda Pandita deals with the consequences of a forbidden adoption. He quotes Manu's requirement that the adopted son should be "similar" and he says, (Dattaka Mimamsa, Section II, paragraphs 22, 23), "Hence, it is established, that one of a different class cannot be adopted as a son." In Section III, he recurs to that prohibition and asks, "should this rule be transgressed, what would be the case ?" Then he deduces from texts of Saunaka and Katyayana that the adopted son shall not share in the inheritance, but shall be entitled to food and raiment. So that the adoption is not void, but the son of the wrong class is reduced to a claim for maintenance only. With this exception, which favours the appellant's theory, it seems to their Lordships that these two treatises leave the question exactly where it stands on the earlier authorities.

From both the Courts below we learn that there is no resentment excited by this kind of adoption. The District Judge of Godavari says "the "people have settled down under the law enunciated in 1862." He can hardly recollect the state of things prior to 1862, but his statement of the present state of things is founded on personal knowledge. Whether the people have settled down under the High Court decision, a result which is usually of very slow growth if it takes place at all, or whether, as is more probable, that decision was in accordance with the ordinary existing ideas and practice, we are told that in point of fact there is no conflict between the declared law and the feelings of the people. Nor is there any indication that there ever was such a conflict. In Allahabad the parties are Agarwala Banias of Benares, who are, as two of the learned Judges below state, specially careful of caste and religious observance. The adoption was 20 years old and no caste penalties had followed it. These things do not prove a custom, but [428] they do tend to prove that among orthodox Hindus the adoption of only sons has never been so inculcated as a sin by their teachers as to excite abhorrence or social hostility, such as we know to follow some other breaches of their religious laws. That the practice is a frequent one is shown by the frequency of litigated cases, which must be quite insignificant in number as compared with those that actually occur, and from the establishment of customs authorising it in various places. This is not one of the cases in which people are tempted by appetite to break an acknowledged law. It is inconceivable that the choice of an only son for adoption can in any large number of cases proceed from any other cause than a conviction of its suitability to the circumstances. That is a family matter which a wise law-giver, while

warning parties of their spiritual responsibility, would yet leave it possible for them to do. The Hindu sages appear to have taken that course in this and kindred matters.

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Their Lordships then have a case before them of which the broad outlines are as follows. Old books, looked on as divine, give to the father plenary powers over his sons. The same books discountenance the giving of an only son in terms which may be construed as a positive command making the gift void or as a warning pointing out the mischief of the act but leaving individual men to do it at their peril. The books contain no express statement which kind of injunction is meant. The practice of such adoptions is frequent. Over some substantial portions of Hindu society it is established as a legal custom, whatever may be the general law. In other very large portions it is held to be part of the general Hindu law. Nowhere is it known to be followed by hatred or social penalties. Pausing there, the case is one in which if the authoritative precepts are evenly balanced between the two constructions, the decision should be in favour of that which does not annul transactions acceptable to multitudes of families, and which allows individual freedom of choice.

But what says authority? Private commentators are at variance with one another, judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority **[429]** rests with the Queen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal, 1868) is grounded on a palpably unsound principle and loses its weight. The second in time (Bombay, 1875) is grounded in part on the first and to that extent shares its infirmity; and in part on texts of the Mitakshara which are found to be misleading. So that it too loses its weight. The third (Bengal, 1878) is grounded partly on the first, and to that extent shares its infirmity; but it rests in great measure on more solid ground, *viz.*, an examination of commentators and of decided cases. It fails, however, to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitakshara, which are misleading, and the greater amount of religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning then in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in part on a misapprehension of previous authority has been pointed out; and the Madras reports do not supply any close examination of the old texts or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the by-ways of them, command their Lordships' assent. Upon their own examination of the smritis their Lordships find them by no means equally balanced between the two constructions but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able

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to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

Their Lordships have been reminded of the length of time for which the law must have been considered as settled in Bombay and Calcutta. A similar consideration affected the Courts of Madras and Allahabad and is remarked on by both. The time is not very long in any of the four provinces, but it is long enough to increase [430] the gravity of the questions in these appeals. In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of the actual decisions; that they represent the opinions of eminent and responsible men, arrived at after public and anxious discussion, carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many minds and many titles to property or to personal status. Such decisions are not lightly to be set aside. A Court of Justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North-West Provinces and in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection is a matter for the Legislature and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance.

Their Lordships will humbly advise Her Majesty to dismiss both appeals, and the appellants must pay the costs.

Appeals dismissed.

Solicitor for appellant in the first appeal—Mr. *R. T. Tasker.*

Solicitors for respondents in the first appeal—Messrs. *Keen, Rogers & Co.*

Solicitors for appellant in the second appeal—Messrs. *T. L. Wilson & Co.*

Solicitors for respondents in the second appeal—Messrs. *Pyke & Parrott, C.B.*

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[431] PRIVY COUNCIL.

PRESENT:

Lords Watson, Lord Hobhouse and Sir Richard Cuch.

[*On appeal from the High Court at Madras.*]

SRI BRAJA KISORA DEVU GARU, *Appellant v.* SRI KUNDANA DEVI PATTA MAHADEVI GARU, *Respondent.*
[17th February and 4th March, 1899.]

Hindu Law—Duration of a grant held by a Hindu widow made to her by her husband in his lifetime.

On the distribution of compensation under the Land Acquisition Act, 1870, the title of a widow to a village, she alleging it to be her property by absolute right, as a jaghir granted to her by her husband, came into contest. Her late husband's adopted son, being now possessed of the zemindari within which the village was, disputed her right, alleging that the grant had been only for her maintenance, and claiming the whole compensation.

The terms of the grant, if any had been expressed, were unknown. No written grant was produced.

The Judicial Committee pointed out that an inquiry, directed by the Appellate Court below, as to whether a local custom existed for zemindars to grant to their wives for life only, and if such custom was valid, was inappropriate; inasmuch as no custom at all, in its legal sense of something exceptional to the general law, was in question. The power of the husband as zemindar to have mâde such a grant for life, or for more, was not in dispute.

All that was known was that the widow had received rents for about twenty-six years.

There was no sufficient evidence for holding that the village had been alienated in perpetuity.

The judgment of the District Judge, dividing the compensation equally between the parties, was maintained, the widow being treated as holding for life.

[R., 11 Bom. L.R. 409.]

APPEAL from an order (2nd May 1895) of the High Court, reversing an order (15th November 1893) of the District Judge of Ganjam, upon a reference made to him under the Land Acquisition Act, 1870.

On the 6th July 1893, the Special Deputy Collector referred to the District Judge the rival claims to the absolute property in a village preferred by the parties, respectively to this appeal.

They were the zemindar now appealing and his adoptive mother, the respondent: she being the widow of his adoptive father. She had had possession of the village for about twenty-six years, and she alleged it to have been given to her as "mokhasa."

[432] She therefore claimed to be absolutely entitled to the village and consequently to the whole of the compensation. The zemindar claimed payment to himself of the whole, on the ground that the widow's possession was only for her maintenance and for her life. He asserted that she possessed no right to sell the village, and that therefore she could not claim compensation in respect of it. He added that he had the right to resume the land, but that he did not wish to do so.

The question raised on this appeal was that expressed in the first issue, whether the grant was to the widow as an absolute jaghir, or only an assignment for her maintenance for life.

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The District Judge decided that there was a presumption, where an Uriya zemindar in the district gave a village to his wife after, or in, marriage that it was a life interest only that was given; and that all the evidence produced to rebut this presumption only confirmed it. He divided the compensation equally between the claimants.

The High Court regarded the gift as coming under the *prima facie* presumption that a gift by a husband to wife was by way of stridhan, and that such a gift passed to her heirs. They remanded the suit, directing the Sessions Judge to find whether there was a valid local custom for zemindars to give villages to their wives for life only. The Judge found in the affirmative. The High Court considering the evidence in support of the custom insufficient reversed the award, and gave the whole compensation to the widow.

Mr. *J. D. Mayne*, for the appellant, the zemindar, argued that there had been no evidence to show that an absolute estate had been given by the husband to the widow.

There was no general principle that favoured her claim, as he was quite as likely to have given the village for her maintenance as to have given it absolutely. There was no presumption that the gift was for her stridhan. The question was neither of the law, which was clear, nor of custom, which was not alleged, nor could be decided, to govern the case; but the question was of a donor's intention in a particular gift, and of the effect of that gift. There was, therefore, no ground for making any other valuation of the interests of the parties than that estimate which the District Judge had made.

The respondent widow did not appear.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

[433] This question relates to the distribution of a sum of money paid into Court as the price of land taken under the Land Acquisition Act, 1870. The land taken is situate in a village called Maulabhonaja, which formed part of the zemindari of Chinna Kimedi. The disputant parties are the zemindar who appeals, and his adoptive mother, the widow of a former zemindar, who is respondent. The sum is small but the title to it is the same as the title to the whole village, and on that ground the High Court has granted leave to appeal.

It is not disputed that the widow has been enjoying the revenues of the village for many years. She alleges that it was granted to her by her husband as an absolute jaghir. The zemindar alleges that it was assigned only by way of maintenance to her. That was the first issue which the District Judge stated for trial.

On the trial no document containing any grant was produced by the widow. She produced two letters from the Collector written on an occasion when the zemindar then in authority denied that she had any title at all. The first (Exhibit I) is dated 13th May 1871, and is addressed to the zemindar. It contains this passage:—

" Sri Kundana Devi Patta Mahadevi Garu has sent me an Arzi " stating, among other matters, that her husband, the late Sri Audiconda " Devu Zemindar Garu, placed her in possession of the three villages of " Pattuguda, Maulabhonaja and Bholladi attached to Pratapagiri taluk, as " jaghir, that after her husband's death the late Collector Mr. Carmichael

"put her in enjoyment of the said villages, that upon your accession to "the zemindari you also wrote and gave her a document for her enjoying "those three villages as jaghir for her life."

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The other letter, dated 15th June 1872 is addressed to a Magistrate. It commences thus :—

"It appears from the decrees hitherto passed by this Court that the "right to the two villages of Maulabhonaja and Pattuguda in Pratapagiri "taluk belongs to Mahadevi Garu, and that they were given by the "zemindar as mokhasa for her enjoyment for life. There is nothing to "show that that grant was cancelled as alleged by the present zemindar."

The term mokhasa is explained to be the equivalent of the more generally known term jaghir. Each shows that the land is to [434] be held for the benefit of the holder. Neither defines the duration of the holding. These terms, therefore, are consistent with either theory; and the Court must judge between them by such indications as it can get. The District Judge gave his opinion thus :—

"The presumption in such cases where an Uriya zemindar in this "district gives a village to his wife after, or in, marriage is that it was a "life interest only that was given. In this case all the evidence produced "by claimants to rebut this presumption only confirms it.

"The contention for claimant 1 under issue I is baseless and "rejected."

He proceeded to award to each claimant one-half of the fund.

The widow appealed to the High Court. The learned Judges said that *prima facie* a gift by a husband to his wife is by way of stridhan and that such a gift passes to her heirs. They add that the District Judge had referred to a local custom of which there was no evidence; and they remanded the case for him to find "whether there is a local custom "for zemindars to give villages to their wives for life only, and if such "custom is valid."

In point of fact the District Judge had not referred to any custom at all, in its legal sense of a rule exceptional to the general law. He had only stated what in his opinion was the presumption relating to gifts by Uriya zemindars to their wives; and very likely his opinion was guided by what he had himself known to be done. It is not suggested that there is any rule of Hindu law forbidding zemindars to make gifts to their wives by way of maintenance if they are so minded. A custom, such as contemplated by the issue directed on remand, is some established practice at variance with the general law. How can there be a custom to do that which the general law permits any one to do or abstain from at his own will? There might be a rigid local or tribal rule forbidding grants to wives except for maintenance. But that is not the scope of the issue; nor could it be, seeing that the power of this zemindar to make a complete alienation is not questioned. The inquiry seems to be unmeaning and therefore misleading. However, the District Judge addressed himself to the duty thrown upon him, and examined three witnesses who said it is the custom in Chinna Kimedi and in other specified zemindaris to give villages to zemindarnis for life, to be resumed at their deaths. Upon these statements he found in favour of the custom.

[435] On appeal the High Court held that this evidence was inadequate to prove a custom, and in this their Lordships agree. The learned Judges then refer to their previously expressed opinion as to presumption,

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and saying that the general law must prevail decide in favour of the widow. This however is a case in which the terms of the grant to the widow, if there ever was any expressed in any terms, are unknown. She has enjoyed the revenue for many years, and that is all we know. There is no general law to determine under such circumstances the amount of benefit which a husband, having absolute discretion in the matter, has conferred on his wife. The two documents produced by the widow herself bear against her view; though it must be confessed that their weight is slight. The evidence of the witnesses is very slight, but such as it is, it goes to show that the idea of giving land for life only to a wife by way of maintenance is not unfamiliar among the class to which this zemindar belongs, as indeed it is highly improbable that it should be.

Their Lordships think that the High Court has been misled by the idea that the nature of the gift is governed by some rule of law which can only be contravened by the establishment of a custom. They agree with the District Judge that there is no sufficient ground for holding that the village has been alienated from the zemindari in perpetuity. And they think that his division of the fund into halves is a very reasonable way of dealing with it. They will humbly advise Her Majesty to reverse the decree appealed from and to restore the award of the District Judge. The respondent must pay the costs of the proceedings in the High Court and of this appeal.

Appeal allowed.

Solicitor for the appellant—Mr. *R. T. Tasker.*

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22 M. 436.

[436] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

NARASIMHASWAMI *(Defendant), Appellant v.* LAKSHMAMMA AND ANOTHER *(Plaintiff), Respondents**. [27th March, 1899.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections* 10, 69, 73 *—Decision of Collector ejecting tenant—Appeal.*

An appeal lies from the decision of a Collector ejecting a tenant under Section 10 of the Rent Recovery Act (Madras), 1865. Such a decision, notwithstanding the use of the word 'order' in the section referred to, is a judgment within the meaning of Section 69.

Mahomed Yakub Sahib v. *Mahomed Jaffer Ali Sahib* (4 M. 167) not followed.

[F., 25 M. 453 (454); R., 30 M. 473 (474) (F.B.) = 17 M.L.J. 129 = 2 M.L.T. 106.]

SECOND appeal against the decree of J. H. Munro, Acting District Judge of Kistna, in appeal suit No. 323 of 1896, affirming the order of ejectment of C. Kristnasami Naidu, Head-quarter Deputy Collector of Kistna, in summary suit No. 290 of 1893.

Suit to enforce acceptance of patta. The Deputy Collector, after hearing the evidence, directed the defendants to accept the patta tendered. The defendant neglected to execute a muchalka in favour of the plaintiffs, and upon the application of the latter an order for ejectment was made by the Deputy Collector under Section 10 of the Rent Recovery Act (Madras),

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* Second Appeal No. 1266 of 1898.

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22 M. 436.

1865. Against this order the defendant appealed to the District Judge who said :—"This is an appeal against an order of ejectment passed under Section 10 of Act VIII of 1865. There is distinct authority (*Mahomed Yakub Sahib* v. *Mahomed Jaffer Ali Sahib* (1)), that no appeal lies against such an order. The appeal is therefore dismissed with costs."

The defendant preferred this second appeal.

Hon. *Bhashyam Ayyangar*, Hon. *Subba Rao* and *Sundara Ayyar*, for appellant.

Hon. *Bhashyam Ayyangar.*—An appeal lies from an order of ejectment made under Section 10 of the Rent Recovery Act (Madras), 1865. Section 69 provides for an appeal from all judgments passed by a Collector under the Act. Though the phrase 'order for ejecting' is used in Section 10, such an order is referred [437] to as a 'judgment for ejectment' in Section 73. Further, an appeal seems to be clearly intended, whether from a judgment or an order, by Section 76. In *Mahomed Yakub Sahib* v. *Mohomed Jaffer Ali Sahib* (1) relied on by the District Judge, the Court evidently overlooked Section 73. *Ragava* v. *Rajagopal*(2) was a suit to set aside an order for ejectment, and the Court seems to have assumed that no appeal would lie. In *Manicka Gramani* v. *Ramachandra Ayyar* (3) SHEPHARD, J., expresses the view that the word 'judgment' as used in Section 69 includes an order made in ejectment made under Section 10, and MOORE, J., that an appeal was clearly intended.

Sivasami Ayyar and *Ramachandra Ayyar*, for respondents.—In the last paragraph of Section 10 the word 'order' is used, whereas the preceding paragraphs refer to judgments. Section 76 relates to orders passed after decree and relating to the execution thereof. *Mahomed Yakub Sahib* v. *Mahomed Jaffer Ali Sahib* (1) is a direct authority that no appeal lies, and was apparently not referred to in *Manickka Gramani* v. *Ramachandra Ayyar.*(3)

JUDGMENT.

The question is whether an appeal lies from the decision of the Collector ejecting a tenant under Section 10 of Act VIII of 1865. The decision of the Court in *Mahomed Yakub Sahib* v. *Mahomed Jaffer Ali Sahib* (1) that there is no appeal appears to have been decided without the attention of the Court having been called to Section 73 of Act VIII of 1865 and without in any way referring to that section. That section describes the decision of a Collector, whereby he orders that a tenant should be ejected, as a judgment, and this must include cases of ejectment under Section 10. Reading, therefore, Sections 10 and 73 together, it seems necessarily to follow that the decision of the Collector ejecting the tenant is, notwithstanding the use of the word 'order' in the former section, a judgment within the meaning of Section 69 of the Act and appealable as such. The observations of the learned Judges (Shephard and Moore, JJ.) in *Manicka Gramani* v. *Ramachandra Ayyar* (3) seem to support this view. We therefore reverse the decree of the District Judge and direct him to receive the appeal memorandum and proceed with it according to law. Costs will abide and follow the event.

(1) 4 M. 167. (2) 9 M. 39. (3) 21 M. 482.

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22 M. 438.

22 M. 438.

[438] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

BOMMARAZU (*Defendant No.* 1), *Appellant v.*
SESHAMMA AND ANOTHER (*Plaintiff and Defendant No.* 2),
*Respondents.** [21st March, 1899.]

Regulation XXV of 1802, (*Madras*), *Section* 9—*Regulation XXVI of* 1802 (*Madras*), *Section* 2—*Assessment of Land-revenue Act* (*Madras*)—*Act I of* 1876.

An application to a Collector to grant separate registration of a portion of a permanently-settled estate, which has been alienated by a Court-sale, is one under the provisions of Regulations XXV and XXVI of 1802 and not under Act I of 1876.

APPEAL against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in original suit No. 35 of 1897.

Suit for a declaration that plaintiff was entitled to have the village of Dalanayipattadai divided from the zamindari of the first defendant, and registered in the name of the plaintiff, and for an order directing the second defendant, the Collector of the District, to so register it. Plaintiff, being the auction-purchaser of the said village, had applied for its separate registration, to the Collector, who refused on the ground that the first defendant did not concur in the application. The first defendant contended that the purchaser could not acquire more than what the vendor could give, and relied upon the fact that Clause 10 of the sannad, of which plaintiff should have been cognizant, expressly prohibited alienation of any portion of the zamindari unless the peishcush on such separate portion should amount to 500 pagodas and upwards ; also that Act I of 1876, under which the application was said to be made, related only to private alienations. The District Judge held that the prohibitory Clause 10 of the sannad referred only to private alienations made by the zamindar, and not to separation, the result of an auction sale in execution of the decree of a Civil Court. He dealt with Section 2 of Act I of 1876 and held that the Collector was not justified in refusing separate registration on the ground that the first defendant did not concur : and he gave plaintiff a decree as prayed for.

[439] Defendant No. 1 preferred this appeal.

Seshagiri Ayyar, for appellant.—Clause 10 of the sannad, which prohibits alienation except in certain circumstances, relates to a Court-sale as well as to private alienations : and a purchaser must be taken to know the conditions which it contains. Further, the suit was brought under Act I of 1876, Section 5, which only relates to acts of parties, and not to the case of a Court sale. (He referred to *Fischer* v. *Secretary of State for India in Council* (1) and *Kamalammal* v. *Raju Naicker* (2)).

Hon. *Bhashyam Ayyangar* and *Desikachariar*, for respondent No. 1.—This suit is not brought under Act I of 1876. That Act was passed to enable matters relating to private alienations to be dealt with. Neither can Clause 10 of the sannad affect a sale under a decree of the Court. This case is governed by Regulations XXV and XXVI of 1802. Section 8 of the former relates to private, and Section 9 to involuntary alienations.

* Appeals Nos. 152 to 154 of 1898.

(1) 19 M. 292. (2) 19 M. 308.

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Section 2 of the latter Regulation directs registers to be kept for the registration of transfers of land, and by Section 16 of Regulation II of 1803 Collectors are to apportion the assessment on land sold in pursuance of decrees, and Act II of 1864, Section 45, deals with sales for arrears of revenue. A Collector is bound to register and sub-assess a portion of a zamindari transferred in accordance with the provisions of Regulation XXV of 1802, and the Court may compel him should he refuse. See *Ponnusamy Tevar* v. *Collector of Madura* (1).

Seshagiri Ayyar, in reply.

The Government Pleader (Mr. *E. B. Powell*), for respondent No. 2.

JUDGMENT.

Paragraph 10 of the sannad has in our opinion no bearing on the matter now in dispute. We consider that both the Collector and the District Judge were in error in considering that this suit is under Section 6, Act I of 1876. The application to a Collector to grant separate registration of a portion of a permanently-settled estate which has been alienated by a Court-sale is in our opinion one under the provisions of Section 9 of Regulation XXV of 1802 and Regulation XXVI of 1802 and not under Act I of 1876 and the decision in *Ponnusamy Tevar* v. *Collector of Madura* (1) shows that where such separate registration **[440]** is refused by a Collector, the party aggrieved can by a suit in a Civil Court, compel him to comply with his request. On this ground we consider that the decree of the District Judge is correct and dismiss these appeals with costs.

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22 M. 440.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

BOMMAYYA NAIDU (*Plaintiff*), *Appellant v.* CHIDAMBARAM CHETTIAR (*Defendant*), *Respondent.** [6th, 7th, and 14th April 1899.]

Revenue Recovery Act (Madras)—Act II of 1864, Sections 38, 59—Sale for arrears of peishcush—Material irregularity or mistake in conduct of sale—Grounds for setting sale aside—Posting notice of sale in Collector's office—Jurisdiction of Civil Courts.

A person whose application that a sale of land may be set aside under Section 38 of the Revenue Recovery Act II of 1864 (Madras) is refused by a Collector, is a person aggrieved within the meaning of Section 59 of that Act, and is entitled to seek redress in a Civil Court; and a Civil Court has jurisdiction to entertain such a suit and may set aside such a sale.

When a party seeks to set aside a sale in a Civil Court on the ground of material irregularity or mistake in the conduct of the sale, he must establish, as in proceedings under Section 38, that substantial injury has been caused by such irregularity or mistake. A Civil Court cannot cancel the sale unless such substantial injury has been established.

The words "except as otherwise is hereinafter provided," which occur in Clause (1) of Section 38, refer to the action which the Collector is empowered to take *suo motu*, under Clause (3) of the same section, and have no relation to the remedy provided by Section 59.

Direct evidence is not necessary to connect inadequacy of price realised with a material irregularity, where the latter has been proved; and the relation of

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* Appeal No. 226 of 1898.

(1) 3 M. H. C. R. 35.

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22 M. 440.

cause and effect between the two may be inferred where such inference is reasonable.

But where the only irregularity shown was an omission to display the notice of sale in the Collector's office, and there was no evidence to show that this affected the attendance of buyers at a place many miles distant, where the sale actually took place, the inadequacy of price being susceptible of other explanations:

Held, that it was not shown that the irregularity referred to had caused substantial loss and that there was therefore no ground for setting the sale aside.

[441] APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in original suit No. 7 of 1898.

Suit to set aside a sale, by the Sub-Collector of Coimbatore to the defendant, of a village, being portion of the plaintiff's zamindari, for arrears of peishcush. The grounds on which the suit was based were:—That the said village had not been properly attached under Section 27 of the Madras Revenue Recovery Act II of 1864; that the attachment notice had not been affixed in any portion of the village; and that the sale proclamation had not been issued in pursuance of the attachment and affixed either to the land or to any other place. It was alleged that by reason of these irregularities the village had been sold at a price below its value. Application had been made by plaintiff, under Section 38 of the Revenue Recovery Act (Madras), 1864, to the Collector, who had refused to set the sale aside, but made the following order:—"The notice required by law was not posted up in this office owing to a mistake in the Sub-Collector's office, but I agree with the Sub-Collector in thinking that this omission does not constitute a serious irregularity." He was not satisfied that the village had been sold for so much below its value as to justify him in setting aside the sale and he therefore confirmed the sale and dismissed the petition. The District Judge found that no notice of sale had been put up in the Collector's office; that there had, in consequence, been an irregularity in the sale; but that such irregularity was not sufficient to justify the Court in setting the sale aside. He was further of opinion that the District Court had no jurisdiction to entertain the suit, Section 38 of the Act referred to providing a special form of procedure. He dismissed the suit.

The plaintiff preferred this appeal.

Sankaran Nayar, for appellant.—A party deeming himself aggrieved by any proceedings under the Madras Revenue Recovery Act II of 1864, may, by Section 59 of that Act, apply to a Civil Court for redress. It is submitted that this may be done even without preliminary proceedings in the Collector's Court. Three formalities are essential under Sections 27 and 36: the notice of demand, the attachment and the proclamation. The notice of demand is admitted, but it is complained that the other two requirements were not fulfilled. Exhibit C shows that the price realized is inadequate. All the prescribed formalities must be strictly carried out (*Maharajah Mahashur Singh Bahadoor* v. **[442]** *Baboo Hurruck Narain Singh* (1)). Nor is it necessary, in a civil suit, to prove damage. None was alleged or proved either in the case cited, or in *Mekaperuma* v. *The Collector of Salem* (2) where the omission to serve notice of demand was held to vitiate the whole sale. So, many cases relating to the question of limitation have been decided on the assumption that suits will lie to set aside such irregularities if brought within six months as provided in

(1) 9 M.I.A. 268. (2) 12 M. 445.

Section 59. The Collector is not a necessary party, *Balkishen Das* v. *Simpson* (1). Section 38 only relates to applications to the Collector; and the words "except as hereinafter provided" must refer to suits brought under Section 59. The result is that while a sale can only be set aside by the Collector on proof of "substantial injury" having been sustained, no proof of injury need be proved before the Civil Court. Nor does the Act curtail the general right to obtain a declaration that no title has passed to the purchaser owing to the omission to perform essential preliminaries, and without which the sale is ineffective. As to notification of sale, see *Narayanan Nambudri* v. *Damodaran Nambudri* (2), also *Monindra Nath Mookerji* v. *Saraswati Dasi* (3). Where an irregularity is such as to be likely to cause a scarcity of bidders, the damage sustained may be assumed to arise from the irregularity (*Gur Buksh Lall* v. *Jawahir Singh* (4) and *Surno Moyee Debi* v. *Dakhina Ranjan Sanyal* (5)).

Hon. *Bhashyam Ayyangar* and *Ranga Ramanujachariar*, for respondent.—The sale complained of took place after the passing of Madras Act III of 1884. *Mekaperuma* v. *The Collector of Salem* (6) was decided prior to that date. Under the later Act the procedure is positively laid down and no sale can be set aside unless substantial injury is proved to have been sustained. Section 38 of the Revenue Recovery Act (Madras Act II of 1864), as it originally stood, gave the Collector no power to set a sale aside; but Section 59 still retains its original form, including the words "except as hereinbefore provided." As no substantial injury has been shown, it is submitted that the suit is not maintainable. Moreover, plaintiff cannot be treated as a party aggrieved, within [443] the meaning of Section 59, unless the Court also holds that he has suffered substantial injury, there being no grievance recognized by the Act, unless accompanied by such injury. Nor will the Court infer that the low price realised at the sale was the necessary consequence of an omission to do one or more out of several specified acts; the connection between the two must be proved, and the onus of proving it is on the person alleging it, *Olpherts* v. *Mahabir Pershad Singh* (7). In *Karuppa* v. *Vasudeva* (8), it was held that non-compliance with the directions of Sections 38 and 39 does not invalidate the title of the purchaser. So in *The Secretary of State for India in Council* v. *Rashbehari Mookerjee* (9), an omission to name all the proprietors of a share in the estate sold was held not to amount to an irregularity within the meaning of Section 33 of the Bengal Revenue Sale Act XI of 1859. See also *Rajah Gobind Lal Roy* v. *Ramjanam Misser* (10). In the acts upon which *Balkishen Das* v. *Simpson* (1) was decided, there is no proviso corresponding to that in Section 38 of the Madras Act II of 1864, making proof of substantial injury a condition precedent to setting a sale aside. Section 38 of the Revenue Recovery Act (Madras Act II of 1864) necessitates a finding both as to a material irregularity and to substantial injury, and these must be the matters subsequently referred to in Section 59, as being "hereinbefore provided." Moreover, the Collector is a necessary party, being, in fact, the real defendant by reason of his refusal to set aside the sale, though the purchaser may be joined, *Arunachellam Chetti* v. *Arunachellam Chetti* (11).

(1) 25 I.A. 151=25 C. 833. (2) 17 M. 189. (3) 18 C. 125.
(4) 20 C. 599. (5) 24 C. 291. (6) 12 M. 445.
(7) 10 I. A. 25. (8) 6 M. 148. (9) 9 C. 591.
(10) 20 I. A. 165. (11) 15 I. A. 171.

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Sankaran Nayar, in reply referred to *Earl of Shaftesbury* v. *Russell* (1).

JUDGMENT.

MOORE, J.—The village of Erumarapatti was sold on the 30th August 1897 on account of arrears due by the zamindar of Andipatti. Application was made to the Collector to set aside the sale, under the first clause of Section 38 of Act II of 1864, on the ground that there were material irregularities in connection with the sale and that in consequence of such irregularities the zamindar had sustained substantial injury. The Collector found that one irregularity, the omission to post a certain notice in his office, had been proved, but held that this was not a serious irregularity and [444] also that although the village had been sold for less than its full value, yet that the price realised was not so much below the value as to justify him in setting aside the sale. He accordingly rejected the petition of the zamindar (plaintiff-appellant) who, thereon, filed a suit to set aside the sale, the auction-purchaser alone being made the defendant (respondent). The District Judge held that the notice of sale was not posted up in the Collector's office, that this was an irregularity, but that it did not furnish sufficient ground for setting aside the sale; and also decided that he had no jurisdiction to entertain the suit.

It appears to me that the District Judge had jurisdiction to entertain this suit. Section 38, Clause 1, Act II of 1864 (Madras), provides that application may be made to the Collector to set aside a sale of immoveable property on the ground of some material irregularity in publishing or conducting it, but lays down that "except as otherwise is hereinafter provided" no sale shall be set aside on the ground of irregularity unless the applicant proves that he has sustained substantial injury by reason thereof. Much has been said at the hearing of this appeal as to the meaning of the words "except as otherwise is hereinafter provided," but I think that there can be no reasonable doubt that they refer to the action which the Collector can take *suo motu* under the latter part of Clause 3 of this section; and that they must consequently be excluded from consideration in determining the question which arises in the present suit, namely, whether an applicant whose petition under the first clause of the section has been rejected has any remedy. It appears to me that he has such remedy under Section 59, which provides that nothing in the Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under the Act from applying to the Civil Courts for redress. Here the plaintiff (appellant) considers himself aggrieved, because the Collector refused to set aside the sale, and he is, in my opinion, entitled to ask a Civil Court to decide if he is entitled to redress.

The District Judge has held that there was an unimportant irregularity in connection with the sale, but that it did not cause the appellant substantial loss. It is contended on behalf of the respondent that if these findings are upheld the appeal must be dismissed. The pleader for the appellant, however, urges that although Clause 1 of Section 38 provides that the Collector cannot set aside a sale, on an application being made to him to do so, [445] unless it is shown that there was an irregularity connected with it which caused the applicant substantial loss, yet that a Civil Court can cancel the sale on proof of any irregularity, whether it has caused loss or not. It does not appear to me that it is

(1) 25 R.R. 534.

possible to accept this argument. It is Section 59 that gives the appellant his right to sue, and that section provides that it is only when he has been aggrieved by proceedings taken under the Act that he is entitled to redress. He cannot be held to be aggrieved because the Collector did not, on proof of an irregularity, set aside the sale, notwithstanding that substantial loss had not been caused, inasmuch as Clause 1 of Section 38, under which the Collector has acted, does not empower him to cancel a sale without proof of substantial injury. The only question that remains for consideration is as to whether it has been shown that any irregularity proved to have been committed in connection with the sale caused the appellant substantial loss. The only irregularity that I can hold has been proved is the one admitted by the Collector, namely, that the notice of sale was not posted up in his office. The evidence given by the plaintiff and his witnesses to prove want of due proclamation, &c., is worthless. The zamindar himself (fourth witness for plaintiff), although he tries to make out that he did not know till the 28th of August that the village was about to be sold, cannot show that there was any irregularity, acknowledges that he cannot remember if he received an attachment notice or not, and admits that he has never taken the trouble to ascertain if the notice was published in the gazette or not. In the absence of evidence, it cannot be assumed that the failure to post up a notice in the Collector's office in Coimbatore affected the attendance of intending purchasers in a village in Karur taluk. The only bidders at the sale appear to have been the appellant and the respondent, and the village appears to have been knocked down to the respondent, because the appellant had not taken the precaution to have sufficient money with him to enable him to deposit the amount required by the Tahsildar before he could be allowed to increase his bids. I must hold that it has not been shown that the irregularity proved in connection with the publication of the notice of sale has caused any substantial loss to the appellant, and on that ground I would dismiss this appeal with costs.

SUBRAMANIA AYYAR, J.—It was for the plaintiff to establish the circumstances which affect the validity of the sale impeached [446] by him. The evidence adduced on his behalf is altogether meagre and unsatisfactory and, as held by the District Judge, it fails to show any defect in regard to the sale except that the sale notice was not affixed in the office of the Collector as it should have been. Now, what is the effect of that omission on the validity of the sale? Does the omission amount, as contended for the plaintiff, to a neglect of an indispensable part of the prescribed procedure, so as to render the sale *ipso facto* null and void? Clearly not. Mr. Sankaran Nayar for the plaintiff relied strongly on *Mekaperuma* v. *The Collector of Salem*(1). But there is a clear and sound distinction between that case and the present. The ground on which the sale was set aside there was the absence of any demand legally served upon the defaulters, and, as the learned Chief Justice and Parker, J., observed, the service of such demand upon the defaulter is an essential preliminary to a sale. Otherwise, the property of a defaulter may be taken away from him, even though he is ignorant that coercive proceedings under the Act are being taken against him. Nothing of the kind, however, can happen in consequence of the defect of procedure which is established here, and which cannot ordinarily result in more than the property sold fetching less than what might have been got for it had that publicity which the

(1) 12 M. 445.

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affixing of a sale notice in the Collector's office is intended to secure, been given to the sale. The omission in question cannot, therefore, be said to be more than an irregularity, though undoubtedly it is a material irregularity. In this view, is a Civil Court altogether debarred, as held by the District Judge and urged before us by Mr. Bashyam Ayyangar on behalf of the defendant, from entering into the question of the validity of the sale? Mr. Bhashyam Ayyangar relied on Section 38 of Act II of 1864 in support of his contention. But what does that section really provide? Under paragraphs I and II thereof, a party may apply to the Collector within thirty days from the date of the sale to set aside the sale, on the ground of material irregularity or mistake or fraud in publishing or conducting it, and the Collector can set it aside, if the alleged ground is made out, provided, however, that, when such ground is material irregularity or mistake in the publication or the conduct of the sale, it can be set aside only if the applicant proves to the satisfaction of the Collector that sub-**[447]** stantial injury was caused by such irregularity or mistake. Under the third paragraph of the Section, it is competent to a Collector to act on his own motion, and, if he thinks that the sale ought not to stand, he can set it aside, irrespective of the question whether substantial injury has been caused by the sale or not. The words, which occur in the concluding part of the first paragraph of the Section and on which much stress was laid by Mr. Bhashyam Ayyangar, *viz.*, 'except as hereinafter provided,' are inserted there obviously for the purpose of excluding from the operation of that part of the Section the case in which the sale is set aside by the Collector *suo motu.* There is, therefore, absolutely nothing in the Section relied on to warrant the view that civil tribunals are entirely debarred from going into the question of the validity of a revenue sale in publishing or conducting which a material irregularity has been allowed to occur. And having regard to Section 59 of the Act, whereby power is reserved to a party aggrieved by any proceeding under the Act, to seek redress in a Civil Court, save as specifically excepted in the enactment, and sales like the present not coming within the saving clause, there can be no doubt that Courts are at liberty to set aside such sales, subject, however, to the condition that the party seeking the relief must establish that he has sustained substantial injury by the irregularity complained of. It is true that no such condition is to be found in the section just cited. But the provision that a party impeaching a sale on the ground of material irregularity cannot have it set aside by the Revenue authority specially empowered to deal with the matter unless proof of injury, as aforesaid, is given, certainly implies that the party is subject to a similar condition, when he takes proceedings in the matter in a Civil Court. For, what reason is there for considering that proof of injury is essential to the cancelment of the sale by one authority, but not for the cancelment of it by the other? None whatever. Such being the case, it remains to consider whether the plaintiff has made out that the omission to put up the notice in the Collector's office has caused him such injury as is required by the law before a sale can be set aside. It must be admitted that the sum of Rs. 5,300, for which the village was knocked down to the defendant, is less than its probable value, which might well be taken at about Rs. 8,000 (Exhibit C). No doubt, as pointed out by Mr. Sankaran Nayar, in cases like this, direct evidence is not necessary to connect the inadequacy of the price **[448]** realised with the material irregularity proved and the relation of cause and effect between the two may be inferred, where such inference

is reasonable from the nature of the irregularity and the extent of the inadequacy of the price (*Gur Buksh Lall* v. *Jawahir Singh* (1); see also *Venkatasubbaraya Chetti* v. *Zamindar of Karvetinagar* (2)). Turning, however, to the irregularity here, to say that the non-publication of the notice at Coimbatore,—the Collector's station—which is many miles from where the property was sold, led to a paucity of bidders at the auction and occasioned a fall in the price, would hardly be a reasonable inference, if it can be called an inference. And as to the inadequacy in the price, it is not such as to be insusceptible of other explanations, such as that it was due to an apprehension on the part of the bidders that the purchaser would probably be involved in litigation about the validity of the sale—an apprehension which suits like this unfortunately tend to foster.

I concur, therefore, in dismissing the appeal with costs.

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22 M. 448.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

APPASAMI NAICKAN AND OTHERS (*Plaintiffs*), *Appellants v.* JOTHA NAICKAN AND OTHERS (*Defendants*), *Respondents.**
[5th, 6th and 14th April, 1899.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 179—*Execution of decree—Payment out of Court to plaintiffs of money collected by receiver, but not under decree—Step-in-aid of execution.*

The question whether an application to enforce execution of a decree was barred by limitation depended upon whether a payment out of Court to plaintiffs of money collected by a receiver constituted (with the application alleged to have preceded it) a step-in-aid of execution within the meaning of Article 179 of Schedule II to the Limitation Act. The receiver had been appointed during the pendency of the suit, which was by mortgagees for possession of the mortgaged **[449]** land and for mesne profits accrued prior to the date of plaint. The receiver remained in possession of the land for a period of six months after decree, when he handed it over to the plaintiffs; and the payment out of Court above referred to was of money which had apparently been collected by the receiver during the said six months, and formed no part of the mesne profits dealt with by the decree:

Held, that such money was not collected or paid in execution of the decree though the plaintiffs had become entitled to it as a consequence of the decree. It consisted of current profits of the estate, in demanding which plaintiffs had done nothing towards the execution of the decree, which did not deal with such profits, and which could be fully executed without reference to them.

And *held*, therefore, that the payment referred to did not constitute a step-in-aid of execution and that the present application was barred by Article 179 of Schedule II to the Limitation Act.

APPEAL under Letters Patent, Section 15, against the order of Mr. Justice Shephard (Officiating Chief Justice), in Appeal against Order No. 176 of 1897, presented against the order of G. T. Mackenzie, District Judge of Coimbatore, in execution petition No. 19 of 1897, in the matter of original suit No. 7 of 1889.

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* Letters Patent Appeals Nos. 57 and 58 of 1898.

(1) 20 C. 599 (604). (2) 20 M. 159 (161).

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Suit was filed on 3rd July 1889 by plaintiffs, as mortgagees, to obtain possession of mortgaged land and for mesne profits in respect of faslis 1295 to 1298 inclusive, and for interest. On 19th October 1889, a receiver was appointed; and on 30th December 1889, a decree was passed as prayed. Plaintiffs took over possession from the receiver in July 1890; but the decree was not otherwise satisfied. On 4th January 1892, plaintiffs obtained out of Court certain money which had been collected by the receiver. On 1st March 1894, plaintiffs applied for execution by sale of the defendants' right of redemption, which was granted by the District Court, but on appeal to the High Court the application was held to be time-barred unless it could be shown to be saved by the said payment on 4th January 1892, and on this point the case was remitted to the District Court. An appeal under Section 15 of the Letters Patent was unsuccessful, and on 6th February 1897 (that being within three years of the previous application) a petition was presented to the District Judge, who said:—"It appears to me that the action of plaintiffs in drawing out of Court the money which the receiver had collected was not a step-in-aid of execution and does not save limitation. *Koormayya* v. *Krishnamma Naidu* (1) is cited and no doubt much can be said in either direction, but **[450]** I think that we must remember that the money which plaintiffs thus took was not part of the mesne profits which the decrees gave them but part of the subsequent rents of the land." He rejected the application. On appeal to the High Court, that decision was upheld by Shephard, Offg. C.J., in the following judgment:—"The first question is whether "the application of 1st March 1894 is barred by the law of limitation. In "the petition, no allegation is made of any proceeding which could act as "an interruption. The only pretence for saying that there was any intermediate application is founded on the receipt, dated 4th January 1892, "for a sum drawn by the appellants out of moneys deposited by the receiver. It is quite clear that this money was not received on account of "the mesne profits in respect of which the decrees now sought to be "executed were given. It was money to which the appellants, as mortgagees having decrees for possession, were entitled on account of current "profits of the property. Even assuming that from the payment of money "by a receiver it may be inferred that there was an application to the "Court to take a step-in-aid of execution, this payment would not help "the appellants. There was in reality no application at all and therefore "the application of March 1894 was barred by limitation. It follows "that the present application, which is only a renewal of the former one, "must fail. I should doubt anyhow whether it could be entertained "seeing that the appellants did not choose to prosecute the former application. On the question turning on Section 99 of the Transfer of Property Act, it is enough to say that anyhow the appellants are not "entitled to have the property brought to sale. The appeals are dismissed with costs."

Against the above judgment the plaintiffs preferred this appeal under Letters Patent, Section 15.

Hon. *Bhashyam Ayyangar*, for appellants.—The action of the plaintiff in applying to the Court and drawing therefrom on 4th January 1892 the money which the receiver had collected and deposited in Court, was a step-in-aid of execution within the meaning of Article 179 of the second schedule to the Limitation Act. The words "in aid of execution"

(1) 17 M. 165.

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are used in the Civil Procedure Code as meaning all the rights that a person may enforce under a decree. [COLLINS, C.J.—The Judge says the money paid was not part of the mesne profits but arose from the subsequent rents and profits of the land. Assume a case of a defaulting [451] tenant : would an application to him by the plaintiff for rent constitute a "step-in-aid of execution ?" The receiver merely held the money for payment to the person entitled.] An application to the Court for money paid in by a purchaser of lands sold in execution of a decree has been treated as a step-in-aid of execution in *Venkatarayalu* v. *Narasimha* (1), *Bapuchand* v. *Mugutrao* (2) and *Koormayya* v. *Krishnamma Naidu* (3). The money for which the receipt was given on 4th January 1892 would not have been paid unless application had been made, and the Court will presume that it was duly applied for (*Trimbak* v. *Kashinath* (4)). In *Dharanamma* v. *Subba* (5), it was held, where the decree-holder consented to the postponement of a sale of certain land but insisted on certain other land being sold, that this was a step-in-aid of execution. So also with regard to an oral application to fix a date of sale, *Amar Singh* v. *Tika* (6).

Sundara Ayyar, for respondents.—The receipt upon which reliance is placed does not show the period in relation to which the money paid was collected, nor the date of the application, and is insufficient to establish that the payment evidenced by it was a step-in-aid of execution. Moreover, possession by a receiver is that of the person ultimately found to be rightly entitled, and the receipt of this money by plaintiff was merely a receipt from his own agent, and cannot constitute a step-in-aid of execution of the decree. The receiver is a trustee (*Seagram* v. *Tuck* (7)), and " when the party is ascertained the receiver will be considered as his receiver "—Kerr on Receivers, page 137. The decree not dealing with profits, plaintiff is not entitled to recover them after the date of plaint: so the receipt of profits of subsequent years is not a step-in-aid of execution of the decree which relates only to profits prior to the date of plaint. In all the cases cited, money had been paid into Court under a decree. Here the receiver was in possession before the date of decree, and there could be no decree against the defendant for mesne profits when he was not in possession. So the money paid to plaintiff was not money which had been paid into Court under a decree.

JUDGMENT.

We think that the order of the learned Judge is right.

[452] There is nothing to show that any application to take a step-in-aid of execution was made within three years prior to the application of the 1st March 1894. The receipt dated 4th January 1892 may, no doubt, be taken as evidence that an application was made to pay out the money referred to in that receipt, but the application is not forthcoming; no sufficient reason for the omission to produce it is given, though a special opportunity was allowed to the appellants to produce it or explain the omission; and there is nothing to show definitely what was the money for which the receipt was given. A receiver was appointed during the pendency of the suit. A decree was given for possession and for mesne profits ascertained in the decree for faslis 1295 to 1298. The receipt was not, it is clear, for any part of these mesne profits. The decree was given

(1) 2 M. 174. (2) 22 B. 340. (3) 17 M. 165. (4) 22 B. 722.
(5) 7 M. 306. (6) 3 A. 139. (7) L.R. 18 Ch. D. 296.

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on the 30th December 1889, but the receiver remained in possession until the 4th July 1890. The receipt was apparently for money collected in the interval. We do not think that it can be properly said that such money was collected are paid in execution of the decree, though no doubt it was as a consequence of the decree that the appellants (plaintiffs) became entitled to it. The appellants in demanding payment of these current profits of the estate did nothing towards the execution of the decree, for the decree did not deal with these profits. It could be fully executed without any reference to them. On the ground, then, that no application for a step-in-aid of execution was made during the three years prior to the application of the 1st March 1894, we must hold that execution is barred by Article 179 of the second schedule of the Indian Limitation Act.

We dismiss the appeal with costs.

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22 M. 453=9 M.L.J. 201.

[453] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

BALKURAYA (*Defendant*), *Appellant v.* SANKAMMA (*Plaintiff*) *Respondent.** [16th March and 11th April, 1899.]

Liquidated damages—Breach of a contract to pay various sums—Agreement to pay enhanced rent in event of breach—Penalty.

By the terms of a deed a tenant was liable to pay rent to the plaintiff at an enhanced rate if he failed to pay, at a time specified, Government revenue, interest on a mortgage, and the rent agreed upon. The interest and the rent having fallen into arrears, and a suit having been brought to recover rent at the enhanced rate:

Held, that plaintiff was entitled to recover the additional amount as liquidated damages.

SECOND appeal against the decree of H. G. Joseph, District Judge of South Canara, in appeal suit No. 270 of 1897, modifying the decree of M. G. Krishna Rao, Acting District Munsif of Puttur, in original suit No. 209 of 1896.

Suit for four years' rent, at an enhanced rate mentioned in the lease upon which the defendant held certain land as tenant. The lease (Exhibit A) contained the following clause :—" If, by your non-payment of the Government revenue, interest (on mortgage amount) and rice at the aforesaid time, you let (them) fall into arrears, you must, by increasing at the rate of five mudis of rice a year commencing from the year in which there have been arrears in that manner, be delivering to me at the rate of forty-five mudis a year." Defendant contended that the enhanced rate was not payable in case of default in respect of interest and rent alone, but only on default in respect of all three obligations, namely, of Government revenue, interest and rent. The Government revenue had been paid. The District Munsif held that defendant had not discharged the obligations as to payment of rent and interest at the proper time, and that the five mudis excess must have been fixed by way of liquidated damages. He decreed at the enhanced rate as prayed. On appeal, the District Judge (with an unimportant variation) upheld the decree.

The defendant preferred this second appeal.

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* Second Appeal No. 1457 of 1898.

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22 M. 453 = 9 M.L.J. 201.

[454] *Srinivasa Ayyangar*, for appellant.—This is a provision for payment at an enhanced rate in the event of certain defaults being made. On the true construction of the lease, liability only arises upon failure to discharge all the obligations thereby imposed. The provision is, moreover, a penal one, and under Section 74 of the Contract Act, plaintiff is only entitled to reasonable compensation. The proportion of the penalty to the contractual obligation should be considered; here there had been no default in payment of the Government kist which was the most important duty; the default was only in respect of rent and interest.

Madhava Rao, for respondent.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The sole question for determination in this case is whether, as contended for the appellant, the provision contained in the instrument of lease (Exhibit A) whereby the lessee is made liable to deliver to the lessor five mudis of rice as additional rent if the lessee should fail to pay in proper time the sum of Rs. 24-8-3 payable to Government as revenue, &c., in respect of the land demised, or to pay on the due date the sum of Rs. 62-8-0, which the lessee was under an earlier provision bound to pay every year to one of the lessors' creditors as interest on the amount due to him under a mortgage held by him on the land, or to deliver at the time fixed forty mudis of rice deliverable to the lessor as net rent, is a penalty. Now, several promises, the breach of any one of which entitles the lessor to the additional quantity of rice, differ considerably in their importance with reference to the possible consequences of their non-performance. The lessee's failure to deliver at the proper time the forty mudis of rice deliverable to the lessor would not ordinarily cause much harm to the latter. But, if default is made in regard to the payment of the Government revenue or the interest due to the mortgagee the lessor might suffer serious injury by the land being caused to be sold on account of such dues. The present case falls therefore under the third head of classification adopted by Jessel, M.R., in *Wallis* v. *Smith* (1) with reference to the question of the distinction between penalties and liquidated damages. And, as pointed out by the Master of the Rolls at page 258 of the report, the decided cases are uniformly in favour of holding in that class of cases that the parties intend the payment to be by way of liquidated damages. Among the decisions which [455] specially deal with the question whether a promise to pay additional rent, as in the present instance, is to be regarded as a penalty or as a promise to pay liquidated damages, it it enough to cite the decision of the House of Lords in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2), where the earlier cases are noticed as an authority clearly supporting the latter view.

The Lower Courts were, therefore, right in rejecting the appellant's contention and holding that as the appellant had committed defaults not only in regard to the delivery of the forty mudis due to the plaintiff, but also in regard to the payment of interest due to the mortgagee, the plaintiff is entitled to recover the additional rent as liquidated damages.

The second appeal fails and must be dismissed with costs.

MOORE, J.—I concur.

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(1) L.R. 21 Ch. D. 243. (2) L.R. 11 App. Cas. 332.

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CRIMINAL.

22 M. 455=
1 Weir 739.

22 M. 455=1 Weir 739.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* AYYAKANNU MUDALI.*
[1st March, 1899.]

District Municipalities Act (Madras)—Act IV of 1884, *Sections* 188, 189—*Keeping a private cart-stand without a license.*

In a prosecution for using a place as a cart-stand without a license, under the Madras District Municipalities Act, 1884, it was proved that carts resorted daily to the premises of the accused, laden with produce for sale to the general public and not only to the accused, who acted as a broker, and permitted the carts to stand on his premises until the sale and removal of the goods was completed:

Held, that the place was used as a cart-stand within the meaning of Section 188, and that the accused had committed an offence punishable under Section 189 of the Act.

APPEAL on behalf of Government under Criminal Procedure Code, Section 417, against the judgment of acquittal passed on the accused by P. Rajagopala Chari in calendar case No. 220 of 1897.

[456] Charge under Section 189 of the Madras District Municipalities Act, 1884, of keeping a private cart-stand without a license within the limits of a Municipality. The accused had been acquitted by the Second-class Magistrate, whereupon an appeal was preferred on behalf of Government and the acquittal set aside by the High Court and the Magistrate directed to re-try the case and to take further evidence as to the character of the alleged cart-stand. (See *Queen-Empress* v. *Ayyakannu Mudali* (1)). The Magistrate accordingly re-tried the case, and, after taking further evidence, arrived at the conclusion that the alleged cart-stand was not really used as such in the sense contemplated by Section 188 of the Madras District Municipalities Act IV of 1884, and again acquitted the accused.

This appeal was preferred on behalf of Government, under Section 417 of the Code of Criminal Procedure, against the above order of acquittal.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

Mr. *K. Brown*, for the accused.

JUDGMENT.

We must say that the re-trial has not been satisfactorily conducted by the Magistrate. He appears to have regarded the evidence of the Sanitary Inspector given at the former trial as evidence in the present trial, for there is no examination-in-chief of this witness in the present trial, but only his cross-examination. In this, the Magistrate was plainly in error. It was his duty as a Magistrate to see that the evidence against the accused was duly placed on the record, but this the Magistrate has failed to do.

Taking the evidence, however (incomplete though it be), as it stands on the record, we are of opinion that the Magistrate has failed to give due effect to it.

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* Criminal Appeal No. 731 of 1898.
(1) 21 M. 293.

1899 MARCH 1.

APPELLATE CRIMINAL.

22 M. 455 = 1 Weir 739.

From the evidence of the defence witnesses themselves, it is clear that some ten or fifteen carts from outside villages daily resort to the premises of the accused, laden with produce and goods of various kinds. These premises consist of one or two sheds (the evidence is conflicting as to the number) and of a vacant piece of ground where the carts stand. The accused pays Rs. 300 per annum as rent for these premises. The carts do not bring produce for sale specially to the accused, but for sale to the general public, and the accused acts as a broker between the owners of the produce [457] and the public. He allows the carts to stand on his premises until the sale and removal of the goods is completed and apparently until they are paid for. It seems to us that these facts show clearly that the place is used as a cart-stand within the meaning of Section 188 of Madras Act IV of 1884. The accused allows the carts of the public to come to his premises and to stand there while their goods are being sold. This is done habitually, and the number of the carts is considerable, so much so that two sweepers are employed to remove the dung and rubbish. The accused himself used to take a license for the premises as a cart-stand, and we have no doubt that the premises were used as such.

We must, therefore, set aside the acquittal and convict the accused, Ayyakannu Mudali, of having committed an offence punishable under Section 189, Madras Act IV of 1884.

Looking, however, to the fact that the offence was committed two years ago and that it does not appear on the present record that the premises were insanitary, and looking also to all the facts of the case, we think that a nominal penalty will suffice to meet the ends of justice. We sentence the accused to pay a fine of one rupee. It is said that the accused is willing and anxious to take out a license. We have no doubt the Municipal authorities will grant it, if satisfied that the premises will be kept in a sanitary condition and if the grant is not open to any other objection on public grounds.

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22 M. 457.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

CHAKRADHARUDU AND OTHERS (*Plaintiffs*), *Petitioners v.* VENKATARAMAYYA (*Defendant*), *Respondent.** [27th January, 1899.]

Provincial Small Cause Courts Act—Act IX of 1887, *Section* 15, *Schedule II, Article* 35 (*j*)—*Civil Procedure Code—Act XIV of* 1882, *Section* 646-*B—Suit for the value of property illegally retained—Jurisdiction of Small Cause Courts.*

Certain moveable property having been distrained under Section 15 of the Rent Recovery Act (Madras), 1865, such distraint was set aside and the property [458] ordered to be restored to the owners. That order not having been carried out, the owners filed suits on the Small Cause side of the Courts of the Subordinate Judge, and the District Munsif, for the value of the property so illegally retained :

Held, that the suits were not excepted from the jurisdiction of the Small Cause Courts by Article 35 (*j*) of Schedule II of the Provincial Small Cause Courts Act, 1887.

[D., 25 M. 540.]

* Referred Cases Nos. 31 to 90 of 1898.

1899 JAN. 27. — APPELLATE CIVIL. — 22 M. 457.

CASE stated under Civil Procedure Code, Section 646-B, by W. C. Holmes, Acting District Judge of Kistna, in civil miscellaneous petitions Nos. 993 to 1052 of 1898 on his file (original suits Nos. 221 to 253 of 1898 and Nos. 510 to 536 of 1898 on the file of the District Munsif of Masulipatam).

Certain moveable properties having been distrained under Section 15 of Act VIII of 1865, Madras, the owners thereof sued to set aside such distraints, and obtained orders from the Headquarters Deputy Collector setting them aside and directing the properties to be restored. These orders not having been carried out, plaints were filed on the Small Cause side of the Subordinate Judge's Court at Kistna, and of the District Munsif's Court at Masulipatam, for the value of the properties so ordered to be restored ; and of which the owners had been kept out of possession though demands for restoration had been made. The plaints were returned as being non-cognizable by a Court of Small Causes, and were accordingly presented in the District Munsif's Court on its regular side. The District Munsif, however, decided, with reference to a ruling of the High Court in *Narasimhalu* v. *Venkataramayya* (1), that the suits were cognizable by a Court of Small Causes and again returned the plaints. The report of the District Judge after stating the above facts, continued :— The suits are cognizable as Small Cause suits under Section 15, Act IX of 1887, provided they are not excepted by Schedule II of the Act. The only clause that would except these suits would be Clause 35 (*j*). The question is, are these suits suits for compensation for illegal, improper or excessive distress? It seems clear they are not; they are suits to recover the value of the property illegally retained. The properties were, according to the averments in the plaints, attached, but the attachments had been set aside by a Revenue Court, and the properties were retained, though ordered by the Revenue Court to be restored to the petitioners. There was no question in the suits as to the original distress being illegal, **[459]** improper or excessive. The suits seem to be clearly cognizable as Small Cause suits."

Mr. *N. Subramanyam*, for petitioners.

Pattabhirama Ayyar, for respondents.

JUDGMENT.

We agree with the District Judge that the suits are not excepted from the jurisdiction of the Small Cause Court by Article 35 (*j*) of the second schedule to the Provincial Small Cause Courts Act IX of 1887. They should be tried by the Small Cause Court. The defendants must pay the plaintiff's costs incurred in this Court and in the Courts below in consequence of defendant's objection to the trial of the suits on the Small Cause side.

(1) Referred Cases Nos. 5 to 13 of 1898 (unreported).

22 M. 459=2 Weir 254.

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22 M. 459=
2 Weir 254.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam.

QUEEN-EMPRESS *v.* RANGAMANI AND ANOTHER.*
[10th January, 1899.]

Criminal Procedure Code—Act V of 1898, *Section* 260—*Charges under Penal Code* (*Act XLV of* 1860), *Sections* 147 *and* 324—*Summary procedure under Penal Code, Section* 323.

A First-class Magistrate took a case on his file and commenced a regular enquiry therein under Sections 147 and 324 of the Indian Penal Code; but after hearing evidence and being of opinion that only an offence under Section 323 of the Indian Penal Code had been made out, he proceeded to deal with the case summarily:

Held, that inasmuch as the evidence adduced was not sufficient to justify a committal, but clearly disclosed an offence over which he had summary jurisdiction, the Magistrate was right in acting as he did. Such a course is different to disregarding part of a charge for the purpose of dealing with a case summarily. The High Court will not interfere where a Magistrate has *bona fide* acted in the interests of justice.

Empress v. *Abdool Karim* (4 C. 18) distinguished.

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by E. A. Elwin, District Magistrate of Bellary, in criminal revision case No. 24 of 1898 (in summary case No. 4 of 1898 on the file of the Deputy Magistrate of Adoni).

[460] Five persons were charged with abusing and beating the complainant, one of them being armed with a pointed sword; and the medical evidence showed that of the injuries inflicted, two might have been caused by such a weapon. The Taluk Magistrate had issued process under Section 147 of the Indian Penal Code, but the Sheristadar-Magistrate, who commenced the enquiry, was of opinion that the offence charged amounted to one punishable under Section 148 of the Indian Penal Code and triable as such by a First-class Magistrate. The case was therefore sent to the Deputy Magistrate, who took it on his file under Sections 147 and 324 of the Indian Penal Code, offences under which are not triable summarily, and commenced a regular enquiry, examining three witnesses for the prosecution, and taking the statements of the accused. Being of opinion that only an offence under Section 323 of the Indian Penal Code had been made out, the Deputy Magistrate proceeded to deal with the case summarily under that section. The question was, whether, having regard to *Empress* v. *Abdool Karim* (1), this course was proper.

The parties were not represented.

JUDGMENT.

The District Magistrate was undoubtedly right to submit this case to the High Court under Section 438, Criminal Procedure Code, having regard to *Empress* v. *Abdool Karim* (1). This case, however, is distinguishable. Here, if the Deputy Magistrate had confined himself to the charge before him, he would have been obliged to discharge the accused, as he was of opinion that the evidence was not sufficient to justify a

* Criminal Revision Case No. 2 of 1899.

(1) 4 C. 18.

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committal, and being of that opinion, he was right in not discharging the accused when the evidence clearly disclosed an offence over which he had summary jurisdiction. This is totally different to disregarding that part of the charge with took the case out of his summary jurisdiction for the purpose of dealing with the case summarily. The High Court will not interfere where the Deputy Magistrate has *bona fide* acted in the interests of justice as in this case.

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22 M. 461.

[461] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Subramania Ayyar.

KUNJAN CHETTI AND OTHERS (*Defendants Nos.* 1, 3 *and* 4), *Appellants v.* SIDDA PILLAI AND OTHERS (*Plaintiffs and Defendant No.* 2), *Respondents.** [10th November, 1898 and 25th April, 1899.]

Hindu Law—Decree against father how far binding against sons -Question of fact—Acquiescence by sons in father's defence.

In a suit against a Hindu father a decree had been obtained, the execution of which interfered with land belonging to the undivided family of which the father was the manager and his two sons members. The sons had not been joined as defendants in that suit, though they were of age at the time; but they had known of it and had not objected to family funds being spent in its defence. On their suing for an injunction to restrain the decree-holder from executing the decree, on the ground that it was not binding on them:

Held, that the question how far the sons are bound by a decree against the father must be decided with reference to the particular facts of each case. If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested with the father, since in that case it will be presumed that the father represents their interest.

The sons will still more clearly be bound if, being of full age, and knowing of the litigation, they acquiesce in the conduct of it by the father.

[R., 7 Ind. Cas. 896 = 8 M.L.T. 355.]

SECOND appeal against the decree of W. J. Tate, District Judge of Salem, in appeal suit No. 178 of 1896, affirming the decree of V. Malhari Rao, District Munsif of Salem, in original suit No. 773 of 1894.

Suit for an injunction to restrain defendants Nos. 1, 3 and 4 from removing a hedge from and felling trees on plaintiff's land. The land in question was the joint family property of the plaintiffs and their father (who was impleaded as second defendant). In a previous suit against plaintiff's father alone, first defendant had obtained a decree, and in execution thereof was doing the acts complained of, namely, attempting to remove the hedge and fell the trees on the family land. It was claimed that the said decree was not binding on the plaintiffs, who, though of age at the time, had [462] not been made parties to that suit. The third issue framed by the District Munsif was whether the decree referred to rendered the question *res judicata*. The judgment and decree were not produced by the defendant, against whom this issue was accordingly

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* Second Appeal No. 1620 of 1897.

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decided. The fourth issue was whether this suit was maintainable: and it was held that it was, inasmuch as the plaintiffs had not been added as parties in the previous suit by the first defendant against their father. A perpetual injunction was accordingly granted restraining defendants Nos. 1, 3 and 4, from interfering with the plaintiffs in their enjoyment of the family land. The District Judge, in confirming this decree, held that as plaintiffs were of age when the previous suit had been brought against their father by first defendant, they should have been made parties to that suit, the evidence showing that they and their father were members of an undivided family, and that the plaint land (on which the hedge and trees stood) was joint family property. He further held that in obtaining the former decree the first defendant had not sued the plaintiffs' father in his representative capacity, and (referring to *Narayan Gop Habbu* v. *Pandurang Ganu* (1)), that the plaintiffs had not been effectively represented in the suit.

Defendants Nos. 1, 3 and 4, preferred this second appeal.

Seshagiri Ayyar, for appellants.

Masilamani Pillai, for respondents.

The appeal was first heard by SUBRAMANIA AYYAR and BENSON, JJ.

JUDGMENT (PRELIMINARY).

The District Judge appears to have assumed that, unless it appears on the face of the record that the father was sued in a representative capacity, the decree obtained against the father must necessarily be held to be not binding on the sons. It is not clear what the District Judge means by stating that the sons were not "effectively represented." The question how far the sons are bound by a decree against the father, in cases like the present, must be decided with reference to the particular facts of the case.

If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested along with the father, for the reason that, in **[463]** that case, it must be presumed that the father represents the interest of all (*Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (2)). If the sons are of full age and are aware of the litigation and take no steps to be brought on the record, but acquiesce in the conduct of the litigation by the father, the case will be still stronger and they will clearly be bound by the decision.

We must, therefore, ask the District Judge to submit a finding on the third issue in the light of the above observations; fresh evidence being admitted on both sides, if desired.

[In compliance with the above order, the District Judge submitted a finding to the effect that the first plaintiff admitted that he had not objected to family funds being spent on the former suit: that his father was manager of the family; and that though he pleaded absence during the litigation, this was improbable. The second plaintiff had lived with his father at the time when and had attended the Court while the former suit against the father was pending. On the whole he found that there was a strong probability that the plaintiffs, who were over thirty years of age, had had every opportunity of knowing and must have known of the former suit: and there was no reason for thinking that the latter was not properly defended.]

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(1) 5 B. 685.

(2) 14 M.I.A. 367 (376).

1899 APRIL 25. — APPELLATE CIVIL. — 22 M. 461.

The appeal coming on for final hearing after the return of the above finding the Court, as constituted above, delivered the following judgment:—

JUDGMENT (FINAL).

Accepting the finding we allow the second appeal, reverse the decrees of the Lower Courts and dismiss the suit with costs throughout.

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22 M. 464 (P.C.) = 1 Bom. L.R. 696 = 3 C.W.N. 777 = 26 I.A. 107 = 7 Sar. P.C.J. 534.

[464] PRIVY COUNCIL.

PRESENT :

Lord Watson, Lord Hobhouse, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

SRI BALUSU RAMALAKSHMAMMA (*Plaintiff*), *Appellant v.* THE COLLECTOR OF THE GODAVARI DISTRICT (*Defendant*), *Respondent.* [21st February and 24th March, 1899.]

Alluvion—Gradual accretion to a formation of dry land already existing, and appropriated to an owner of land, on a river's bank—The ownership of the bed of the river was not the subject of contest below—Variation of claim disallowed.

Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land to which the accretion is made, following the ownership of that land, the rule is equally well established in both those provinces.

Both parties were riparian proprietors of adjoining estates on both banks of the river Godavari. The plaintiff claimed the right to newly-formed land, in mid-stream, which she alleged to have been formed by accretion upon an already existing lanka or alluvial island which belonged to her. On that point there were concurrent findings against her. The accretion had taken place upon a lanka owned, not by her but by the Government, and higher up stream than hers :

Held, that the plaintiff must abide by the ground of claim which she had presented below, that being that the new land was formed by gradual accretions to definite and visible portions of a lanka previously belonging to her. This she could not now vary to a claim founded on an ownership of the river-bed on the strength of her being zemindar and owner of the land on both banks of the river, without either issue or evidence directed to such subaqueous ownership.

[F., 14 C.P.L.R. 97 (99); 1 M.L.T. 101 (102); R., 36 M. 57 (61) = (1911) 2 M.W.N. 261.]

APPEAL from a decree (17th September 1895) of the High Court, affirming a decree (31st December 1891) of the District Judge of Godavari, dismissing the appellant's suit.

The plaintiff (appellant) sued the defendant (respondent), who represented the Government on the 22nd June 1889, for the proprietary possession of an area of dry land in mid-stream of the river Godavari.

The river divided her zemindari estates which adjoined Government villages higher up-stream on both banks. Her claim was for 102 acres of cultivated land, and 160 acres of sands, newly formed against a lanka, or island. This formation she alleged to have accreted to a lanka or island previously existing within the [465] limits of her zemindari (Kapileswarapuram), that lanka having been named Kedarlankar, and being

her property. She alleged that, during her minority, the Government being, as the Court of Wards, in charge of her zemindari, took possession of the land in suit as it was gradually formed, and having made over the rest of her estate to her on her attaining her majority on the 23rd March 1886, retained possession of the formation as if entitled thereto.

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The written statement of the defendant was (1) that the formation was in the bed of a tidal and navigable river, and (2) that it was a gradual accretion to a lanka named Tatapuda, higher up the river, and belonging to the Government.

The position of each lanka is stated in their Lordships' judgment, which contains all the facts of the case.

In his judgment of the 31st December 1891, the District Judge decided that the judgment must turn on the fact whether the new formation was a gradual accretion to the one lanka or to the other. He then found that the accretion had been entirely to the lanka Tatapuda, belonging to the Government.

The formation of lankas in the Godavari was described by the District Judge, on a remand from the High Court, in his return, dated the 11th March 1895, as follows:—

"The Godavari is a broad river. In places it is about four miles wide. In the hot weather the river-bed is a waste of sand with some streams of clear water here and there finding their way down to the sea. When the floods come down in June and later months, the river is a turbid torrent, more than twenty or thirty feet deep, very heavily laden with rich silt from the black soil of Central India. When the river reaches the deltaic tract, where the fall is only one foot per mile, the current slackens and the silt is deposited in large islands or accretions in the riverbed, which are called lankas. These are composed of rich black soil, carried down and re-arranged by the river, and they are extremely fertile. As the river falls, these lankas have their edges cut off abruptly by the current. When the river is at its lowest in the hot weather, one sees, as I said above, a few streams of clear water, an extensive waste of barren valueless sand, and, standing up in the midst of this waste of sand, the black fertile lankas."

The High Court on the 17th November following dismissed the appeal with costs.

[466] In their judgment the High Court said:—"We are satisfied "upon the evidence adduced that at the lanka in dispute the river Goda-"vari is not a tidal and navigable river."

As regards the question of accretion, the Court doubted whether there was any presumption in the case of such rivers as the Godavari, that the owner of both banks was also the owner of the bed of the river. Without deciding this point, they said:—"In the present case the existence of "a lanka belonging to Government in mid-stream would be sufficient to "rebut the presumption. The origin of the Government title to that Tata-"pudi lanka does not appear to be material. It exists, and the suit lanka "is an accretion to that Tatapudi lanka, and it is not a sudden vertical "accretion in the bed of the river. The well-established rule is that, where "the acquisition of land is by gradual, slow and imperceptible process, "the accretion by alluvion belongs to the owner of the adjacent land. We "see no reason why this rule should be held to apply only to alluvion "caused by the action of the sea or by the ebb and flow of waters in tidal "rivers. The gradual and imperceptible character of the accretion is the "reason and foundation for the rule; and if the accretion had been a

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"gradual one to the bank on either side, no one would doubt that it belonged to the riparian proprietor to whose land it was annexed. We are "of opinion, therefore, that the principle on which the late District Judge "(Mr. Ross) decided the case was correct, and that the suit lanka is the "property of Government."

On this appeal, Mr. *J. D. Mayne*, for the appellant, argued that, notwithstanding the finding on the question of the accretion, her case could rest on her right of property in a formation in the bed of the river within the limits within which, on either bank of the river she possessed zemindari rights. The issues had sufficiently raised the question. The bed of the river, on which the lanka was formed, was her property. The lanka in dispute had not ceased to be her property, though it might have, in the course of its increase, come into contact with the lanka belonging to the respondent.

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the respondent, were not heard.

Afterwards, on 24th March, their Lordships' judgment was delivered by LORD HOBHOUSE :—

JUDGMENT.

[467] The plaintiff in this case, who is now the appellant, brought the present suit for the purpose of establishing, as against the Collector who represents the Government, her title to a formation of land in the river Godavari. The formation is called a lanka, which term, as their Lordships understand, not only includes islands more generally known as churs, but also accretions to the banks of rivers. The lanka in dispute is one formed in contact with an island called the Tatapudi lanka.

The plaintiff and the Government are neighbouring owners of land. Each possesses a village and lands on both banks of the Godavari, the Government village Tatapudi being higher up stream than the plaintiff's village which is called Kapileswarapuram. The river is very broad ; said to be in some places hard by four miles broad. At this spot, their Lordships gather from some measurements made in 1866 that it was then not less than two miles broad. It is above the flow of the tide, but is used for navigation, whether at all times or only when the waters are high does not appear.

At some time not precisely specified an island was formed commencing at a point in the river between the banks which are owned by the Government, and extending gradually till its lower extremity protruded between the banks which are owned by the plaintiff. The Government took possession of this island. The plaintiff's predecessor in title claimed it in the year 1847, and the Collector rejected his claim. He sued for possession in the year 1859, but his suit was barred by time. This island is Tatapudi lanka, and it has ever since been the property of the Government without dispute. The plaintiff now sues to recover the later formation which is in contact with Tatapudi lanka, alleging that it is within the village of Kapileswarapuram. The Collector alleges that it is an accretion to Tatapudi lanka. He also alleged that it is formed in the bed of a tidal navigable river, but it has been found against him that the river is not tidal at this point.

Issues were framed, of which the important ones are as follows :—

"(1) Whether the land in dispute is within the boundaries of the "Kapileswarapuram village?

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"(2) Whether, by reason of being within the boundaries of the "Kapileswarapuram village, the land in dispute is the property of the "plaintiff?

Framed on allegations made by pleader at first hearing.

[468] "(3) Whether the plaint land is the property of the plaintiff by right of accretion to "Kedarlankagedda and Nadimtippa?

"(4) Whether the plaint land is the property of "the defendant by right of accretion to Tatapudi lanka?

"(5) Or, whether it is the property of the defendant as a formation "in the bed of tidal navigable river?"

On the first issue the District Judge found that, if two imaginary straight lines were drawn connecting the two eastern boundaries of Kapileswarapuram and its two western ones on each bank, the disputed lanka would lie between those lines, and in that sense it is within the limits of Kapileswarapuram. But then he went on to point out that Tatapudi lanka falls within the same limits; and he accordingly finds on the second issue that the disputed lanka is not the property of the plaintiff simply by reason of its lying within the aforesaid imaginary lines.

He states that each party asserts the disputed land to be not an island which has sprung up in the bed of the river, but a gradual accretion to previously formed land; the defendant says to Tatapudi lanka, and the plaintiff says to a lanka of hers called Kedarlankagedda. It is therefore the third and fourth issues which comprise the substance of the dispute; and after examining the evidence closely the District Judge finds, "that "the land is not the property of the plaintiff by right of accretion to "Kedarlankagedda and Nadimtippa, but that it is the property of defend- "ant by right of accretion to Tatapudi lanka." On that finding he dismissed the suit.

On the fifth issue the District Judge found that the land is an accretion to a lanka in the bed of a tidal navigable river; but on this point the High Court directed further enquiry, after which they decided that the disputed land is not in tidal waters.

The High Court agreed with the District Judge in holding that the plaintiff's test of drawing mathematical lines from bank to bank was a fallacious one because it included in the plaintiff's land Tatapudi lanka which is defendant's land. They then addressed themselves to the claim which the plaintiff urged to be owner of the whole bed of the river between the banks owned by her, and therefore of every formation of soil on that bed. Upon [469] that claim their Lordships observe that it is not made by the pleadings or by the issues settled by the District Judge. The third and fourth issues relate simply to accretion to some previously existing dry land, and the question raised was whether that was the plaintiff's land or the defendant's. The subaqueous ownership now claimed by the plaintiff raises a totally different question on which much evidence might and probably would have been given; and that question was not tried by the District Judge. The High Court would have been quite justified in refusing to entertain the question until raised by proper issues and evidence. The practical result was no more favourable to the plaintiff. The learned Judges point out that they are called on to decide a very important and difficult question on very meagre evidence. It is indeed hard to say that there is any evidence at all. None has been mentioned by Mr. Mayne, and the learned Judges say that the whole case of the plaintiff rests on the presumption of English law founded on the character of English rivers.

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The difference between them and such rivers as the Godavari is obvious. Their Lordships do not travel into that interesting discussion because it is irrelevant to the case made by the plaintiff.

The view of the High Court is that at the highest the principle relied on by the plaintiff is only a presumption, and that the ownership of Tatapudi lanka by the Government rebuts the presumption. They then find concurrently with the District Judge that the lanka is an accretion to Tatapudi and not a vertical accretion in the bed of the river. That carries the case in favour of the defendant. There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land which attracts it; but the rule, though unwritten, is equally well established. It is hard to see why it should not apply to land which the river washes on both sides, as well as to land which is washed only on one side. If the *terra firma* of Tatapudi pushed out a promontory by gradual imperceptible deposits, that would, in the absence of special circumstances to show title in another, enure to Tatapudi. It is the same with an island which is part of the Tatapudi estate.

The result is that their Lordships, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godavari, would require to know much more about the river in question and the mode in which it has been dealt with, **[470]** before deciding as to the presumption or its rebuttal. The plaintiff must abide in this suit by the case she has presented. The case is that the disputed lanka was formed by gradual accretions to definite visible portions of her land. That is found against her by the concurrent decisions of the Courts below; and without examining the matter further their Lordships must hold that her claim has failed. Their Lordships will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Lawford, Waterhouse, & Lawford.*

Solicitor for the respondent—*The Solicitor, India Office.*

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PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Lord Macnaghten, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

RAJA SETRUCHERLA RAMABHADRA AND ANOTHER (*Defendants*), *Appellants v.* RAJA SETRUCHERLA VIRABHADRA SURYANARAYANA AND ANOTHER (*Plaintiffs*), *Respondents.* [14th February and 4th March, 1899.]

Hindu Law—Agreeement between members of a Hindu family—Construction—Their estate managed by one in the relation of ordinary agent to principal—Liability to account.

Three brothers of a joint Hindu family agreed that their estate should remain joint, excepting the share of a separated fourth brother, which was excluded. It was in the agreement that the eldest of the three should manage the family estate, and that after twelve years, and after an account rendered by him of the profit and loss, a division among them should be made; any one of them to obtain his share on giving up his portion of the profits. In a suit for partition commenced by one of the brothers and carried on by his representatives, the term having expired :

Held, that the true construction was that the above was not a mere agreement to postpone partition, leaving the family status of the brothers uninterrupted, but was an agreement which put them on a new footing. Upon reference to several terms of the agreement it appeared that the elder had become liable on the [471] footing of an ordinary agent, accountable for receipts and expenditure, and that he was not in the position of the managing member of a joint family liable only to account as to the then existing state of the property.

[R., 32 M. 271 = 19 M.L.J. 70 = 5 M.L.T. 145 (146); 9 C.L.J. 133 = 13 C.W.N. 309 (313).]

APPEAL from a decree (20th October 1895) affirming a decree (24th November 1892), of the District Judge of Vizagapatam.

The suit out of which this appeal arose was brought on the 20th November 1888 by the father, since deceased, of the two respondents, against his two brothers. The respondents were minors, representing their father, and appearing by the Collector of Vizagapatam, agent to the Court of Wards. The suit claimed delivery of the plaintiff's one-third share, which had been, with the rest of the family estate, in the possession of the eldest of the three brothers, under an agreement executed by them on the 6th October 1874; also an account of the past profits, during his management, and interest.

The following table shows the relative position of the parties :—

Setrucherla Jagannadha I, Zamindar of Merangi (died 1864).
- Chandrasekhara, Zamindar (died 1869).
  - Jagannadha II, Minor Zamindar under Court of Wards.
- Ramabhadra, First defendant and appellant.
- Somasekhara, Second defendant and appellant.
- Jogi, First plaintiff (died 1889).
  - Second plaintiff
  - Third plaintiff
  and respondents.

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The Merangi zamindari was finally declared, as the result of litigation between Jagannadha II and his uncles Ramabhadra, Jogi, and Somasekhara (see *Zamindar of Merangi* v. *Sri Rajah Satrucharla Ramabhadra Razu* (1)), to be partible among the four brothers, the sons of Jagannadha I, as members of a joint Hindu family. The actual partition of the rest of the property was the subject of an award of a panchayat on the 7th October 1874, and on the previous day the agreement, on which this suit was based, was executed by the three, Ramabhadra, Somasekhara and Jogi. The twelve years therein mentioned expired on the 6th October 1886.

The decision of the District Judge was that the appellant Ramabhadra was liable under the arrangement, evidenced by the contract of 6th October 1874, as a trustee, his position not being that of a mere manager of a joint Hindu family, and that as such trustee he was liable to make over, to the plaintiff, land of the [472] value of Rs. 16,622, and money to the amount of Rs. 1,36,407, as the plaintiff's share of the property made over to him, Ramabhadra, and to make over the accumulations and investments thereof, together with mesne profits and interest thereon, and with further interest and costs, and he declared the second appellant, Somasekhara, to be liable jointly with Ramabhadra for the costs of the suit.

The defendants appealed. It was pending this appeal that the estate of the respondents passed into the hands of the Court of Wards.

The Judges of the High Court (Shephard and Best, JJ.) supported the conclusion of the Court below that the defendant Ramabhadra had been placed in possession of the property found to have been made over to him by that Court, in which the plaintiff's representatives were entitled to a one-third share. They also maintained the decision that, on the construction of the 'Samakhya' (as the agreement of 6th October 1874 was termed), it was intended that that defendant should be put, for the time being, in a position to make him accountable at the end of the period for the rents and profits accruing during it. The first Court's decree was affirmed. Ramabhadra and Somasekhara appealed from that decision.

Mr. *Cozens Hardy, Q.C.*, and Mr. *J. D. Mayne*, for the appellants, argued that there was error in the judgments of the Courts below. The agreement of 1874, on its true construction, had effect to cause either the result that the original status of union was continued between the brothers, or a re-union was effected between them. In either case, the three were placed in the same position as if the separation of the fourth had not taken place. The appellant Ramabhadra, the manager, on behalf of himself and his brothers, received possession of the family estate upon no other footing than as manager for the family of a joint and undivided Hindu estate. The present suit should be dealt with as one for the partition of joint family property, which had remained undivided by consent of three brothers, while a fourth separated himself and his share from them; and the property should be deemed to be the undivided estate of the three nevertheless. The error indeed amounted to this that the suit had been treated as one for specific performance against a trustee. In an ordinary suit, and in the absence of fraud, the only account that the managing member [473] was liable for was as to the existing state of the property divisible. The parties had no right to look back and claim relief against past inequality of enjoyment on the part of the members. Redress in this respect could not be awarded. The plaintiffs by the law

(1) 18 I.A. 45 = 14 M. 237.

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of joint families could not claim a decree for their shares, respectively, with profits that might have accrued since 1874, with interest and mesne profits, down to the date of the decree. All that they were entitled was an account of their properties as they existed at the date of their suit, without calculation of what might have accrued in the past.

Mr. *J. H. A. Branson* (with whom was Mr. *A. Cohen, Q.C.*), for the respondents, argued that the Courts below were right in holding that by the effect of the agreement of 1874 there was neither re-union nor continuance of the former united status of the three brothers; nor were they constituted a joint family. That, they had ceased to be on the partition. The relation of Ramabhadra, as managing member of a Hindu family, had ceased. He was no longer on the less responsible footing of the ordinary manager in a joint family, but was accountable, under the terms of the agreement, as an agent acting in the possession of his principal's property. The terms of the agreement were inconsistent with any other view of his position. As to this part of the case counsel was not heard in reply.

The statements on both sides as to a contested item, whether one portion of the property sued for was comprised in the agreement, appear in their Lordships' judgment. This was delivered on a subsequent day, 4th March, by Lord Hobhouse:—

JUDGMENT.

The principal question in this suit relates to the construction of a very peculiar agreement between three brothers. Their position at that time may be stated in brief outline. They belonged to the Merangi family, being a joint family of Hindus, and the property with which they were dealing belonged to the Merangi estate. When their elder brother died in the year 1869 he was succeeded by an infant son, between whom and his uncles there arose dispute whether or no the zamindari was partible. This dispute was not settled till the year 1891. But other portions of the family property were clearly partible, and a panchayat was appointed to make partition. That body made an award in December 1873, and a revised award on the 7th October 1874. These awards appear to have effected a final settlement as between [474] the three younger brothers on one side and their nephew on the other. But the day before the revised award was completed the three younger brothers entered into the agreement in question.

The document bears date the 6th October 1874, and runs as follows:—

"As one of us, Sri Somasekhara Raju Bahadur Garu, has not agreed "to the award passed by the panchayat in the dispute in respect of dayam "(partition) which took place between us three and the minor zamindar "of Merangi, we have resolved that it would be better for us three to live "jointly than to become divided by instituting civil suits and putting "ourselves to much expense and trouble, and have arranged, among our"selves, the following conditions for living jointly:—

"1. That the three shares belonging to us according to the panchayat "award after excluding the share of the minor should be kept joint;

"2. That Sri Ramabhadra Raju Garu, who is the eldest of us, should "take charge of the said three shares and manage the same; and

"3. That we should live jointly for twelve years from this date, and "effect division thereafter after settling the profit or loss accruing up to "that date. Should in the meantime any of us desire to become divided,

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"without remaining joint for twelve years as aforesaid, the member so "desiring should give up his share in the profits which may accrue up to "that date and should himself bear the loss which may have been occa-"sioned thereby. We have entered into this 'samakhya' (agreement) after "agreeing that it should be acted upon accordingly and therefore we three "shall bind ourselves to the said conditions."

This arrangement was followed during the twelve years' term. About two years afterwards the youngest brother Jogi, for whom his two minor sons have been substituted and are now respondents, filed his plaint in this suit against his two brothers who are now appellants. He prayed for a division and delivery of his third share of the property including the income during the twelve years' term.

Ramabhadra resisted the suit, alleging that the agreement had never been acted on, and pleading limitation. Those issues were decided against him, and there is no longer any question about them. The questions raised in this appeal are :—first, whether the [475] defendant Ramabhadra is liable to account for the income of the property during the twelve years' term, and secondly, whether one portion of the property sued for was comprised in the agreement.

On the first point the defendant contends that under the agreement the three brothers remained a joint Hindu family and that he was the manager of that family and is not accountable for the income of past years. The District Judge has stated his view of the defendant's position in these terms :—

"I think the first defendant is liable to answer to the plaintiff not "only as the manager of a Hindu family, but further as a trustee. He "is, I find, accountable not only on the footing of what is spent and what "remains, but upon the footing of what expenditure might have been "confined to if frugality and skill had been employed."

On this footing he took accounts and framed his decree. The defendant appealed, but the High Court dismissed his appeal with costs.

Their Lordships cannot accept the defendant's view of the agreement. It is not a simple agreement to postpone the partition and so to leave the family status of the brothers untouched. They are put upon a new footing. The defendant has the management secured to him for an absolute term of twelve years, and though during that term the others would not be precluded from demanding division, they could only do so on condition of giving up profits and bearing any loss occasioned by their premature withdrawal. Moreover the division when it comes is to be effected after settling the profit and loss accruing to that date. That is hardly the language which would have been used if the parties had meant nothing except that they should divide the corpus of the estate as it stood at the end of the term, whether it had increased or decreased. The language is more appropriate to express an intention that accounts should be taken of receipts and expenses, treating surpluses as profits and deficits as loss.

In their Lordships' view the defendant was an agent for the three, unpaid it is true, but accountable for his receipts and expenditure. The District Judge's description of him as a trustee, and as liable for failure in frugality or skill is open to criticism in point of expression, but it does not appear that in applying his principle he has saddled the defendant with any larger liability than results from his agency. It is true that the [476] defendant by not keeping accounts has driven the Court to proceed on grounds more or less conjectural; but his Counsel admit that if he fails in maintaining his position as an ordinary joint family

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manager, he has nothing to complain of in the District Judge's treatment of the case except as regards one item in the account.

That item is a substantial one. It is stated in Schedule D * as profits from 1874, the date of the panchayat, from the lease of the Merangi estate by the defendant. That means a lease of the zamindari, which belonged to the minor nephew's share, to the defendant. After deducting the rent paid to the zamindari treasury and other expenses the District Judge brings out the sum of Rs. 16,483-5-4 as the net sum due to the plaintiff's share. †

The lease by the Court of Wards is dated the 20th August 1874. It is made on the application of the defendant in the previous May, and the grant is in these terms :—" You should continue to enjoy the said "Merangi zamindari at an annual cost of Rs. 37,000." The holding is to be from the first July 1874 till the zamindar ceases to be a minor. There are several other conditions, none of which throw any light on the question between the defendant and his brothers.

From the terms of the lease itself and from the award of the panchayat‡ it would seem that the defendant had been previously in enjoyment of the property at a favourable rent on account of rendering services to the family. The terms of that holding do not appear in the record ; and it cannot be gathered from the award what precisely was the view which the arbitrators took of the defendant's interest. They awarded some amount of profits equally between the four branches of the family. But as between the three brothers the award became abortive, and the lease of August 1874 put the matter on a new footing.

The view taken by the District Judge is thus expressed. He is referring to a tabular statement explaining his decision :—

"Item No. 15 represents the plaintiff's one-third share of the profits " of a lease of the zamindari of Merangi which the Collector on behalf of the minor zamindar gave in the name of the first defendant. The first defendant contends that this should be treated as his self-acquired and separate property. In Bengal the first defendant, as the person who acquired this lease, might, though he pledged the joint property of his brothers (Exhibit K) as security for the fulfilment of the terms of his lease, claim [477] " a double share of the proceeds of the lease ; for he alone worked " that lease. But in this part of India property obtained with the assist- " ance of the joint funds is joint, and I think that this lease and conse- " quently its proceeds may be said to have been acquired by the aid of the " joint property pledge to secure it."

There is, however, no proof that the joint estate ever became security for the rent; and there is good ground for inferring that it did not.

From a letter written by the defendant on the 8th June 1876 it appears that some demand must have been made by the Court of Wards upon him to give security for the rent. He then says it is true that he alone is the lessee. But he goes on to state the arrangement of October 1876, and he continues thus :—

" As the lands which fell to my share and to those of my brothers are " sufficient for the security of the rent, we three are ready to give, in wri- " ting, those properties as security. While we three brothers are possess- " ed of property sufficient for the security, there appears to be no reason

* (Record, p. 320 —ED.). † (Record p. 290.—ED.). ‡ (Record p. 43—ED.)

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"why others should be asked to give security. It is all the same whether "one security bond is obtained from us three or whether separate ones are "obtained. Therefore, you are hereby informed that, if you would write "your opinion in regard to this matter, a draft copy of the security bond "will be prepared and sent to you as soon as the Tahsildar puts us in "possession of the lands."

The security bond bears date the 1st November 1876. * It purports at the beginning to be executed by the defendant alone. In the subsequent part language is used as if a plurality of persons were giving security and it refers to a schedule which comprises the family lands. At the foot it is executed by the defendant alone. And when the lands actually charged come to be specified in the schedules, the shares of his brothers are expressly excluded, though his own share which is charged is incorrectly spoken of as "our" one share. The following item is a specimen :—

"Out of the land within the said boundaries the three shares of Sri "Raja Setrucherla Jagannadham Raju Bahadur Garu, the minor zamindar "of Merangi, of Sri Raja Setrucherla Somasekhara Raju Bahadur Garu "and of Sri Raja Setrucherla Jogi Raju Bahadur Garu being excluded, one "acre of land belonging to our one share."

When this had been pointed out by Mr. Mayne, their Lordships asked Mr. Branson if he could show how the joint property or the [478] property of the defendant's two brothers was ever made a security for the rent, and he stated that he could not show how.

The result is that though the defendant spoke of giving security by joinder of his brothers, and though the language of the security bond is in part drawn on that footing, it did not bind any property except that of the defendant himself. Whether his brothers refused to join, or whether on reading his letter the Court of Wards thought his security ample without them, it is idle to speculate. The District Judge was perhaps misled by the language of the letter and the corresponding language of the body of the security bond, excluding its commencement, its ending and its schedule. As a matter of fact, his reason for treating the lease as joint property fails; and then no other reason is shown why it should not take effect according to its tenor.

Their Lordships will humbly advise Her Majesty to vary the decree appealed from by striking out of the sums to be paid to the plaintiffs the sum of Rs. 16,483-5-4 being item No. 15 in the tabular statement framed by the District Judge and with that exception to affirm the decree. As each party has partially succeeded and partially failed each should bear their own costs.

Appeal, on the principal point, dismissed; varied as to an item in the account.

Solicitors for the appellant—Messrs. *Keen, Rogers & Co.*

Solicitor for the respondent—The *Solicitor, India Office.*

* (Record p. 99.)

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.

MURUGESA MUDALI (*Plaintiff*) v. JOTHARAM DAVAY AND ANOTHER (*Defendants*).* [27th January and 10th February and 13th April, 1899.]

Specific Relief Act—Act I of 1877, *Sections* 10, 11—*Civil Procedure Code—Act XIV of* 1882, *section* 208—*Limitation Act—Act XV of* 1877, *schedule II, article* 49—*Claim to recover goods in hands of third parties—Alternative claim for value as compensation.*

In execution of a decree obtained by the defendants against one M in the Court of Small Causes, certain goods were attached, to which plaintiff preferred [479] a claim. That claim being disallowed, plaintiff filed in the City Civil Court, Madras, a suit for and obtained a declaration of his title to the goods, but prior to the date of the decree, namely, in October 1895, the goods attached had been sold by the Court of Small Causes, and certain third parties had become purchasers thereof. On plaintiff, in December 1897, suing "for the recovery of the goods or their value as compensation:"

Held, (1) that the goods not being in the possession or under the control of the defendants, plaintiff was not entitled to a decree for their recovery *in specie*: and that plaintiff's only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants; and

(2) that the suit being framed for the recovery of specific moveable property was governed by Article 49 of Schedule II of the Limitation Act, 1877, and was therefore not barred by limitation. The alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to Section 208 of the Code of Civil Procedure and did not alter the character of the suit or bring it within any other category of the schedule.

[R., 23 M. 621 (624); 31 M. 431 (436)=18 M.L.J. 590=4 M.L.T. 271; 6 C.L.J. 535 (538); 4 N.L.R. 49 (50).]

CASE stated under Civil Procedure Code, Section 617, and Presidency Small Cause Court's Act, Section 69, by the Judges of the Presidency Small Cause Court, Madras, in small cause suit No. 23026 of 1897.

The defendants obtained a decree in small cause suit No. 4062 of 1895 against one Manikka Mudali. In execution of that decree certain goods were attached. The plaintiff in the present suit preferred a claim to the goods, but the Court disallowed the claim. Within one year from the date of the order dismissing the claim, the plaintiff filed a suit in the Madras City Civil Court for a declaration of his title to the goods. On the 4th December 1896, the plaintiff obtained a decree declaring his title to the goods. Before the date of this decree, namely, in October 1895, the goods attached were sold by the Court of Small Causes, and certain third parties became purchasers thereof. On the 4th December 1897, the present suit was filed for the recovery of the goods or their value as compensation.

The defendants pleaded that the suit was barred, under Sections 13 and 43 of the Civil Procedure Code, by suit No. 171 of 1895 in the City Civil Court; and that the suit was also barred by limitation.

The Chief Judge, by whom the case was tried, held that the suit was not barred by the suit in the City Civil Court and the decision therein;

* Referred Case No. 29 of 1898.

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and that it was not barred by limitation so far as it was a suit for recovery of the goods *in specie*, but that in so far as it claimed compensation, if claimed as a distinct alternative **[480]** relief and not as included, under Section 208 of the Code, in a decree for recovery of the goods *in specie*, it was barred by limitation; but that the plaintiff could not, under the circumstances of the case, have a decree for recovery of possession of the goods *in specie*; and he therefore dismissed the suit. The plaintiff then preferred an application to the Full Bench under Section 38 of the Presidency Small Cause Court's Act. The Full Bench agreed with the decision of the Chief Judge on the limitation question, but upon the question whether the plaintiff was entitled to a decree for recovery of possession of the goods *in specie*, there was a difference of opinion among the members of the Bench.

The following two questions were, therefore, referred for the opinion of the High Court:—"(1) Whether the plaintiff, in the circumstances of "this case, is entitled to a decree for recovery of possession of the goods "in question *in specie*? and (2) in the view that the suit is one for compen-"sation or damages, whether the suit is barred by limitation?"

Narayana Rao, for plaintiff.

Venkataramayya Chetti, for defendants.

JUDGMENT.

The right to sue for the recovery of specific moveable property is governed by Sections 10 and 11 of the Specific Relief Act I of 1877. In the present case the goods are in the possession of third parties who purchased them, when sold in execution, under a decree of the Court. The goods are not, and never have been, in the possession or under the control of the defendants. It seems to us that there is no foundation for the contention that the plaintiff is, in the circumstances of this case, entitled to a decree for the recovery of the goods *in specie*. The injustice that might result from giving such a decree is apparent if it is remembered that such a decree may be enforced under Section 259, Civil Procedure Code, by attachment of the judgment-debtor's property and the imprisonment of his person, yet it would be impossible for the judgment-debtor to obey the decree without the assistance of the third parties who are in possession of the goods, which assistance might be refused, or be granted only on ruinous terms. If the goods had been purchased by the defendants and were in their possession, then, no doubt, an action would lie for their recovery *in specie*, but, in the facts of this case, the plaintiff's remedy is by way of damages for the wrongful taking of his goods at the instance of the defendants. A similar **[481]** distinction, in an analogous case, is made in Section 298, Civil Procedure Code. The remedy by way of damages is, in the circumstances of this case, a complete remedy, and, in our opinion, it is the only remedy open to the plaintiff against the defendants.

We answer the first question in the negative.

As to the second question we agree with the Full Bench of the Small Cause Court that the suit is not barred. The suit as framed is one for the recovery of specific moveable property, and therefore, falls under Article 49 of the second schedule of the Limitation Act, which allows a period of three years from the time when the property was wrongfully taken. The taking in the present case was admittedly less than three years prior to the suit. The alternative prayer in the plaint for the value

of the goods must be read as ancillary to the main relief asked for with reference to Section 208 of the Code of Civil Procedure. It does not alter the character of the suit, or bring it within any other category of the schedule.

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22 M. 481=9 M.L.J. 203.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

ANANTANARAYANA AYYAR (*Defendant*), *Appellant v.* KUTTALAM PILLAI AND OTHERS (*Plaintiffs Nos.* 1 *and* 2 *and Supplemental Respondents*), *Respondents.**
[24th, and 28th March and 3rd May, 1899.]

Religious Endowments Act—Act XX of 1863—*Trustees—Dismissal for breach of duty—Failure to submit accounts—Meetings of Committee—Number of members present—Resolution appointing* quorum—*Resolution by three out of seven.*

Though committees constituted under the Religious Endowments Act, 1863, are not strictly corporations, their procedure in matters relating to the management of properties and trustees under their control should be governed by the rules applicable to regular corporations.

In 1879, when a committee consisted of seven members, a meeting was held at which five were present, and a resolution was unanimously passed that at future meetings three should form a *quorum*. This resolution had never been rescinded, and had always been acted upon. In 1895, when the committee also consisted of seven, a meeting was held after due notice to all its members, at which three were present, and a trustee of the temple was, on valid grounds, dismissed from office, and called upon to hand over charge of the temple and its [482] properties. The resolution of dismissal was unanimous and was confirmed at a subsequent meeting:

Held, that the meeting as constituted was competent to pass the resolution removing the trustee.

Whether unanimity of the whole committee might not have been necessary in the event of business having been transacted otherwise than at a meeting: *Quaere.*

Failure on the part of a trustee to submit accounts to the committee is a breach of one of the most important duties cast upon him by law and is sufficient to justify his dismissal.

[R., 39 C. 304 (303)=12 Ind. Cas. 147 ; D., 34 M. 1 (6)=7 Ind. Cas. 754=20 M.L.J. 814=8 M.L.T. 213.]

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Tinnevelly, in original suit No. 48 of 1895.

Suit by three out of four trustees of the temple of Sri Narambunadhaswami at Tiruppudaimaruthur to eject the fourth trustee from the properties of the said temple, and for an injunction restraining him from interfering with the temple, and its properties, for cash in hand, mesne profits and an account. The temple is an institution governed by the Religious Endowments Act, XX of 1863, and is managed by trustees appointed by the Siva committee of the district. The defendant, having refused to recognise the plaintiffs as his joint-trustees, and having otherwise defaulted, was first suspended, and subsequently, in 1895, dismissed from office by the committee, who, at a later meeting confirmed the order of dismissal and called upon the defendant to hand over the temple and its properties. The

* Appeal No. 272 of 1897.

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defendant declined to accept the notice and continued in charge of the temple and in possession of its properties. Dealing with the merits of the dismissal, the Subordinate Judge held that defendant had been guilty of gross default, negligence and disobedience in the matter of keeping and submitting accounts, and also of insubordination, and that he was fully liable to be dismissed. The defendant, however, disputed the power of the committee, as constituted at their meetings, to suspend or remove him, on the ground, *inter alia*, that only three members, and not the whole or a majority of the committee had passed the orders. The committee, at the time of the last-mentioned meetings, consisted of seven members, of whom only three were present when the order of dismissal was passed. It appeared, however, that on 19th March 1879, when the committee also consisted of seven members, a meeting was held at which five members were present, when a resolution was unanimously passed that at future meetings of the committee three members should form a *quorum*. This resolution had never been rescinded or [483] altered; and had ever since been acted upon. The Subordinate Judge held that the order of dismissal had been validly passed, and decreed for the plaintiffs as prayed.

The defendant preferred this appeal.

Sundara Ayyar and *Ramachandra Ayyar*, for appellant.

Hon. *Bhashyam Ayyangar* and *Ramakrishna Ayyar*, for respondents.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The appellant in this case was a trustee of the temple of Narambunadhaswami at Tiruppudaimaruthur, subject to the superintendence and control of a committee constituted under the Religious Endowments Act (XX of 1863). He was removed from the office under a resolution, dated the 24th October 1895, and passed at a meeting of the committee which was convened after due notice to all the members, and at which three of them attended and concurred in his removal, the total number of members constituting the committee being seven. The Subordinate Judge upheld the dismissal. There is no doubt that the dismissal is right so far as the merits go. Admittedly, the appellant sent no accounts to the committee from October 1892. The plea set up by him that a great portion of the accounts was stolen from the temple is obviously unreliable.

This breach alone of one of the most important duties cast upon him by the law would have justified his dismissal. Several other grounds also in support of the dismissal have been established by the evidence.

It was, however, contended on the appellant's behalf that the resolution sanctioning the dismissal was invalid in law. First, because unanimity on the part of all the members of the committee was necessary for a valid resolution: and, secondly, if unanimity was unnecessary, then because the members who passed the resolution did not constitute a majority of the committee.

It is, however, difficult to believe that the learned vakil for the appellant was serious in contending that in the case of a body such as the committee in question unanimity was necessary, since it is elementary law that in the case of persons called upon to exercise powers and functions of a more or less public character, unanimity is dispensed with for the obvious reason that if it were insisted upon, the power of willing and acting on the part of such persons would become impossible.

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[484] As to the second part of the contention *Virasami* v. *Subba* (1) is a direct authority against the appellant. As, however, the question was not discussed there, as the learned vakil strongly urged that the view taken in that case with reference to the present point is opposed to the established legal principle applicable to the matter, and as the point is one of some importance in connection with the working of committees under the Act, it is perhaps desirable to discuss it, though briefly. In the Act just referred to, there are no provisions bearing on the present question. Though committees constituted under the Act are not strictly corporations, there can be no doubt that, with reference to the matter in hand, such committees ought to be looked upon in the light of, and be governed by the rules applicable to, regular corporations, as appears from, among other cases, *Grindley* v. *Barker* (2) where Eyre, C. J., and Buller, J., expressly refer to the existence of such an analogy between corporations and persons exercising powers of a public character.

Now, as to the rules relating to corporations with reference to the present point, the law is stated thus in Kents' Commentaries:—"The same principle prevails in these incorporated societies as in the community at large, that the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular corporate meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the *quorum* may decide. This is the general rule on the subject; and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the Act or charter of incorporation." (Volume II, 13th Edition, pages 292 and 293.)

It is superfluous to say that this statement of the law is amply supported by the authorities cited by the learned author, many of which are decisions of English Courts. As to the distinction, however, between the case of a select body as a board of directors and the case of constituent members, noticed by the learned [485] author, it is to be observed that such a distinction does not appear to have been recognized by the Civil Law, as will be seen from the following passage from Mackeldey's work on that law:—"If not otherwise prescribed this (*i.e.*, the corporate) will is expressed by a resolution of the corporation. But if the constitution has no provisions on the matter, then all the members who have a vote must be convened, and whatever is then determined by a majority of the voters is to be regarded as the united will of the corporation, to which dissenters and absentees must submit." (Translation by Dropsie at page 139.) Nor does Savigny recognize any such distinction in that part of his system of Modern Roman Law, where he deals exhaustively with the topic of juristical persons and cognate matters, inclusive of the subject of majority, and where he points out the error of the notion (which notion is alluded to in the Subordinate Judge's judgment) that under the Civil Law, it was necessary in the case of corporations generally, that a majority of two-thirds of all the members should be present whenever a resolution of a corporation had to be determined by a majority

(1) 6 M. 54 (57).

(2) 1 Bos. & Pul., 229 at pp. 237, 239.

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(see particularly page 244 and note, 250, and 251 and note—Rattigan's Translation of Book II). The distinction in question would seem, therefore, to be more a peculiarity of the English Law than a principle of general jurisprudence. Assuming, however, that it is otherwise, let us consider the validity of the resolution in question on the footing that the law applicable is as stated in the passage quoted from Kent. Now, if a committee under Act XX of 1863, is in the position of the constituent members within the meaning of the passage, the conclusion to be arrived at is simple and clear. The meeting at which the resolution was passed, having, as already stated, been convened after due notice to all the members, and the members that attended the meeting having been of one mind, their resolution must in law be undoubtedly regarded as the resolution of the whole body. But suppose such a committee is to be viewed in the light of a select body, as a board of directors. As only three members were present at the meeting and as that number was less than a majority of the total number of members constituting the committee, the meeting and the proceedings thereof must be held to be invalid, unless the contrary conclusion is sustainable with reference to the resolution of the 19th of March 1879 (Exhibit B) and to the practice introduced thereby as to a *quorum*. This resolution was passed at a meeting at which five **[486]** out of the seven members were present; and it was then settled unanimously that three members should from that time form the *quorum*. The evidence abundantly shows that this resolution has ever since been acted upon. That the committee, as a body resembling a corporation, pessesses, as urged for the respondent, in the absence of any provision on the subject in the Act XX of 1863, implied power to make rules or bye-laws with reference to the matters dealt with in the resolution of the 19th March 1879 was not disputed and cannot be disputed (Lumley on Bye-laws, pages 7-11). This resolution, until it is revoked or altered, must be taken to be a valid bye-law and binding upon all the parties concerned, provided that it does not contravene the law of the land in any respect and provided that it is not unreasonable. No doubt if the rule requiring the presence of a majority of all the members of a select body at a meeting of such a body were an inflexible rule, the resolution of the 19th March 1879 cannot be treated as a good bye-law. But that that rule is not inflexible is shown by *In re Tavistock Ironworks Company* (1). Lord Romilly, M.R., there held that as the articles of association of the company concerned in that case were silent on the point, and as the business of the company had been usually conducted by any two out of a board of six directors, two directors did form a *quorum*. The circumstance that there the practice of two directors conducting business was tacitly adopted, while here the practice of three members doing business was introduced by an express resolution, is, of course, immaterial. The difference, if any, between the two cases, is only such as to make the present a stronger case than the other. As to unreasonableness, there is no ground whatever for saying that the resolution is open to such an objection.

It follows that the resolution of the 19th March 1879 and the practice inaugurated by it are valid, and that the three members who attended the meeting on the 24th October 1895 were perfectly competent to pass the resolution removing the appellant. It is scarcely necessary to say that the present decision applies only to the transaction of business by

(1) L.R. 4 Eq. 233.

the members of a committee at a meeting which is the ordinary and natural mode of ascertaining the corporate will, securing as it does, the advantages and safeguards resulting from personal consultation. Should a committee transact **[487]** business otherwise than at a meeting, whether unanimity is not necessary to render such transaction of business valid, (*In re Great Northern Salt and Chemical Works* (1)), does not arise in this case and need not be considered.

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It remains to notice the cases cited for the appellant. First as to *Cook* v. *Loveland* (2). The master and one warden whose action was there in question had clearly no authority to act as deputies of the whole body, as they were not appointed as deputies. With reference to their position as among the principals no question of a *quorum* at a meeting such as is raised here was or had to be decided there. *Brown* v. *Andrew* (3), cited next, was a case in which the relation of principal and agent, in the strict sense of the terms, undoubtedly existed. The authority given was treated as a special joint authority given to a fixed number of persons who were bound to join. It is, however, noteworthy that Lord Denman, C. J., pointed out that there was no evidence of the course of proceeding on the part of those persons, thus implying that had such evidence been given, the question would probably have borne a different aspect. *Cook* v. *Ward* (4), which was the other case cited, is one in which a delegated authority was again delegated. This latter delegation was, of course, held to be invalid. None of these cases is therefore in point. The legal objection taken to the validity of the resolution removing the appellant also fails and the appeal is dismissed with costs.

MOORE, J.—I concur.

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22 M. 488 = 1 Weir 558 & 821.

[488] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.

RUPPEL (*Complainant*), *Petitioner v.* PONNUSAMI TEVAN AND ANOTHER (*Accused*), *Respondents.** [24th March, 1899.]

Penal Code—Act XLV of 1860, *Sections* 482, 486—*Merchandise Marks Act—Act IV of* 1889, *Section* 15—*Use of counterfeit trade-mark—Prosecution after one year from first discovery of offence—Limitation.*

A complainant having, in 1893, discovered that goods were being sold marked with what was alleged to be a counterfeit trade-mark, called upon the persons so selling to discontinue the use of the said alleged counterfeit trademark and to render an account of sales. The right to proceed further was reserved but no action was then taken. In 1898, upon its being ascertained that the same trade-mark was being used, a prosecution was commenced:

Held, that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time-barred under Section 15 of the Indian Merchandise Marks Act, 1889; and that the complainant must enforce his remedy by civil process.

[F., 4 Bur. L.T. 83 = 12 Cr. L.J. 246 (247) = 10 Ind. Cas. 787.]

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* Criminal Revision Case No. 16 of 1899.

(1) L.R. 44 Ch. D. 472 at pp. 480, 481.
(2) 2 Bos. & Pul. 31.
(3) 18 L.J. Q.B. 153.
(4) L.R. 2 C.P.D. 255.

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22 M. 488 = 1 Weir 558 & 821.

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the proceedings of R. Sivagnanam, Town Second-class Magistrate of Trichinopoly, in calendar case No. 130 of 1898.

Charge of using a false trade-mark and selling goods with a counterfeit trade-mark under Sections 482 and 486 of the Indian Penal Code. The complainant, on behalf of Messrs. McDowel & Co., Madras, alleged that his firm had since 1886 sold cigars, and that they had the exclusive right to the use of the word 'Bahadur' as the trade-mark in respect of their said cigars: that the accused had been offering for sale and selling cigars not of his firm's manufacture under the name of 'Rai Bahadur,' packed in a manner and in boxes similar to those which his firm packed theirs, and had fraudulently appropriated a material and substantial part of his firm's trade-mark. The complainant, in cross examination before the Magistrate, had deposed as follows:—"In 1893 or 1894 I think we noticed Messrs. Ponnusami Tevan & Co. infringing our trade-mark. It was about that period that we [489] noticed the said firm was manufacturing 'Rai Bahadurs.' We then wrote a letter to Ponnusami Tevan & Co., in 1893 or 1894. I do not know that the accused was continuing the 'Rai Bahadurs.' I then believed that he gave up the 'Rai Bahadurs.' Because we wrote a threatening letter to the accused, I believed he gave it up. Exhibit I, now shown me, might be the threatening letter alluded to." After hearing the evidence for the prosecution the Magistrate discharged the defendants under Section 253 of the Code of Criminal Procedure, holding that the resemblance between the two trade-marks was not such as to deceive people and that no case had been made out.

The complainant presented this petition.

Mr. *E. Norton*, for the petitioner.—Under Section 486 of the Indian Penal Code, when proof has been given of the factum of user, the onus is thrown upon the accused to establish his innocence. The Magistrate has erred in holding that the difference between the trade-marks was sufficient to justify an acquittal. Proof of user of a false trade-mark is sufficient, and actual deception need not be shown. The word 'Bahadurs' was essentially the trade-mark of Messrs. McDowell & Co.; and the manner in which the word 'Rai' has been prefixed is sufficient to show a dishonest intent. See *Nallaya Pillai* v. *Rangasami Pillai* (1). It is a fact to be taken into consideration that the respective boxes of the petitioners and of the defendants would never be exposed for sale side by side, and a strict comparison by purchasers would, therefore, never be possible. See *Seixo* v. *Provezende* (2), per Lord Cranworth, L. C., at page 198. Also *Ford* v. *Foster* (3), per James, L J.; and *Wotherspoon* v. *Currie* (4).

Sivagnana Mudaliar, for the accused.—Apart from the great difference between the descriptions 'Rai Bahadurs' and 'Bahadurs,' petitioners knew of the use of the words 'Rai Bahadurs,' by the accused so far back as 1893, and the present charge is therefore barred. (He read Exhibit I.) By Section 15 of the Indian Merchandise Marks Act, no complaint is to be lodged after the expiration of three years of the commission of the offence, or after one year of its first discovery. (On the question of the alleged false [490] trade-mark, he referred to *Leather Cloth Company* v. *American Leather Cloth Company* (5) and *Barlow* v. *Gobindram* (6).)

(1) Criminal Revision Case No. 204 of 1895 (unreported).
(2) L.R. 1 Ch. App. 192. (3) L R. 7 Ch. App. 611 at p. 622.
(4) L.R. 5 H.L. 508 at p. 510. (5) 11 H.L.C. 523. (6) 24 C. 361.

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Mr. *E. Norton*. in reply.—The evidence of the complainant shows that he believed the defendants had ceased to use the mark after the letter of complaint of 1893, to which no reply had been received. Section 15 of the Merchandise Marks Act could not have been intended to apply to a case where it is supposed that the offence has been discontinued, and it is subsequently found that it has been persisted in, in spite of complaint.

JUDGMENT.

It is perfectly clear that the petitioners were aware of the alleged infringement so long ago as 1893, and there is nothing to lead us to conclude that they believed that the manufacture was discontinued and was lately revived. Section 15 of the Merchandise Marks Act IV of 1889 enacts that no prosecution such as the present shall be commenced after the expiration of one year after the first discovery of the offence by the prosecutor. The reason for this limitation is clear.

Ordinarily the infringement of a trade mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature, in its anxiety to protect traders, has allowed of resort to the criminal Courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the criminal Courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction.

On the ground that the prosecution is barred by time, we decline to interfere with the order of the Magistrate, and we dismiss this petition.

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22 M. 491 = 2 Weir 746.

[491] APPELLATE CRIMINAL.

Before Mr. Justice Boddam.

QUEEN-EMPRESS *v.* LAKSHMAYYA PANDARAM.*
[17th March, 1899.]

Evidence Act—Act I of 1872. *Sections* 30, 114. *illus.* (*b*)*—Joint trial—Confession of co-accused—Plea of guilty by one—Evidence.*

On the trial of more persons than one, jointly, for the same offence, where one of them pleads guilty, the person so pleading is no longer on his trial, and cannot be treated as being jointly tried with the others. A confession by that person affecting himself and others cannot, therefore, be taken into consideration as against such others under Section 30 of the Indian Evidence Act.

[**Diss.**, 23 M. 151 (153); **R.**, 23 A. 53 (54).]

APPEAL against the sentence of B. H. Chester, Presidency Magistrate, Black Town, Madras, in calendar case No. 24661 of 1898.

Charge against first and second accused, under Sections 411 and 414 of the Indian Penal Code, of dishonestly receiving and assisting in the disposal of a currency note for Rs. 1,000, knowing it to be stolen property; and against third accused, under Section 381, Indian Penal Code, of theft

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* Criminal Appeal No. 804 of 1898.

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in respect of the same. The first accused pleaded not guilty: the second and third accused pleaded guilty. The third accused had stolen the note in Madras and passed it to the second accused, his brother, who brought it to the first accused at Conjeevaram. The note was cashed for the second accused by the partner of the first accused, at the request of the latter, an entry being made in the books of the firm recording the number of the note and the name of the first accused; and the said partner subsequently passed the note on to the local treasury. The second accused made a statement which incriminated the first accused. In his judgment the Presidency Magistrate referred to that statement, taking it into consideration under Section 30 of the Indian Evidence Act; and he accepted it as true. He convicted first accused and imposed a fine of Rs. 1,000 with six months' rigorous imprisonment in default; and sentenced the second and third accused to rigorous imprisonment for three months and nine months, respectively, and to pay a fine of Rs. 50 each. [492] Compensation amounting to Rs. 1,000 was directed to be paid to the complainant out of the fines.

The first accused preferred this appeal.

Mr. *D. Chamier* and *Venkatasubba Ayyar*, for appellant.—The circumstances under which the first accused cashed the note do not warrant the conviction. Further the chief, if not the only evidence against him, is the statement of the second accused, which the Magistrate accepted as true. That evidence was wrongly relied upon. Under Section 30 of the Indian Evidence Act when more persons than one are being tried jointly for the same offence, the Court may take into consideration a confession made by one of them. Here, the second accused was not being jointly tried with the first accused for he pleaded guilty; and having so pleaded he was no longer on his trial and his confession was not admissible, *Queen Empress* v. *Pirbhu* (1); see also *Queen-Empress* v. *Pahuji* (2) and *Reg.* v. *Kalu Pattil* (3)). Even though the confession of a fellow prisoner be received, it is insufficient in itself to support a conviction (*Queen-Empress* v. *Khandia bin Pandu* (4)). Further, by Section 114 of the Indian Evidence Act, illustration (*b*), the Court may presume, *inter alia*, that an accomplice is unworthy of credit unless he is corroborated in material particulars. Here there was no such corroboration. On these grounds as well as on the evidence it is submitted that the conviction should be reversed.

The Crown Prosecutor (Mr. *R. F. Grant*), for the Crown.

JUDGMENT.

The first accused has been convicted under Section 411, Indian Penal Code, of dishonestly receiving a currency note which was stolen property, knowing the same to have been stolen. He was charged jointly with the second accused, who pleaded guilty and made a further statement which implicated the first accused.

The evidence for the prosecution showed that the note was stolen by the third accused who informed the second that he had found it and asked him to get it cashed in April. In May the first accused took the note to his partner, and it was cashed by him and an entry of the first prisoner's name, the number of the note and the amount given in cash was made in the firm's books. Some months afterwards the partner sent the

(1) 17 A. 524. (2) 19 B. 195. (3) 11 B.H.C.R. 146. (4) 15 B. 66.

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note to the treasury and there it [493] was cashed. The witnesses for the accused proved that the second accused came to the first and asked him to cash the note in the presence of another person. He enquired how the second accused became possessed of it, and being satisfied with his answer went publicly to the treasury, where he was known, and there tried to get it cashed. Having been unable to get it cashed there he went again publicly to his partner and there in the presence of two or three people got the note cashed and handed the money to the second accused who went away with it. The Magistrate appears to have convicted the first accused upon the statement of the second accused, and, contrasting that with the evidence called for the accused, to have disbelieved the latter.

It is to be observed in the first place that, though the statement of an accused person may be considered under Section 30 of the Evidence Act, it is not in fact of equal weight with the evidence of an accomplice and that by Section 114 the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In this case the only part of the accomplice's statement which went to show that the first accused had reason to believe that the note was stolen was not only not corroborated but was distinctly contradicted by the evidence in the case. There was absolutely no evidence given apart from this statement (if it can be considered at all) that the first accused had any reason to believe that the note was stolen. Moreover the statement of the accused was not entitled to be considered even under Section 30, for it follows his plea of guilty and it has been held, as I think rightly, that in those circumstances it ceases to be the statement of a person jointly tried, because the trial ends with his plea (see *Queen-Empress* v. *Pirbhu* (1) and *Queen-Empress* v. *Pahuji* (2)).

The conviction of the first accused is, therefore, wrong. The appeal is allowed and the conviction set aside. The fine if paid must be refunded to the first accused.

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22 M. 494 = 9 M.L.J. 37.

[494] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

ASSAN AND OTHERS (*Defendants Nos.* 5 *to* 8, 10 *to* 13, *and* 15 *to* 17 *in Second Appeals Nos.* 1951 *to* 1955 *and* 1958 *and* 1959 *of* 1897, *and Defendants Nos.* 10 *to* 13, 15 *to* 18, *and* 20 *to* 22 *in Second Appeals Nos.* 1956 *and* 1957 *of* 1897), *Appellants v.* PATHUMMA AND OTHERS (*Plaintiff and Defendants Nos.* 1 *to* 4, 9, 14 *and* 18 *to* 43), *Respondents.**

[17th, 18th, and 21st November, 1897, and 9th January, 1899.]

Limitation Act—Act XV of 1877, *Sections* 4, 14—*Exclusion of time of proceeding* bona-fide *in Court without jurisdiction—Joinder of causes of action—Court Fees Act—Act VII of* 1873, *Section* 28—"*Plaint*"—*Suit filed before period of limitation expired, but stamp duty not paid till afterwards—Muhammadan Law—Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law.*

Two suits were brought for partition of the property of a deceased by his heirs under the Muhammadan Law:—the first, by his widow and six children in the

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* Second Appeals Nos. 1951 to 1959 of 1897.

(1) 17 A. 524. (2) 19 B. 195.

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Court of the Subordinate Judge; the second, by two other children by his first wife, in the Court of the District Munsif, from which Court it was transferred to the Court of the said Subordinate Judge. The Subordinate Judge having ruled that the plaintiffs in each suit were not entitled to sue jointly, the plaints were permitted to be amended. The first plaint was accordingly re-presented in the Subordinate Court as that of the widow; the second, also in the Subordinate Court, as that of the first child of the first wife: and seven further plaints were filed in the Subordinate Court on behalf of the remaining children respectively. These seven further plaints were unstamped. Six of them, presented by the widow's children, stated explicitly that the duty payable thereon was included in that already paid on the widow's plaint, which sum correctly represented the duty payable on the footing that the share of each formed a distinct subject-matter. All the plaints were by order placed on the file of the District Munsif's Court. The plaints were at first treated at the Munsif's Court as being duly stamped: though payment of fresh Court-fees was subsequently ordered after the expiration of the period of limitation. The deceased had died in 1882; the two original suits had been filed in 1893 and 1894, respectively—within twelve years of his death; and the two amended suits and the seven fresh plaints had been filed in December 1894 more than twelve years from his death:

Held, (on the question of joinder), that there was no misjoinder of causes of action. If the suits were viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were competent to sue together in respect of **[495]** what was thus a common injury to them. If, on the other hand, the suits were suits for partition, the plaintiffs were *a fortiori* entitled to join;

(On the question of limitation), that the suits by the two children of the first wife were not barred as they should be treated as a continuation of their original joint claim, which had been instituted in the same Court before the period of limitation had expired:

That where there has been a misjoinder which has precluded a Court from entertaining a suit, the period during which such suit has been prosecuted diligently and in good faith may be deducted in computing the period of limitation: the inability of the Court to entertain a suit combining causes of action which could not be combined, being covered by the words "from other cause of a like nature," —in Section 14 of the Limitation Act:

That with reference to the widow's amended suit, inasmuch as her original suit (on behalf of herself and her six children) had been filed before the period of limitation had expired and had been prosecuted diligently and in good faith the time during which that original suit had been pending must be deducted and her amended suit held to be not barred:

That for similar reasons, a like deduction should be made in favour of the six fresh suits of her children (unless a contrary decision were necessitated by the fact that their plaints had remained unstamped until after the expiration of the extended period of limitation.)

Per SUBRAMANIA AYYAR, J.—That although an amount equal to the fees properly payable in respect of the widow's amended suit and of the six fresh suits filed by her children had in fact been paid on the joint suit originally filed, credit could not be claimed out of that original payment for the Court-fees due on the six fresh suits subsequently instituted. These plaints must, therefore, be considered to have been not duly stamped, if not entirely unstamped, at the time when the period of limitation expired:

That, the said plaints having been filed in time, the fact that they were not duly stamped or were entirely unstamped when the period of limitation had expired, did not render them time-barred; since the plaints must be regarded as having been presented on the day upon which they were filed. It cannot be inferred from the Limitation Act, 1877, that the word "plaint" as used in Section 4, explanation, means "plaint duly stamped." A "plaint" in law means merely "a private memorial tendered to a Court, in which the person sets forth his cause of action: the exhibition of an action in writing." Whether any Court-fee is payable in an action commenced by the plaint, and if so when and how it should be paid, are matters that are foreign to the question whether the document is a plaint or not. The Court Fees Act and the Limitation Act are entirely different in their purpose and scope, and neither can be taken to control or qualify the other.

Per DAVIES, J.—That inasmuch as the order of the Subordinate Judge requiring separate plaints was erroneous it could not operate to enhance the Court-fees truly payable. The true plaints in the case, in so far as stamp duty was

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concerned, were the two joint plaints originally presented. These were filed in time, and were sufficiently stamped. The fees having been paid at the beginning. no question arose as to the insufficiency of stamp duty, and the objection on the ground of limitation was thereby disposed of.

[496] A deceased as well as his paternal ancestors had followed the Muhammadan Law; but his mother had been a member of a tarwad which held property subject to Marumakkatayam Law. On its being contended that in such a case the property of the deceased, whether derived from his father or mother, passed according to the rule of Marumakkatayam Law to his mother's tarwad, and not to his heirs according to the Muhammadan Law:

Held, that the law governing the devolution of the property of the deceased, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law.

Venkatramayya v. *Krishnayya* (I.L.R., 20 Mad. 319) referred to.

[F., 24 M. 361; Appl., 27 B. 330 (333); R., 22 A. 248; 32 A. 469 (474) = 7 A.L.J. 451 = 6 Ind. Cas. 692; 35 C. 728 (735) = 12 C.W.N. 473; 27 M. 77 (79); 31 M. 228 (229) = 18 M.L.J. 16; 32 M. 305 (307) (F.B.) = 6 M.L.T. 129 (130); 4 Ind. Cas. 1081 = 19 M.L.J. 736 = 7 M.L.T. 221; 3 M.L.T. 63 = 123 P.R. 1907 = 82 P.W.R. 1907; 4 O.C. 108 (113); D., 29 B. 219 = 7 Bom. L.R. 90; 23 M. 583 (590); 14 Ind. Cas. 157 (158) = 22 M.L.J. 377 = (1912) M.W.N. 457.]

SECOND appeals against the decrees of S. Subba Ayyar, Subordinate Judge of North Malabar, in appeal suits Nos. 229, 212 to 216, 221, 225 and 226 of 1896, affirming the decree of V. Kelu Eradi, District Munsif of Tellicherry, in original suits Nos. 429, 430, 432, 433 and 434 of 1894, 135 and 136 of 1895; 431 and 435 of 1894.

Suits (nine in number) for partition of property by a widow and her six children, and by two children by a first wife, as heirs of one Pokker, deceased, who had lived subject to Muhammadan Law.

The facts and arguments are fully set out in the judgments.

Sankaran Nayar and *Ryru Nambiar*, for appellants.

Mr. *C. Krishnan*, *V. Krishnasami Ayyar*, *Anantakrishna Ayyar*, and *Govindan Nambiar*, for respondents.

JUDGMENTS.

SUBRAMANIA AYYAR, J.—The facts which have given rise to these second appeals, though complicated, may, so far as the determination of the questions raised in this Court is concerned, be stated as follows: The property in dispute was held by one Pokker, alleged by the contending defendants to have died in 1881. The plaintiffs in the nine suits are the surviving widow of Pokker and her six children by him and his two children by his other wife deceased. They sued for a partition of the property as his heirs under the Muhammadan Law. Originally these had been commenced as two suits. Kunhi Pathumma, the surviving widow of Pokker, and her children sued jointly for their shares of the property, in original suit No. 71 of 1893, on the file of the Tellicherry Subordinate Court, instituted on the 22nd December 1893. Assan and Packichiumma, Pokker's other children, sued similarly for their shares in original suit No. 293 of 1894 in the Tellicherry District Munsif's Court on the 7th of September 1894. The latter suit was, on the 5th October 1894, transferred to the [497] Subordinate Court to be tried with the other suit. Among the objections taken to both the suits in the Subordinate Court by the contesting defendants, one was that the plaintiffs were not entitled to sue jointly as they did. On the 5th December 1894 the Subordinate Judge passed an order holding that that objection was fatal to the entertainment of the suits but permitted the plaints to be amended so as to make each that

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of any one of the plaintiffs therein. Accordingly, within the time fixed by the Subordinate Judge for the amendment, *i.e.*, on the 11th December 1894, the plaint in No. 71 of 1893 was re-presented amended as the plaint of Kunhi Pathumma: while that in No. 293 of 1894 was re-presented amended on behalf of Assan. On the same day, seven separate plaints were filed in the Subordinate Court, namely, one by each of the remaining plaintiffs in the two suits Nos. 71 of 1893 and 293 of 1894. On the next day the Subordinate Judge for the reason that the value of the subject-matter in every one of the nine suits thus filed was below Rs. 2,500, ordered all the plaints to be returned for presentation to the District Munsif's Court. This was done on the 17th December 1894. Two of the said plaints—those of Assan and Packichiumma—were not, however, placed on the file of the District Munsif's Court then. As the said parties had commenced their suit No. 293 of 1894 in that very Court the District Munsif took exception to the order of the Subordinate Judge whereby their plaints were returned, and on the 17th December ordered the same to be taken back. They were, two days later, lodged once more in the Subordinate Court. But on the very next day the Subordinate Judge again returned them for reasons which it is not necessary to refer to. After some intermediate proceedings, also unnecessary to mention, the plaints were re-admitted by the Subordinate Judge on the 25th February 1895 and under the orders of the District Court transferred to the District Munsif's Court, on the file whereof the plaints thus ultimately came for disposal. Among the plaints in these nine cases, seven, *viz.*, the one presented by Packichiumma and the six presented by Kunhi Pathumma's children, were unstamped when presented to the Subordinate Court on the 11th December 1894 and to the District Munsif's Court on the 17th *idem* and remained so till the beginning of 1896. In the view I take of the case of Packichiumma, it is needless to refer to the circumstances connected with the payment of Court-fees in respect of her plaint. In regard to [498] the other six cases, however, it is necessary to enter into the details connected with the matter. Though these plaints were unstamped, each of them stated in explicit terms that the duty payable thereon was included in that paid in Kunhi Pathumma's suit. The particulars of payment therein are—

Before the splitting of the claims under the order of the Subordinate Judge, dated the 5th December 1894—

	RS.	A.	P.
On the 22nd December 1893	32	8	0
On the 10th October 1894	237	8	0
(On account of increase as per Commissioner's valuation).			
On the 12th November 1894	163	8	0
Subsequent thereto on the 17th December 1894	68	4	0
Total ...	501	12	0

This sum of Rs. 501-12-0 represents correctly the amount payable upon the value of the shares of the seven plaintiffs calculating the Court-fees on the footing that the share of each formed a distinct subject-matter. The course adopted in the said six cases with reference to the Court-fees

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as explained above was at first accepted as correct, as will be seen from the endorsements on the plaints by the Head Clerk of the District Munsif's Court bearing date the 17th December 1894, and the documents were treated as duly stamped. But in the beginning of 1896 the District Munsif directed the plaintiffs to pay fresh Court-fees and in compliance with the order they furnished Rs. 416 worth of stamps. The defendants contended that Pokker was not the exclusive owner of the property and that all these suits were barred by limitation. In the Lower Courts the plea of limitation was based on the allegation that the suits were not instituted within 12 years of Pokker's death in 1881. But the Lower Courts having found that Pokker died in 1882 exclusively entitled to the property, the plea was sought to be supported here on other grounds. It was urged that the period taken up in the litigation mentioned, up to the 12th December 1894, cannot, under Section 14 of the Limitation Act, be allowed in favour of the plaintiffs in computing the period of limitation, and, therefore, all the nine suits should be held to have been barred when the plaints were presented in the **[499]** District Munsif's Court on the 17th December 1894, and, further, even if that time is to be allowed, in at least seven of the cases, the plea must prevail inasmuch as the plaints in them remained unstamped till after the expiry of the limitation period.

Now, the two main points arising for determination are whether any, and if so which of these suits are barred, and what is the law governing the devolution of the property. Before entering into the consideration of the questions it is necessary to advert to the nature of the claim made by the plaintiffs. For it is the erroneous view of the Subordinate Judge in the matter that has contributed largely to the subsequent troubles and difficulties. Now what was the nature of the claim? Whichever of the two views that can possibly be taken is adopted, there was no misjoinder of causes as was held by the Subordinate Judge. If the suits be viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were undoubtedly competent to sue together in respect of what was thus a common injury to them. (Paragraph 2, rule 80, 'Dicey on Parties' page 380, and the cases referred to in illustration of that paragraph in page 381). If, on the other hand, they were suits for partition, which, in my opinion, they really were, *a fortiori* the plaintiffs were entitled to join. For in a suit for partition each co-owner, as against another, occupies in himself the role of plaintiff as well as defendant. It is in consequence of this reciprocal character of the right which co-owners have in the matter of partition, that even those who are not actual plaintiffs can claim that their shares also be allotted to them by the decree (Domat's 'Civil Law', paragraph 2757, *Sheik Khoorshed Hossein* v. *Nubbee Fatima* (1)). How, then, can a suit, in which some of the co-owners concerned in the division seek as plaintiffs to enforce it, be objected to on the ground of such joinder? In such a case the reciprocal character of the right of the parties renders the cause of action the same within the meaning of Section 26 of the Code of Civil Procedure, each party, however, being entitled to separate relief.

Such being the nature of the claim, original suit No. 293 of 1894, was not open to the objection of misjoinder of causes and having regard to the substance of the proceedings, I think that, notwithstanding the presentation of two plaints by Assan and **[500]** Packichiumma in pursuance of the

(1) 3 C. 551.

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Subordinate Judge's erroneous order, the litigation, in so far as they are concerned, ought to be held to be but a continuation of their original joint claim. *Cf. Beru Mahata* v. *Shyama Churn Khawas* (1). In this view their case is clearly not barred by limitation, as the suit was instituted within twelve years from the date of Pokker's death, as found by the Lower Court.

Turning now to the remaining seven suits, the matter is not so clear. The plaintiffs therein having given up their suit in the Subordinate Court and instituted these others in a different Court, the latter suits cannot possibly be looked upon as a continuation of the joint suit in the Subordinate Court. In discussing the point of limitation in these cases it is important to bear in mind the effect as between the parties of the order of the Subordinate Judge that suit No. 71 of 1893 was unsustainable on the ground of misjoinder of causes. The appellants, whose contention to that effect prevailed under that decision, cannot, as against their adversaries, who accepted and acted upon it, be heard to say that the decision is not correct. Taking, therefore, that in No. 71 of 1893 there was a misjoinder which precluded the Courts from entertaining that suit, can the period during which that suit was prosecuted diligently and in good faith, be deducted in calculating the period of limitation with reference to the present suits? In other words, is the inability of a Court to entertain a suit combining causes of action which could not be combined, covered by the words "from other cause of a like nature" in Section 14 of the Limitation Act? That it is so seems to my mind to follow almost necessarily from the recent Full Bench decision in *Venkiti Nayak* v. *Murugappa Chetti* (2). There it was held that the time spent in the due prosecution of a suit which failed for the reason that in the plaint therein matters that could have been joined with leave obtained under Section 44 of the Civil Procedure Code had been joined without such leave, is allowable under the provision of the law referred to. When the provision thus applies to a proceeding which becomes abortive owing to an unauthorized joinder of matters—the joinder whereof the Court on application of the parties could have authorized—how can it consistently be held that the provision does not apply to a proceeding which fails on account of **[501]** a misjoinder that the Court could not sanction and which is prohibited by the law absolutely? Compare *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (3). That original suit No. 71 of 1893 was prosecuted in good faith is unquestionable. And as there was no suggestion and there are no reasons for thinking that the plaintiffs did not prosecute it diligently, the time during which that suit was pending must be deducted and Kunhi Pathumma's present suit held to be in time. A similar conclusion should be arrived at in her children's suits also unless the fact that the plaints therein remained unstamped until after the expiry of the limitation period necessitates a contrary decision.

This leads to the other contention urged as to limitation. No doubt the plaintiffs had, when they presented the plaints in the Munsif's Court, paid, jointly with their mother on account of Court-fees, sums aggregating to an amount equal to that properly payable by them in respect of their shares, taking each share as a distinct subject-matter. But no authority has been shown for holding that they were entitled to claim, as they did, credit for the Court-fees paid before the plaints were put in, *i.e.*, more than three fourths of the total amount. These plaints, therefore, have to

(1) 22 C. 483. (2) 20 M. 48. (3) 23 C. 821.

be considered to have been not duly stamped, if not entirely unstamped, when the period of limitation expired. In this view the present cases cannot, in my opinion, be distinguished from *Venkatramayya* v. *Krishnayya* (1), cited for the appellants, and they should be held to be barred by limitation if the decision just referred to is to be followed. It, however, is in conflict with the decision in *Papamma Rao* v. *Sitaramyya* (2). In the latter case, the plea of limitation, raised with reference to a set-off claimed in the written statement of the defendant was similarly based on the fact that the written statement which in regard to the amount of set-off was the plaint (*Chennappa* v. *Raghunatha* (3)) was not stamped as it should have been until after the period of limitation in respect of the set-off had expired. Parker and Best, JJ., dealt with the point thus : "We now "come to the defendant's claim against the plaintiff for the set-off. We "attach no weight to the objection that as no Court-fee was paid on the "written statement when it was first filed, it cannot be levied afterwards. "It was open to the Courts so to levy [502] it, and the omission to do so "for a considerable time was as much the mistake of the Court as the "default of the party. The written statement was put in on the 1st of "August 1891, though the Court-fee was only levied in 1892. But the "decisions in *Chennappa* v. *Raghunatha* (3) and *Patcha Saheb* v. *Sub-"Collector of North Arcot* (4) are authority for holding that though the "deficient stamp duty was levied afterwards, the claim must be regarded "as presented on the day on which it was put in. No bar of limitation, "therefore, arises."

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And for my own part, with all deference to my learned colleagues who took part in the case relied on by the appellants, I am unable to agree with their conclusion. There is no warrant in the Limitation Act itself for inferring that the term "plaint" in Section 4, explanation, means "a plaint duly stamped." According to the well-known rule of interpretation, words must, in the absence of any indication to the contrary, be understood in their ordinary and natural acceptation. Plaint, in law, means (and has, since before the days of Blackstone, whose phraseology in regard to the explanation of the term has been accepted by Lexicographers, meant) nothing more than "a private memorial tendered to a Court in which the person sets forth his cause of action ; the exhibition of an action in writing." In the absence of a distinct and direct statutory definition to the contrary we have no right to put a more restricted construction on the term. Certainly, whether any Court-fee is payable in an action commenced by the plaint and, if any is payable, when and how it should be paid, are manifestly matters that are entirely foreign to the question whether the particular document is a plaint or not. It is, however, proposed that Section 4 must be read with Section 28 of the Court Fees Act. No doubt it is true that in construing an Act, provisions of other statutes which are in *pari materia* may be referred to. But when the two enactments are not in *pari materia* how can one be taken to control and qualify the other ? In the present instance the two enactments are quite different in their purpose and scope. See *Dayachand Nemchand* v. *Hemchand Dharamchand* (5). The subject of Court-fees, with which one is concerned, evidently has no real or necessary connection with the limitation of suits and proceedings to which [503] the other is exclusively devoted. If authority were needed against

(1) 20 M. 319. (2) Appeal No. 159 of 1893 (unreported). (3) 15 M. 29 (34).
(4) 15 M. 78. (5) 4 B. 515 (526).

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reading together provisions of such unconnected and divergent statutes, reference may be made to *Eyre* v. *Waller* (1) and particularly the judgment of Wilde, B., who, dealing with a similar point, observed :—" With "respect to the other Acts referred to in which the word 'Check' is intro-"duced, they are not in *pari materia* and have a totally different scope. "Nothing can be more dangerous than to construe one statute by another, "especially when we consider the mode in which the statutes are framed in "the present time." Attention may also be drawn to *Knowles and Sons* v. *Lancashire and Yorkshire Railway Co.* (2) where Lord Halsbury, L.C., observed :—"I, for myself decline to consider any other statute proceed-"ing on different lines and including different provisions . . . . I do not "think one gets any help from the construction of other statutes passed "at different times and in pursuance of different lines of thought." I, therefore, find it impossible to see any justification for interpolating, as the case relied on by the appellants in effect assuredly does, in Section 4, after the word "plaint" and before the words "is presented," a whole "clause, *i.e.*, duly stamped in accordance with the law for the time "being in force." Such an interpolation must, in not a few cases, cause great hardship, seeing the doubt and difficulty which not infrequently arise with reference to the determination of the exact amount of the Court-fee payable in particular instances and considering, especially, the mistakes which are often committed by the Courts themselves in regard to the matter. I need hardly say that the present cases furnish a remarkable illustration of the disastrous consequences which would be caused undeservedly to suitors by adopting the construction proposed. By the memoranda attached to each of the plaints in explanation of the circumstance why the plaints themselves were not stamped the attention of the Court was admittedly drawn to the fact that the plaintiffs treated the plaints as duly stamped for the reason stated by them—which no doubt was honestly taken by them to be good. Had the Court then informed them, as it ought to have done, that their view was wrong, they certainly would have at once furnished the requisite stamps, as they did when required to do so some months later. But the plaints were received without objection, and, notwithstanding that the plaintiffs had [504] eventually to pay, as already mentioned, double the amount, owing to the unfortunate order of the Subordinate Judge referred to, there is no alternative left but to dismiss the suits—according to the decision relied on by the appellants. And the plaintiffs must suffer, though they began the litigation in proper form and in the proper Court some nine months before the expiry of the twelve years prescribed by the law, solely and simply on account of the error committed by the Court in considering, in the first instance, that the stamp duty in respect of the plaints had been duly paid. A result so unjust ought surely to be avoided if it can be reasonably avoided. Certainly such a result would be avoided if the operation of Section 28 of the Court Fees Act is confined within its legitimate limits and the section held to mean that so long as any portion of the Court-fees under the Act in respect of a document remains unpaid, the document shall not, for the purposes connected with the Court Fees Act be regarded as valid, although it had been once mistakenly treated with reference to the Court-fees as valid. It is not easy to see why an interpretation so sweeping and drastic as that suggested, tending as it does to deprive the parties of their substantive rights, should

(1) 5 H. & N. 460 at p. (464). (2) L.R., 14 App. Cas. 248 (253).

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be put on what is altogether a mere fiscal enactment; particularly when it is in the power of the Courts to enforce payment up to the very last moment of the smallest fraction of the fee remaining due. It is rather strange that the very clause which is now sought to be interpolated in Section 4 should have been once introduced into it by the Legislature but struck out when the Bill became law, on the ground of the hardship it would cause. (See Report of Select Committee, dated the 13th June 1897.) As to the argument drawn from Section 582A of the Code of Civil Procedure, I cannot see how that provision, enacted, many years after the passing of the Limitation Act and having no reference to suits, can be taken to explain the law as to plaints laid down in the prior enactment. It remains to add that the view which I take, following the decision of Parker and Best, JJ., already referred to, is supported also by *Moti Sahu* v. *Chhatri Das* (1), neither of which decisions appears to have been brought to the notice of the Court when the ruling in question was given.

The other main point for determination in the cases is as to the law governing the devolution of the disputed property. The [505] conclusion of the Lower Courts that Pokker's paternal ancestors and Pokker himself had all along been following the Muhammadan Law was not, and could not have been, impeached considering the satisfactory evidence on which it rests. The learned vakil for the appellants, however, contended that Packichi, Pokker's mother, having been a member of a tarwad which held property subject to Marumakkatayam rules, even the exclusive property of Pokker, whether derived from his father or mother, passed according to the rule of that system to his mother's tarwad but not to his heirs according to the Muhammadan Law. Though the Marumakkatayam Law applies to joint property held by a Mopla as a member of a tarwad, it does not follow that it necessarily applies to property not so held. Now there can be no doubt that even in the case of Moplas of North Malabar the Muhammadan Law, as the law of their religion and their original law, is their general law, the Marumakkatayam rules in regard to Moplas who follow them, being rules of later adoption [Logan's 'Manual,' Vol. I, page 273] and forming, so far as they go in the case of such persons, exceptional rules modifying the general law (compare *Kunhi Bivi* v. *Abdul Aziz* (2)). And though where a custom is proved to exist it supersedes the general law, yet inasmuch as it is the latter that still regulates all beyond the custom, (*Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (3)), the Muhammadan Law must be taken to govern the devolution of the separate and exclusive property of a Mopla, notwithstanding that he is a member of a tarwad owning property subject to Marumakkatayam Law, except where it is shown that the Muhammadan Law has, even in regard to the separate and exclusive property of such a person, been superseded by rules established by usage or otherwise. That in the absence of such special rules, the Muhammadan Law ought, in cases like the present, to prevail on principle and in justice becomes evident if the matter is considered somewhat closely. Now Pokker's father was unquestionably subject entirely to the Muhammadan Law. Consequently Packichi (unless there were usage to the contrary and none was set up) must, under that law, be held to have acquired, by virtue of her marriage, a right to claim a share in her husband's estate if she survived him. And as under the said law the right to inherit

(1) 19 C. 780. (2) 6 M. 103. (3) 12 M. I. A. 523 (542).

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is mutual in the case of Moslem spouses, as in the present instance, [506] (Amiralli's 'Muhammaddan Law,' Vol. II, pages 118 and 158), it must be conceded that Packichi's husband, for his part, became, on his marriage, entitled to claim a share in her exclusive estate if she pre-deceased him. Again, as regards Moslem parents and issue also, since the right of inheritance is reciprocal (Wilson's 'Digest of Muhammadan Law,' page 79) it must be held that Packichi possessed the right to inherit her share of the separate exclusive property left by any of her children dying in her life-time and similarly her children surviving her had a right to take by inheritance shares in her separate and exclusive estate. To hold that Packichi did possess a title to claim shares as widow or mother but that the husband and the children did not possess corresponding rights in respect of her separate and exclusive estate would be not only quite anomalous but highly inequitable. It follows, therefore, that the law governing the devolution of Pokker's property, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law. The conclusion of the Lower Courts on this point also is, in my opinion, correct.

I would, therefore, dismiss the appeals with costs of respondents other than Kunhamad Haji.

DAVIES, J.—The question of limitation raised in all the appeals excepting 1951 and 1956 has arisen solely through the Subordinate Judge's erroneous order requiring separate plaints to be put in. The result has been that the disposal of the cases has been greatly delayed owing to their being taken out of his jurisdiction, that the plaintiffs have had to pay Court institution fees twice over, and that their cases have been unnecessarily laid open to attack on the ground (1) that the present plaints were not filed in time, and (2) that when filed they were not duly presented owing to their not being properly stamped. Neither of these points could have been taken, had the Subordinate Judge proceeded, as he ought to have done, with the trial of the cases.

As to the first point I agree with my learned colleague that the plaintiffs are entitled to the benefit of Section 14 of the Limitation Act, and so, excluding the time they were before the Subordinate Judge, they were well within the limitation bar when they filed their present plaints.

As to the second point, while I also agree that the objection fails, it is on different grounds from those adopted by my learned [507] colleague. I am unable to agree with him that the decision in *Venkatramayya* v. *Krishnayya* (1) passed by Mr. Justice Shephard and myself is wrong, and if it was necessary I should be prepared to support that decision by further reasons now. In my opinion, however, that ruling does not affect the present case. There, the fact was that the insufficiently-stamped plaint was not received, filed or acted upon by the Court, through mistake or inadvertence, but was at once returned to the plaintiff as not being properly stamped. Here, the Court at first accepted and filed the plaints as being sufficiently stamped (apparently allowing the plaintiffs credit for the duties they had paid on the joint plaints) and it was not until more than a year afterwards that the Munsif came to the conclusion that a mistake had been made and directed further fees to be paid. That order was forthwith complied with by the plaintiffs and thereupon the plaints, under the proviso to Section 28 of the Court Fees Act, became " as valid

(1) 20 M. 319.

"as if they had been properly stamped in the first instance." But the plaintiffs need not rely on even this protecting clause, if, as I think, their two joint plaints originally presented should be treated as the true plaints in the case, so far as the question of stamp duty is involved, and the subsequent ones as superfluities, because those plaints were admittedly sufficiently stamped. The direction of the Subordinate Judge to split them up, now that we find it was a wrong direction, cannot still operate to enhance the Court-fees truly payable. These were paid at the beginning, so that I hold no question arises as to the insufficiency of stamp duties. This disposes of the appellant's objection on the score of limitation. In other respects, I concur in the judgment of my learned colleague and to the dismissal of these second appeals with costs as directed.

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22 M. 508 (P.C.) = 1 Bom. L.R. 394 = 3 C.W.N. 485 = 26 I.A. 101 = 9 M.L.J. 147 = 7 Sar. P.C.J. 516.

[508] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Macnaghten, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

PRANAL ANNI (*Defendant*), *Appellant v.* LAKSHMI ANNI AND OTHERS (*Plaintiffs*), *Respondents.* [14th February and 4th March, 1899.]

Registration Act—Act III of 1877—*Registration—Unregistered agreement incorporated into a judicial proceeding.*

A prior suit between the same parties, now contesting the right to part of an ancestral estate, claimed another part of the same estate, without comprising the lands now in suit, which, at the time when the first suit was brought, were outstanding under a mortgage. A decree had been made by consent, excluding the lands now sued for. The defendant's case was that the lands now claimed, together with those decreed by consent, had been made the subject of a compromise of which the terms had been stated in two written agreements not registered. Also, that according to the compromise each of the parties was to take a moiety of the whole estate. Each had obtained possession; but the decree was limited to the part of the estate for which the prior suit, then disposed of, was brought; and only one of the agreements—that one which related to the lands then in suit—was presented to and accepted by the Court which made the consent decree:

Held, that this agreement had a different effect from the other one, as it constituted a step in a judicial proceeding, and did not require registration. The order was pronounced in terms of it. But as regarded the lands now in suit, excluded as they had been from the decree in the former suit, the defendant's title to them had been left to stand or fall by the other unregistered document. The latter by the Registration Act, 1877, conferred no title, and this defence failed.

[**F.**, 29 M. 365 (366); 33 M. 102 = 3 Ind. Cas. 701 = 20 M.L.J. 20 (32) = 6 M.L.T. 313; **R.**, 31 A. 13 = 5 A.L.J. 717 (721) = A.W.N. (1908) 264; 33 A. 728 = 8 A.L.J. 918; 30 C. 783 (787); 35 C. 837 (841) = 7 C.L.J. 492 = 12 C.W.N. 849; 35 C. 1010 (1012) = 8 C.L.J. 90 = 12 C.W.N. 854; 36 C. 193 = 5 C.L.J. 611 (636); 25 M. 7 (14) = 11 M.L.J. 370; 31 M. 330 (333) = 18 M.L.J. 16-N = 3 M.L.T. 377; 1 C.L.J. 388 (406); 9 C.L.J. 16 (19) = 13 C.W.N. 217 = 5 M.L.T. 274 = 1 C.L.J. 96 = 13 C.W.N. 226; 27 P.R. 1906 = 11 P.L.R. 1906; 14 C.W.N. 874 = 6 Ind. Cas. 443 (444); 3 N.L.R. 72 (78); 4 O.C. 78 (81); **Expl.**, 28 A. 78 (79) = 2 A.L.J. 564 = (1905) A.W.N. 195; 36 M. 46 (52) = 12 Ind. Cas. 317 = 21 M.L.J. 870 = 10 M.L.T. 232 = (1911) M.W.N. 265; **D.**, 5 C.L.J. 15 (17).]

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22 M. 508 (P.C.) = 1 Bom. L.R. 394 = 3 C.W.N. 485 = 26 I.A. 101 = 9 M.L.J. 147 = 7 Sar. P.C.J. 516.

APPEAL from a decree (26th January 1894) affirming a decree (30th April 1892) of the Subordinate Judge of Kumbakonam.

The suit out of which this appeal arose was brought in 1891 by three collateral relations of the grandfather of the defendant, now appellant, Pranal Anni, who was the grand-daughter, through a daughter, of the last male owner of the lands now in suit. The latter died in 1872, and his widow, daughter, and mother had the estate for their lives in succession. As reversioners, the plaintiffs, Varadaraja Mudali (who, dying, pending this appeal, was represented by Lakshmi Anni), Srinivasa Mudali, and Manikka Mudali, sued in 1885 to obtain a decree for the proprietary right [509] in the property by inheritance on the death of the said mother. From their suit they excepted the part of the property which was claimed in the present suit, it having been then outstanding under a mortgage to one Patra Chariar. Besides other defences (including one under Section 43 of the Code of Civil Procedure) Pranal Anni, then a minor, represented by her husband and guardian Venkataranga Mudaliar, set up the following :—That in the suit of 1885 it had been agreed between the parties that, in consideration of the plaintiffs' acknowledging the defendant's title to half of the whole estate, the defendant should acknowledge the title of the plaintiffs to the remaining half. A razinamah upon this was executed on the 16th January 1886 and filed in the Court on the 18th January; and a decree in March 1886 was passed in accordance therewith. That, in addition, another deed of even date was executed by the defendant's guardian relinquishing all her rights to one-half of the whole estate; and it was alleged that this had been carried out by giving possession. The Subordinate Judge found in favour of the plaintiffs. He considered that the not filed and unregistered agreement, dated the 16th January 1886, although it divided all the estate between the parties, was inoperative to confer title and inadmissible. He decided that Section 43 of the Code of Civil Procedure did not apply and decreed the claim.

The High Court, on the following grounds, dismissed the appeal :—

"We are clearly of opinion that as at the time when the previous "suit was brought the property now in suit had been conveyed to Patra "Chariar, Section 43 has no application.

"The only other question raised was that by the document of the "16th January 1886 a partition of the same land was effected. The docu-"ment was not registered and the Subordinate Judge was right in holding "it inadmissible in evidence."

Mr. *J. D. Mayne*, for the appellant, argued that due weight had not been given to the fact of the razinamah, filed on the 18th January 1886, not having required registration inasmuch as it was part of the judicial proceedings.

Mr. *J. H. A. Branson*, for the respondent, was not called upon.

Their Lordships' judgment, on the 4th March, was delivered by LORD WATSON:—

JUDGMENT.

[510] Ramasami Mudali, of Kappur, in the presidency of Madras, a Hindu, subject to the Mitakshara law, died in the year 1872, leaving landed estates, part of which are the subject of the present litigation. He left no male descendant, but was survived by a widow, a daughter

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and also by his mother. His widow, his daughter, and his mother, successively took a female estate in the lands which he left; and his mother, who was the last taker, died in December 1883. On her death, the lands were taken possession of on behalf of the present appellant, then an infant, who is the grand-daughter of the deceased, being the only child of his daughter.

On the 28th January 1885 a suit was raised in the Court of the Subordinate Judge of Kumbakonam against the appellant, then a child eight years of age, as represented by her testamentary guardians, and also against four other defendants, at the instance of Varadaraja Mudali, now deceased, and the present respondents Srinivasa Mudali and Manikka Mudali, who alleged that they were the reversionary heirs of Ramasami. In their plaint, the reversionary heirs concluded for decree against the present appellant and her guardians for possession of certain lands which are not the subject of the present controversy; but it expressly excluded certain other lands, which had admittedly been the property of the deceased Ramasami, and had also been taken possession of on behalf of the appellant as part of the deceased's succession. These lands were purposely excluded from the plaint because the plaintiffs, the reversionary heirs, had, on the 30th December 1884, conveyed their interest in them to one Vijayaraghava Patra Chariar for the sum of Rs. 4,000, in order to provide themselves with funds to meet the expenses of litigation.

The suit of 1885 was, in so far as it concerned the interests of the plaintiffs and of the present appellant, brought to an amicable conclusion; and the present appeal turns upon the effect of the mutual arrangement or compromise which was then made. That arrangement was embodied in two deeds, which bear the same date, the 16th January 1886, the one being a razinamah, and the other an agreement, or, as it is entitled, an 'agreement of union.'

By the deed last mentioned, the agreement of union between the plaintiffs on the one hand, who now are, or are represented by, the present respondents, and the appellant who was then, being still a minor, represented by her husband and guardian, Venkataranga [511] Mudaliar, on the other hand, it was agreed that the second contracting parties should have and retain one-half share of the lands which were claimed from the appellant and her guardians in the suit of 1885, and should also have or retain one half share of the lands which had been excluded from that suit, and had been conveyed to Vijayaraghava Patra Chariar. The deed of agreement was not produced in the suit of 1885, and was not submitted to the Subordinate Judge Kumbakonam, before whom that litigation depended. It was not registered in accordance with the provisions of the Registration Act III of 1877, although it professes to deal with the title to immoveable property, which is admittedly beyond the value of one hundred rupees.

The second document executed by the same parties, the razinamah, was not registered in terms of the Act of 1877, but it was produced in the suit of 1885; its terms were considered in a judgment delivered by the Subordinate Judge of Kumbakonam on the 31st March 1886; and they were made the foundation of an order passed by the learned Judge, the parties to the document having concurred in moving "that a decree may "be passed in accordance with the razinamah which they have presented "under Section 375 of the Code of Civil Procedure, after settling."

The razinamah had incorporated with it four schedules of lands, marked, respectively, A, B, C, and D; Schedule D containing a description

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of the lands which had been expressly excluded from the suit of 1885, and of no others. In the body of the document, the parties, first, set forth in detail the lands as to which they were in controversy in the suit of 1885, and concluded by stating that they had agreed each to take a certain share of these lands and their produce, "in full satisfaction of all claims "within the 15th of Panguni (27th March 1886) next; and that both "the parties shall bear their respective costs of this suit." In the second place, the document set forth as follows:—"Remarks.—Not only have "we, on this date, entered into a union agreement in regard to the land, "&c., referred to in the plaint in this suit, and described in Schedule D "hereof, and divided thereunder the said lands into two equal shares "between us, but a deed of release has also been taken from the seventh "defendant's (present appellant's) guardian in relinquishment of the "right possessed by the seventh defendant (present appellant) to the "said half share of lands."

[512] In the judgment delivered by him on the 31st March 1886, the Subordinate Judge, having the razinamah before him, treated the first part of it as the only portion of the contents of the document with which he was desired by the parties to deal. In giving effect to its terms, the learned Judge observed:—"The seventh defendant (present appel- "lant) is her only daughter (*i.e.*, of Ramasami's grand-daughter) and she "and the plaintiff have put in a razinamah in respect to items 1, 3, 5 "and 7, and a decree in its terms has been passed." It is admitted that items 1, 3, 5 and 7, specified by the learned Judge, were the lands claimed from the present appellant in the suit of 1885. The learned Judge, plainly, did not understand that he was asked by the parties either to consider or to give effect to the terms of the compromise which the parties narrated, by way of remark, that they had made with respect to the lands contained in Schedule D of the razinamah, which are the subject of this appeal. Accordingly, the order passed by him did not include, and had no reference to these lands.

The fact has not been disputed that at, or shortly after, the execution of the two deeds of the 16th January 1886, the parties acted upon the whole of the mutual agreement contained in or narrated by those deeds; that they each took one-half share, not only of the lands in controversy between them in the suit of 1885, but of the lands excepted from that suit, as to which they are in controversy in the present case. The appellant was permitted to enter into possession of her half share of all those lands; and whilst the respondents, the reversionary heirs of Ramasami, do not challenge her title to one-half of the lands for which they sued her in the action of 1885, they claim, in this action, to have right to the half which she possessed of the lands excluded from that action. and described in Schedule D of the razinamah. The only defence which their Lordships are asked to sustain on behalf of the appellant is mainly, if not wholly, founded upon the terms of the two deeds of 16th January 1886, and of the proceedings which followed upon them.

There are two suits, subsequent to these proceedings for compromise, which it is necessary to notice, although they do not materially affect the question which their Lordships have to decide. In both these suits, it was the interest of the parties to this appeal to defeat the claims of the plaintiffs, because these, if successful, [513] would have carried off the whole or part of the lands which the present parties had chosen to treat as belonging to one or other, or both of them.

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In 1886, a suit was brought against the parties to this appeal, by Kappachi Anni, the elder sister of Ramasami, who claimed his estates as his reversionary heir, and pleaded that the proceedings of the defendants with a view to compromise had been fraudulent. The suit was dismissed, with costs by the Subordinate Judge of Kumbakonam on the 7th May 1887, and his decree was allowed to become final.

In the year 1888, Vijayaraghava Patra Chariar sued the parties to this appeal for the enforcement of the sale-deed which he had obtained, in December 1884, from the reversionary heirs, of their interest in the lands which are the subject of this appeal. The parties whom he called as defendants joined in defence to the action, and set up the division of the property between them under the compromise of January 1886. The Subordinate Judge, on the 6th November 1889, held that the transaction which the plaintiff sought to enforce was one not of sale but of loan, and gave him decree for Rs. 1,300. On appeal to the High Court, the decree was varied by increasing the sum awarded to Rs. 4,000.

Although the mere statement of the facts of this appeal has necessarily occupied some time, yet the questions to which these give rise lie within a very narrow compass. The respondents rest their claim to possession of the lands in dispute upon their title as the reversionary heirs of the deceased Ramasami; and the appellant does not, in this appeal, defend her possession, except upon the ground that she, as in a question with the respondents, derived a valid title from the compromise embodied in the razinamah and agreement of union, and to the effect which was given to the razinamah by the Subordinate Judge Kumbakonam, in the suit of 1885.

It is sufficiently obvious that, in maintaining that defence, the appellant can derive no aid from the terms of the agreement of union. The document has not been registered under the provisions of Act III of 1877; and therefore its stipulations are ineffectual in law to create in favour of the appellant any right, title, or interest to or in the lands in dispute.

The razinamah was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does **[514]** not, in their Lordships' opinion, apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The razinamah, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both parties to this appeal who gave their consent to it.

If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken either in the razinamah or in the judicial order which gave

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effect to it. The razinamah merely referred, by way of remark, to the lands now in dispute; and the Judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in Schedule D of the razinamah. So far as regarded these lands, the compromise was not submitted to the learned Judge, but was deliberately left by the parties to stand upon their unregistered agreement of union.

For these reasons, which are substantially the same with those assigned by both Courts below, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay the costs of the second and third respondents who defended this appeal.

Appeal dismissed.

Solicitor for the appellant : Mr. *R. T. Tasker*.
Solicitors for the respondents : Messrs. *Burton, Yeates & Hart*.

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22 M. 515 (P.C.) = 1 Bom. L.R. 850 = 26 I.A. 55 = 7 Sar. P.C.J. 531.

[515] PRIVY COUNCIL.

PRESENT :

Lords Watson and Hobhouse and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

SUNDARALINGASAMI KAMAYA NAIK (*Plaintiff*), *Appellant v.* RAMASAMI KAMAYA NAIK (*Defendant*), *Respondent.* [17th February and 11th March, 1899.]

Hindu Law—Customary law of inheritance of certain zemindaris in and about Madura.

The principal issue on this appeal was whether the defendant was entitled, by a custom prevailing in the Saptur zamindari, and in other zamindaris held by zamindars of the same caste connection in Madura, and neighbouring districts, to inherit the impartible raj estate of that, the Saptur, zamindari in preference to the plaintiff. Both the parties were sons of the late zamindar, being halfbrothers, sons of their father by different mothers. The plaintiff was the elder of the two, but the mother of the younger had been married by the zamindar before his marriage with the mother of the elder. In virtue of his seniority the elder brother claimed. The younger defended the suit on the title that his mother's marriage with the Raja had preceded the marriage of the plaintiff's mother, alleging the custom to prevail in the zamindari as above stated.

The Courts below, having considered the evidence, found that the custom was proved, in concurrent judgments :

Held, that no error having been shown, and the Courts having decided with reference to what was laid down in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (14 M.I.A. 570) as to the requisities for the proof of such a custom, the findings below were conclusive as to its existence.

APPEAL from a decree (2nd March 1894) of the High Court at Madras affirming a decree (19th December 1890) of the Subordinate Judge of Madura, dismissing the appellant's suit.

The appellant and respondent were the sons of Nagayasami Kamaya Naiker Avargal, the late zamindar of Saptur in the Madura district, an impartible zamindari descending to a single heir. The zemindar died on the 14th October 1886, leaving three sons, two born of his wife Muthuvirammal, who was fourth in the order of the wives married by him, and

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22 M. 515 (P.C.) = 1 Bom. L.R. 830 = 26 I.A. 55 = 7 Sar. P.C.J. 531.

a third son born of his wife who was sixth in that order. This last-mentioned son in date of birth preceded the other two; and on the ground of his seniority in age claimed the estate as plaintiff, now appellant.

On the death of the father Nagayasami I, the elder of the two sons born of the fourthly-married wife, Muthuvirammal, such elder [516] of the two being named Nagayasami also, succeeded as zemindar. On the death of the latter, on the 31st December 1887, the question as to the right of succession arose between the younger of the two sons born of Muthuvirammal, now defendant-respondent and the half-brother born before him of the wife whose marriage was later. On the death of Nagayasami I, all the sons, being then minors, the estate was taken possession of by the Court of Wards, who held it on behalf of Nagayasami II; and on his death, while still an infant and unmarried, the Court purported to hold the estate for the benefit of the respondent, then still an infant. They repudiated the claim of the appellant, the eldest surviving son of Nagayasami I.

In answer to the plaint filed on the 12th July 1889, which claimed the exclusive title, the question was raised whether the defendant was entitled by the custom alleged to prevail in the Saptur zemindari, and in other zemindaris held by proprietors of the same caste, the Kambla Thotiya, in Madura and neighbouring districts, to succeed in preference to the plaintiff by reason of the priority of the defendant's mother's marriage over that of the mother of the plaintiff.

The principal question on this appeal was whether this rule of descent had been established by the evidence.

The facts are stated in their Lordships' judgment.

The Subordinate Judge of Madura found that the custom was established as alleged for the defence. And this finding was affirmed by the High Court (Muttusami Ayyar and Davies, JJ.)

The judgment of the High Court is reported in the Indian Law Reports, XVII Mad., 422.

Two findings of fact, in which the Courts concurred, and which, for the purposes of this report, should be here stated, were as follow:—

That the appellant's mother was of a lower division of caste than that of the respondent's mother: that the zemindari descended, according to custom, to the sons as single owners, according to priority in the order of the marriages of their mothers respectively.

On this appeal, Mr. *J. D. Mayne*, and Mr. *J. H. A. Branson*, for the appellant, argued that no sufficient evidence had been adduced to satisfy the requirements of law for the purpose of establishing a custom such as that now alleged. The custom which [517] the respondent sought to have regarded as established set aside the general principle of the Hindu law of inheritance, by which principle succession as between brothers proceeded upon, and was regulated by, seniority of birth. *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1) and *Lakshmipathi* v. *Kandasami* (2) were referred to.

Mr. *A. Cohen, Q.C.*, and Mr. *A. Phillips*, for the respondent, were not called upon.

Afterwards, on the 11th March, their Lordships' judgment was delivered by Sir RICHARD COUCH.

(1) 14 M I.A. 570. (2) 16 M. 54.

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22 M. 515 (P.C.) = 1 Bom. L.R. 350 = 26 I.A. 55 = 7 Sar. P.C.J. 531.

JUDGMENT.

The question in this appeal is which of the two sons of Nagayasami Kamaya Naik deceased, the proprietor of the zemindari or palayapat of Saptur, in the taluk of Tirumangalam, Madura district, an impartible estate descending to a single heir according to the custom of primogeniture, is entitled to succeed to it on the death of their elder brother. The father died on or about the 14th October 1885, leaving three minor sons, Nagayasami Kamaya Naik the deceased, and the respondent, by his wife Muthuvirammal and the appellant by his wife Nagammal, and a daughter. On the death of the father, the estate descended to the eldest son Nagayasami and by reason of his minority the Court of Wards took charge of it under Regulation V of 1804. He died on the 21st December 1887 a minor and unmarried. The appellant is the senior in age to the respondent, and as such claimed to be entitled to succeed to the zemindari. The Court of Wards, on behalf of the respondent, asserted his title and assumed charge of the estate on his behalf and continued to manage it. The suit was brought by the appellant, by his mother and guardian, and was defended by the respondent's guardian and the Court of Wards. One ground of the defence was that the appellant's mother was not the wife of Nagayasami, the father, but his mistress and the other that if she was legally married to him the appellant was not entitled to the zemindari in preference to the respondent who is the son of the senior wife and the brother of the last owner. It was admitted at the trial in the first Court that the appellant was the senior in age to the respondent, and that the appellant's mother was married after the [518] respondent's mother. It has been found by both the Lower Courts that the appellant's mother was legally married, but that her status and rank were inferior to those of the respondent's mother, the latter being the daughter of a zemindar, while the former was the daughter of an ordinary raiyat. Upon this finding the first Court held that the appellant could not be preferred to the respondent, but must give way to him. This was also held by the High Court on appeal. It was treated by both Courts as a question of law and was raised by the third of the settled issues. This question has not been argued before their Lordships, and it is not necessary to decide it as the fourth issue was whether, as alleged by the defendant, he is entitled by the custom prevailing in the Saptur zemindari and in other zemindaris held by zemindars of the same caste in Madura and neighbouring districts to succeed in preference to the plaintiff by reason of his mother having been married prior to the plaintiff's mother.

Upon this issue a large quantity of evidence was put in at the trial in the first Court and appears in the judgments to have been fully considered by that Court and by the High Court on the appeal to it. Both Courts have found for the respondent upon this issue. In the argument of this appeal it was attempted to be shown that in this they were wrong in law and what was laid down by their Lordships in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1) as to the proof which is required of such a custom was referred to. The judgment in that case is noticed by the High Court in its judgment, and their Lordships see no reason to doubt that it has received the attention of both Courts. There is really in this case no pretence for saying that there has been any error in law; the concurrent findings must be held to be conclusive.

(1) 14 M.I.A. 570 (585, 586).

An objection was made by Mr. Mayne that some of the land in Schedule C appears in it not to be within the limits of the zemindari, and the High Court has held that all the lands in that schedule "were merged in the estate proper and are therefore not partible." This objection is apparently now taken for the first time and cannot be entertained. It should have been taken in the first Court when there might have been an enquiry as to what lands were within the limits of the zemindari.

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[519] Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Lawford, Waterhouse & Lawford.*
Solicitor for the respondent: *The Solicitor, India Office.*

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22 M. 519 = 9 M.L.J. 127.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

KRISHNASAMI KONAN (*Defendant*), *Appellant v.*
RAMASAMI AYYAR (*Plaintiff*), *Respondent.**
[27th February, 1899.]

Hindu Law—Liability of a divided son where debt was incurred by the father before partition—Decree against father and execution proceedings against son's property in father's lifetime.

In 1890 a person subject to the Hindu Law incurred a debt for purposes that were neither illegal nor immoral. In 1891 he divided the family property with his son, and a house fell to the son's share under the division. In 1893 the creditors sued the father in respect of the debt, and, having obtained a decree, sought, in the father's lifetime, to make the son's house liable in execution thereof:

Held, that property taken by a son in partition cannot be seized in execution in respect of an unsecured personal debt of his father, even though the debt has been incurred before the partition, provided that the partition is not shown to have been made with a view to defraud or delay creditors.

[R., 40 C. 407 (421) = 16 C.L.J. 311 = 17 C.W.N. 102 = 17 Ind. Cas. 257 ; 18 M.L.J. 590 (602) = 4 M.L.T. 277 ; D., 24 M. 555 (557).]

SECOND appeal against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 211 of 1896, reversing the decree of A. David Pillai, District Munsif of Srirangam, in original suit No. 151 of 1895.

Suit for a declaration that plaintiff was in possession of a certain house as owner, and that it was not liable to be attached in execution of a decree in small cause suit No. 89 of 1893, which had been obtained by the defendant against plaintiff's father on a promissory note, dated 6th June 1890. In execution of the said [520] decree, defendant had brought the house to sale, and plaintiff had intervened under Section 278 of the Code of Civil Procedure, but without success. Plaintiff's father was still alive but had no property. The plaintiff alleged, and the District Munsif found as a fact, that a division had taken place between plaintiff

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* Second Appeal No. 825 of 1898.

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and his father on 24th September 1891, and that it was not effected in fraud of creditors. By the deed of partition the house in question fell to the plaintiff's share, but no reference was made therein to the debt owing to the defendant which was then outstanding on the promissory note. The District Munsif found that the debt for which the promissory note had been given was incurred by plaintiff's father for buying ploughing cattle, and not for any immoral or illegal purpose, though there was some evidence of extravagance and immorality against the father. Relying on *Bhagbut Pershad* v. *Mussumat Girja Koer* (1), *Mussamat Nanomi Babuasin* v. *Modun Mohun* (2), *Khalilul Rahman* v. *Gobind Pershad* (3), and *Kunhali Beari* v. *Keshava Shanbaga* (4), he held that plaintiff, though not a party to small cause suit No. 89 of 1893, was still liable to pay the decree-debt, and that the whole of the house specified in the plaint was liable. He dismissed the suit. On appeal, the District Judge agreed with the finding that the debt secured by the promissory note was proved, and that it was not tainted with illegality or immorality. He said :—"The question then is whether the creditor can, in execution of a money decree against the father, proceed in the father's lifetime against the ancestral property in the hands of a separated son. If the father were dead, the decree-holder could proceed against the son in execution as his legal representative by virtue of the provisions of the Civil Procedure Code, and could attach and sell such property as had devolved on him as such representative by inheritance; in the case, that is to say, of a separated son, such property as had fallen to his father's share at the partition or formed his self-acquisition ; but he could not proceed in execution against the son's property which fell to him at the partition. That is the son's own share, and though liable for the father's debt, is not liable to be taken on a decree to which [521] the son is not a party. But when the father is alive, there is no question of legal representative. Of course, if the family had remained undivided, the whole joint property would be liable for the father's debt and could be taken in execution, though the son were not a party to the decree—but the family being separate, the case is different. When the separation is before the suit, as in this case, I think the creditor is bound to make parties all those whose interests he wishes to bind by his decree. The property is, from the date of separation, the son's property in which the father has no interest, and though the son may be liable to pay the debt, his liability must be enforced in a suit against himself." He reversed the decision and made the declaration prayed for.

The defendant preferred this second appeal, on the ground that the father's debt, not having been incurred for illegal or immoral purposes, was binding on the son, and that the family property in the hands of the son was, under the Hindu Law, liable in respect of it, that liability not being affected by the fact that the son was divided from his father.

Rangachariar, for appellant.

Seshagiri Ayyar, for respondent.

JUDGMENT.

The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of

(1) 15 I.A. 99=15 C. 717.
(2) 13 I.A. 1=13 C. 21.
(3) 20 C. 328.
(4) 11 M. 64.

the father is that the father, under the Hindu Law, is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is seized it remains the undivided estate of the father and the son. If the estate were divided the father could not sell what does not fall to him in the division. Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would be otherwise, but no such case is made out here. On this ground we confirm the decree of the Lower Appellate Court and dismiss the second appeal with costs.

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22 M. 522 = 9 M.L.J. 101.

[522] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

RAMAKKAL (*Plaintiff*), *Appellant v.* RAMASAMI NAICKAN AND ANOTHER (*Defendants*), *Respondents.** [24th February, 1899.]

Hindu Law—Division by co-widows of their late husband's estate—Alienation by one after the division—Validity of alienation as against surviving widow on decease of alienor.

A Hindu died, leaving two widows who divided his property by a formal registered partition deed, under which each took possession of her share, with powers of alienation over the property comprised in it. Certain alienations were made by one widow, who subsequently died. On the surviving widow claiming the whole of her late husband's property, including the portions so alienated:

Held, that there is no legal obstacles to prevent one of two co-widows from so far releasing her right of survivorship as to preclude her from recovering from an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. A widow may alienate for her life any estate which comes to her by virtue of her widowhood, and may therefore enter into such a deed as will preclude her from recovering during her life property which she has alienated, to the full extent of such alienation, provided that it does not extend beyond her life interest.

[R., 33 C. 1079 (1089); 34 M. 72 (73) = 7 Ind. Cas. 858 = 8 M.L.T. 233; 9 C.L.J. 421 (428) = 13 C.W.N. 611; 16 Ind. Cas. 428 (430) = 23 M.L.J. 355 = 12 M.L.T. 288 = (1912) M.W.N. 908 (911); 14 M.L.J. 175 (179).]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Coimbatore, in appeal suit No. 184 of 1897, reversing the decree of T. A. Ramakrishna Ayyar, District Munsif of Udamalpet, in original suit No. 392 of 1897.

Suit to recover a house and two items of land, together with mesne profits. Plaintiff's husband had died leaving plaintiff and another widow him surviving. The widows divided the property of their deceased husband by a formal registered partition deed which, after reciting that each had taken charge of her share under the division, declared that each would be bound to enjoy, separately, the property appertaining to her share, with power of alienation by way of gift, mortgage, sale, &c., and that from that day forward the relationship between them should be that of friendship alone, and that there should be no further relationship in pecuniary matters. One of the widows alienated portions of [523] the

* Second Appeal No. 799 of 1898.

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22 M. 522 = 9 M.L.J. 101.

property comprised in her share, selling the house to first defendant and giving the two items of land as stridhanam to second defendant, whom she had adopted as a daughter. She subsequently died. Plaintiff now contended that the partition was an arrangement intended only for the convenient enjoyment of the property by the widows and that she, as surviving widow, was entitled to the whole of her late husband's estate. She claimed the alienated property, and the District Munsif ordered the defendants to surrender it to her as prayed. The District Judge, on appeal, reversed the decree. He said:—"The two widows held this estate together, and on the death of the survivor the estate will pass to the reversioner whoever he then may be. Until the death of plaintiff, no reversioner can claim possession. That being so, the plaintiff is the only person now who can sue to eject defendants, and I am of opinion that plaintiff's suit is barred by the partition deed. It is true that Hindu Law does not recognize partition among widows, but that means only that any such arrangement among widows will not affect the right of the reversioner who comes forward at the death of the surviving widow. Such an arrangement among widows will be good until the death of the surviving widow. A widow can alienate and the alienation is good during her lifetime. So plaintiff in this case alienated to her co-widow, now deceased, who passed on the land to defendants, and the alienation must hold good until plaintiff's death."

The plaintiff preferred this second appeal.

Sivasami Ayyar, for appellant.

Kasturiranga Ayyangar, for respondents.

JUDGMENT.

We think that there is no legal obstacle to prevent one of two co-widows by apt words in a deed from so far releasing her right of survivorship as to preclude her from recovering from an alienee after the other co-widow's death, property given by way of partition to the latter and alienated by her.

In this case two co-widows entered into a deed which they called a deed of partition, whereby they divided the property between them and each gave the other full power of alienation. One of the widows alienated her share and after her death the other widow, the plaintiff, sued as the surviving widow to recover the property so alienated. The District Judge held that she was estopped by her own deed from recovering. It is argued before [524] us that whatever may be inserted in a deed of supposed partition between co-widows, nothing can preclude the surviving widow from recovering, as there is no legal power which enables widows to make a partition except for the period of the life of each. For the property can only be held separately by widows for the purpose of the maintenance of each of them during her life and after the death of any one the share reverts to the survivor. *Bhugwandeen Doobey* v. *Myna Baee* (1), *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2), *Kathaperumal* v. *Venkabi* (3), *Ariyaputri* v. *Alamelu* (4) and *Sri Gajapathi Radhamani Garu* v. *Maharani Sri Pusapati Alakarajeswari* (5) were cited as supporting these propositions. We have no doubt that a widow can alienate for her life any estate which comes to her as such and that she can therefore enter

(1) 11 M.I.A. 487. (2) 4 I.A. 212=1 M. 290. (3) 2 M. 194.
(4) 11 M. 304. (5) 19 I.A. 184=16 M. 14.

into such a deed as will preclude her from recovering during her life property which she has alienated to the full extent of such alienation, provided it does not extend beyond her life interest.

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Substantially the analogous case of daughters was so decided in Calcutta (*Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (1)).

We, therefore, dismiss the second appeal with costs.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

THE TRUSTEES OF THE HARBOUR, MADRAS (*Defendants*), *Appellants* v. BEST & CO. (*Plaintiffs*), *Respondents*.*
[7th, 13th, 14th and 23rd March, 1899.]

Contract Act—Act IX of 1872, *Sections* 151, 152—*Liability of bailees for hire for loss of goods—Negligence—*Onus *of proof—Madras Harbour Trust Act* (*Madras*)—*Act II of* 1886, *Sections* 70, 87—*Immunity from action—Breach of contract.*

When goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of [525] ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss.

Per SHEPHARD, J.—The provision in Section 87 of the Madras Harbour Trust Act, 1886, to the effect that the Board, its officers and servants shall not be liable in damages for any act *bona fide* done or ordered to be done by them in pursuance of the Act, does not apply to all causes of action, and, *inter alia*, to a suit in respect of a breach of contract against the Board. The immunity there given applies only to those cases in which there is an act done or purporting to be done in pursuance of the Act. The fact that the Board has worked under the provisions of a statute does not prevent it from entering into a contract; and the section does not apply in a case where the party aggrieved complains of the breach of such a contract on the part of the Board.

By Section 70 of the Madras Harbour Trust Act, 1886, the Board is empowered to make bye-laws for the reception, removal and porterage of goods. A bye-law framed under this section provided that importers desiring to store cargo must apply to the Secretary of the Board for such space as they might require, and that such applications would be granted on such terms as the Board, might approve, and concluded with the reservation that the Board, while taking all reasonable precautions, would accept no responsibility in respect of property stored upon its premises, which would remain at the risk of the consignees or owners:

Held (*per* COLLINS, C.J., and BODDAM, J.), that this provision was not a bye-law for the reception or removal of goods, within the meaning of Section 70 of the Act, and was *ultra vires*.

[R., 31 M. 522 (524) = 4 M.L.T. 224.]

APPEAL against a decree passed, on the original side of the High Court, in civil suit No. 99 of 1897.

Suit to recover a balance of coal alleged to have been landed at defendants' harbour and to have been left in their custody and to have

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* Original Side Appeal No. 42 of 1898.

(1) 24 C. 339.

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remained undelivered by defendants to plaintiffs; or, in the alternative, for damages in respect of the said non-delivery. The defendants relied upon certain bye-laws duly made under Section 70 of the Madras Harbour Trust Act, 1886, the provisions of which were as follows:—"(3) All goods landed at the port of Madras shall be moved from the place or places where the same may be landed to the place or places set apart for the reception thereof, by some person or persons—authorised in that behalf by the Board—who shall in due course deliver the same to the consignees, upon payment by them of all costs and charges of receiving and of so moving such goods, and of delivering the same, including all costs, charges, and expenses of counting, sorting and weighing, and other costs, charges and expenses whatsoever, incurred or payable under the directions and with the sanction of the Board . . . . (7) Coal, coke, patent **[526]** fuel, timber of all descriptions and firewood shall be landed only at such place or places as may be approved by the Board for that purpose from time to time. Any person contravening this bye-law shall be liable to a penalty, upon conviction before a Magistrate, not exceeding rupees fifty (50) for each offence . . . . (8) Importers or owners desiring to store cargo of the descriptions mentioned in bye-law No. 7, within the limits of the Harbour Trust premises must apply to the Secretary to the Board for such space as they may require. Such applications will be granted on such terms as the Board may approve. Wharfage will be payable for the plots so assigned at the rate fixed by the Board under the provisions of Act II of 1886. The Board, while taking all reasonable precautions to ensure the safety of property stored upon its premises, will accept no responsibility whatever in respect of such cargo as is mentioned in bye-law No. 7, from the time when the same shall have been placed or stored on such plot or plots, and such cargo shall from that time remain at the sole risk of the consignees or owners, who shall however be entitled to employ such servants or others as they may consider necessary for the due protection of such cargo." Defendants contended that they had delivered and accounted to plaintiffs in respect of all the coal landed, and denied liability They also demurred to the suit and contended that it was not maintainable inasmuch as even assuming that the non-delivery complained of was caused by the act or default of any officer or servant appointed under Madras Harbour Trust Act II of 1886, they were exempted and relieved from liability for such Act or default by virtue of the provisions in that behalf of Section 87 of the said Act. They further contended that the suit was not maintainable on the ground that assuming that the non-delivery complained of had been caused by an act or omission on the part of themselves or their agents, such act or omission was done or omitted to be done *bona fide*, and that they were therefore, exempted and protected from liability in damages by the said Section 87.

Mr. *E. Norton*, for the plaintiffs.

Mr. *R. F. Grant*, for the defendants.

The case was heard, in the first instance, by SHEPHARD, J., when the following issues were tried:—"(3) Are the defendants exempt from responsibility for any undelivered portion of coal either under bye-laws in force under Section 70 of the Madras **[527]** Harbour Trust Act or under and by virtue of Section 87 of that Act? (4) Is the eighth bye-law *ultra vires*?" His Lordship delivered the following judgment on 2nd September 1897:—

"I have had an opportunity of considering this matter, and therefore see no reason for delaying to give my judgment. The plaintiffs state that on the 10th of July 1896 the defendants, for reward, received from the plaintiffs certain coal. Of this coal, a certain quantity was removed by the plaintiffs. The remainder—2,769 tons, the plaintiffs say—was left in the care and custody of the defendants, and was stored by them on a place set apart by them on their premises at the plaintiff's' request to be there kept for reward by the defendants in their care and custody until the plaintiffs should require delivery thereof. The plaint then goes on to say that certain other quantities of coal were delivered and that then the plaintiffs called upon the defendants to deliver the balance of 816 tons of coal. The plaint further goes on to say that the defendants did not deliver or account for the same. Then in the alternative the plaintiffs charge that the defendants are liable to pay the sum of Rs. 20,400 for damages resulting from the failure of the defendants to take reasonable care and on account of the negligence of themselves and their servants. To this plaint two legal objections are taken. First of all it is stated in the written statement that a certain rule has been passed under Section 70 of the Madras Act II of 1886 under which the defendants are constituted. On that rule the defendants rely, as far as I can understand, as an absolute answer to the plaint. They also rely on Section 87 of the same Act and say that the suit is not maintainable. With regard to this section, *viz.*, Section 87, the question is whether it is applicable to a cause of action such as is disclosed in the plaint. It must be assumed that that cause of action really exists, that is to say, that the plaintiffs did leave with the defendants certain coal, and that the defendants stored it for them as paid warehousemen. It is argued on behalf of the defendants that Section 87 gives the defendants absolute immunity from action in a case such as the present. The section is very difficult to construe. Fortunately, however, a part of it has already received an interpretation. The first paragraph of it, that paragraph which provides that notice should be given in certain cases, is a provision which is not uncommon in English statutes, and it has been held with regard to this provision that it [528] does not apply in cases where the plaintiff is suing on a specific contract made with the public body which relies upon the requirement of notice. The difficulty in the case lies in seeing to what class of cases the second paragraph of the section applies, and that paragraph as far as I have learnt is not to be found in any English statute. It is quite clear that the general words in that second paragraph must receive some limitation. The last sentence of the section (which contains a not unusual provision, see, *e.g.*, Dangerous Epidemic Act, III of 1897) provides that the Board, its officers and servants shall not be liable in damages for any act, *bona fide* done or ordered to be done by them in pursuance of this Act. That is one class of cases in which exemption from suit is absolutely given to the Board and its servants. Another class of cases is that in which damage has been sustained by any vessel in consequence of any defect in any of the moorings belonging to the Board. There, again, absolute exemption is given in special words by the section. It appears to me that having those two instances before me I can hardly be asked to say that the second paragraph of the section covers all causes of action which may be brought against the Board. There must be some limitation put upon the meaning of the words in the second paragraph of Section 87. There is another reason why some limitation must be put on the general words of the second paragraph, and that is that the first

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paragraph provides that notice shall be given in a certain class of cases. Some attempt was made to show that the word 'person,' occurring in the first paragraph, did not include the Board mentioned in the second paragraph. I do not think this argument can be accepted. It is clear, I think, that the word 'person' mentioned in the first paragraph, includes, among other persons, the Board. Therefore we have it that there is a provision to the effect that notice is to be given in certain instances. It follows necessarily, if the Legislature contemplated notices to be given in certain actions against the Board, that there must be certain actions against the Board which are maintainable. For this reason again, I think the second paragraph must have an interpretation put upon it, more limited than would at first sight appear to be the right one. One of the difficulties which I feel in the case arises from the construction which has been put upon the first paragraph of the section. It has been held, as I have said, with regard to that [529] paragraph, that it does not apply to cases where the action is on contract. It may be asked to what cases then does the first paragraph apply. It appears to me that it may be taken to apply properly to those cases in which there is an act done or purporting to have been done in pursuance of the Act—an Act of such a character as not to deserve the immunity which the last clause of the section gives. That is to say, if the officers or servants of the Board are charged with doing an act not *bona fide* done, but purporting to have been done in pursuance of the Act, then they will be entitled to notice. Then, clearly, according to the last clause there will be nothing to prevent the action being brought, and they will be entitled to the notice provided for in the first paragraph. The question still remains to what cases the second paragraph applies. It appears to me that the Legislature must be taken to have intended those cases in which there was an act done or default made in pursuance of the Act. As an instance of a case to which that paragraph might apply I would refer to Section 57 of the Act, which in certain instances gives the power of distraint and arrest. That is a case to which, it appears to me, the second paragraph might be applicable. It is argued that in the present case the defendants in keeping the coal of the plaintiffs were really acting under the statute, and were not governed by any contract between themselves and the plaintiffs. The fact, however, that the defendants are working under the provisions of a statute does prevent them from making a contract, and rightly or wrongly it is alleged in the plaint that they did contract with the plaintiffs. That being so it appears to me that the ordinary consequences must follow, namely, that the defendants must incur liabilities which ordinary persons do incur under contracts. That the defendants are at liberty to make contracts there can be no question. Whether they did make the contract or not in this particular case is a matter of fact. But assuming that they did make the contract with regard to this coal with the plaintiffs then I consider that the second clause of this section cannot be applicable, because if it were applicable it would lead to this absurd result that the Legislature would be authorizing a public body to make contracts, and at the same time providing that they were not to be sued upon them. That, to my mind, is an absurdity. Some meaning must be given to the words of the section, which, I admit, is an extremely difficult [530] one, in order to avoid the absurd result that would otherwise follow. I must, therefore, hold that whatever may be the meaning of this section it does not apply in a case where the party aggrieved complains

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of a breach of contract on the part of the Board. (See *Brabant & Co.* v. *King*(1).)

"The other question is whether the bye-law made under Section 70 is a valid bye-law. According to the written statement it was made under the following provision :—Section 70 says the Board may from time to time make bye-laws 'for the reception, removal and porterage 'of goods brought within the premises of the Board and for the exclu-'sive conduct of these operations by the Board or persons employed by 'them.' What I understand to be admitted to be the course of business is that goods are brought to the shore by the consignees and then are placed in the hands of the defendants. They are received by the defendants and, under certain circumstances, may be retained by them under Section 53 of the Act. The goods are received by the defendants and it is also competent to the defendants to make arrangements for storing them. That is provided for in Section 61 of the Act which states that the works to be executed by the Board may include warehouses, sheds and other appliances for storing goods landed. There is also a provision in Section 45 enabling the Board to frame a scale of rates to be levied for the storage of goods. It appears that it is obligatory on the consignees to have their goods come through the hands of the Board, inasmuch as they must be landed on the Board's premises. On the other hand, it is optional with consignees to leave them in the Board's premises or not, an exception being made however, as I have said, in the case where the Board is at liberty to retain the goods under Section 53. Section 70 says that the Board may make bye-laws for the reception, removal and porterage of goods. The rules which they made under this section are the seventh and the eighth. The seventh rule says that coal and other things of that sort shall be landed only at such place or places as may be approved by the Board for that purpose from time to time. That, clearly, is a rule for the reception of the goods. The eighth rule says that importers or owners desiring to store cargo of the [531] descriptions mentioned in the last bye-law must apply to the Secretary to the Board for such space as they may require. No objection is taken to that part of the rule, nor to the part which says 'such applications will be granted on such terms as the 'Board may approve.' Then the rule ends with this:—'The Board, 'while taking all reasonable precautions to ensure the safety of property 'stored upon its premises will accept no responsibility whatever in respect 'of such cargo as is mentioned in bye-law No. 7 from the time when the 'same shall have been placed or stored on such plot or plots and such 'cargo shall from that time remain at the sole risk of the consignees 'or owners, who shall, however, be entitled to employ such servants or 'others as they may consider necessary for the due protection of such 'cargo.' I am clearly of opinion that this cannot be called a bye law for the reception or removal of the goods. As a matter of plain English that appears to me clear. Mr. Grant argues that finding the words 'reception' and 'removal' I ought to imply an intention to make provision for the storage of goods. I cannot think that the Legislature so intended. The matter of storage must have been present in the minds of the Legislature, because, as I have shown, they have made provision for it in other parts of the Act. They provided for the rates of the storage. That being so, they deliberately leave out the word storage when they authorize the Board to make rules. It seems to me, therefore, impossible

(1) (1895) A.C. 632.

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to hold that it was intended that the rule which they made in these words could include rules for storage of coal, and that on the contrary the intention must have been to have the terms of any contract of storage so far as not provided for in the Act to be settled in the ordinary way by contract between the parties. Even if it were otherwise, even if it were competent for the Board to make a rule for the storage of coal, I should have the greatest difficulty in holding that a rule claiming for the Board or purporting to claim for the Board immunity from action could be deemed to be a rule for the storage of coal. It is enough for me, however, to say that I am clearly of opinion that the rule in question, *viz.*, the latter part of rule 8 cannot be called a bye-law for the reception or removal of the goods. Some attempt was made to show that the general words at the end of the section might cover the case. Applying the ordinary principles of interpretation I do not think that [532] argument can be accepted. I have pointed out that in my view the word storage was deliberately omitted in the place where it might have been inserted in the clause.

"Several other questions were argued, namely, the question as to the meaning of the rule and the question as to its reasonableness. These questions it seems to me unnecessary to enter upon. It is enough to hold that this rule is a rule which it is not competent for the Board to make under Section 70.

"The answer, therefore, that I give to these two issues is in both cases in favour of the plaintiffs."

Against the above judgment the defendants preferred an appeal (original side appeal No. 43 of 1897), which was heard by COLLINS, C.J., and BODDAM, J.

Mr. R. A. *Nelson*, for the appellants.

Mr. *E. Norton* and Mr. *K. Brown*, for the respondents.

Their Lordships delivered the following judgment on 30th November 1897 :—

"We think the judgment of Mr. Justice Shephard is right.

"The defendants admittedly received the goods sued for, for hire "under and by virtue of the Madras Harbour Trust Act, 1886, and their "bye-laws purporting to have been made under Section 70 of that Act. "They contend, however, that both the 87th section of the Act and the "eighth bye law or one of them relieves them from all liability in respect "of the goods so received.

"It is clear that the eighth bye-law contemplates that terms should "be arranged for the storage of goods received under it, and it must be "assumed for the purpose of dealing with the defendants' present conten-"tion that the goods sued for were received by them under and by virtue "of some contract made between the plaintiff and the defendants in "accordance therewith.

"Counsel for the defendants admits that if the goods were received "under a contract, Section 87 of the Act does not protect them.

"The only remaining question is whether the eighth bye-law protects "them. We agree with Mr. Justice Shephard that the bye-law is *ultra* "*vires*, for the reasons given in his judgment. We also think that it is "unreasonable. The bye-law, therefore, affords the defendants no "protection.

"We accordingly dismiss the appeal with costs."

[533] The case then came on for hearing, on 26th October 1898, before SUBRAMANIA AYYAR, J., for the determination of the following issues :—

"(1) How much coal was delivered by the plaintiffs to the defendants between the 11th and 17th July 1896 with reference to the consignment referred to in the plaint ?

"(2) Whether the defendants failed to account for any and how much of the coal so delivered ?

"(3) If the defendants did fail to account to any extent whether they, as bailees, are liable in respect of such failure."

On the first of these issues the finding of the Court was that 3,385 tons of coal had been delivered by the plaintiffs to the defendants ; on the second issue, that only 2,569 tons had been re-delivered by the defendants, and that the balance not accounted for, after allowing five per cent. for wastage, amounted to 640 tons. His Lordship then dealt with the remaining issue in the latter part of his judgment as follows :—

"The remaining question is whether the defendants are liable for the said balance. A great deal was said in the argument about the onus of proof in such cases. The point, however, seems to be free from doubt, upon the authorities. The cases cited for the defendants are not similar to the present in their facts. But two English and two Indian decisions cited for the plaintiffs are in point, and I shall refer to them only. In *Mackenzie* v. *Cox* (1) the plaintiff gave no evidence as to how the animal which was the subject of bailment there was lost. Gurney B, laid down that the onus was on the defendant—the bailee—to acquit himself by showing that he was not in fault with respect to the loss. In *Reeve* v. *Palmer* (2) a deed was lost while in the hands of the bailee. Cockburn, C. J., observed :—'Now, the jury have found that the defendant lost it (the 'deed). That, in the absence of any explanation, must, I think, be taken 'to be a loss without there having been that proper care which it was the 'defendant's duty to take of the deed. Unless, therefore, this be qualified by 'showing the loss to have arisen from circumstances which could not 'have been prevented from occurring by ordinary care, it must be '[534] considered that the defendant, who had the deed as an attorney, 'lost it in consequence of the absence, on his part, of ordinary care.' In *Raisett Chandmull Hamirmull* v. *Great Indian Peninsula Railway Company* (3) Starling, J., dealing with the question of onus said:—'In the absence of any evidence as to how the parcel (which contained the property 'lost) was treated between Itarsi and Saugor, it is impossible to hold 'that the defendants have discharged the onus, which lay upon them, of 'showing that they had in respect thereof fulfilled the duties of a bailee 'as laid down in Section 151 of the Contract Act.' Lastly in *Sesham Patter* v. *L. S. Moss* (4) decided in this Court, Muttusami Ayyar, J., laid down the rule thus:—'The plaintiffs must show in the first instance the 'alleged loss or deficiency, and then the Railway Company will be bound 'to show that the loss occurred under circumstances which would 'exempt a bailee from responsibility for it.' Now, turning to the present 'case, the coal to which the dispute relates has been undoubtedly lost. Have the defendants then shown that the loss arose from circumstances which could not have been prevented from occurring by that care which

(1) 9 C. & P. 632.
(2) 5 C.B (N.S.) 84 ; 27 L. R. C.P. 327 at p. 329.
(3) 17 B. 723 (729, 730).
(4) 17 M. 445 (446).

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they were bound to take?" [His Lordship, referring to the evidence, held that no explanation had been established.] . . . . . The loss remains unexplained and that, as already stated, is evidence of negligence for which the defendants are liable.

"I therefore direct the defendants to pay to the plaintiffs rupees sixteen thousand with 6 per cent. interest from the date of the plaint and costs throughout."

Against this judgment the defendants preferred an appeal.

The Advocate-General (Hon. *C. Arnold White*) and Mr. *R. A Nelson*, for appellants.

Mr. *E. Norton* and Mr. *K Brown*, for respondents.

This appeal was heard by the Bench as above constituted, and their Lordships delivered the following

JUDGMENT.

COLLINS, C.J.—There are three questions to be decided in this appeal:—

First—How much coal was delivered by the plaintiffs to the defendants between the 11th and 17th days of July 1896 with reference to the consignment referred to in the plaint? On this issue the evidence is all one way. It is proved beyond reasonable **[535]** doubt that the steamship *Graffoe* was loaded with 3,385 tons of coal at Newcastle-upon-Tyne consigned to the plaintiffs, Messrs. Best & Co. at Madras. On this part of the case the Advocate-General. who appears for the defendants, the Harbour Trust Board of Madras, admits that he is unable to dispute this fact. The further question then arises,—was the whole of the coal delivered to the plaintiffs at Madras and by them delivered to the defendants? It appears to me that the evidence called by the plaintiffs establishes both those propositions, . . . [His Lordships then dealt with the evidence.]

The second question is:—Did the defendants fail to account for any, and how much, of the coal so delivered? There is no dispute upon this point of the case. If 3,385 tons were delivered the defendants admit a deficiency of 816 tons.

The third question is:—If the defendants did fail to account to any extent, whether they, as bailees, are liable in respect of such failure to account. It is not denied that the defendants charged wharfage and the ordinary dues for the coal deposited with them, or that they have the sole dominion over the coal. No coal can be removed from their wharf without the permission of their authorized servants; but they contend that unless the plaintiffs can prove negligence on the part of the defendants a suit will not lie. The defendants are unable to account for the deficiency in any way and can give no explanation of the loss. The defendants further rely upon Section 151 of the Indian Contract Act which enacts that "in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

The cargo of coal was discharged between the 11th and 17th July 1896, and the deficiency was discovered on the 3rd November 1896—a period of about three and a half months. (It may be here stated that the learned Judge who tried this case was of opinion that a wastage of 5 per cent. ought to be allowed; so he reduced the deficiency to 640 tons.)

It appears to me, upon the facts proved or admitted, that the defendants did not take such ordinary care of the bailment as prudent men would take, under similar circumstances, of their own goods.

[536] The case of *Reeve* v. *Palmer*(1) appears somewhat in point. Cockburn, C.J., (Williams and Willes., JJ., concurring) says :—"The deed for the recovery of which this action of detinue is brought, was a deed which was in the care and keeping of the defendant as attorney for and on behalf of his client, the plaintiff, and consequently it was his duty to take ordinary care of it. The jury have found that he lost it: and I am of opinion that that must be taken to mean, in the absence of any explanation, that he lost it for want of that due and proper care, which it was his duty to apply to the keeping of it, unless it is qualified by circumstances showing that the loss of the deed could not have been prevented by the application of ordinary care." Can it be said that the defendants in this case used ordinary care in the storage and keeping of this coal ? I think not. 640 tons of coal out of 3,385 tons disappear in three and a half months, and the Traffic Manager of the defendants can give no explanation. He says:—" I have not made up my mind as to (how) the 800 and odd tons have been lost. On that point, my mind is still in a state of flux." [After dealing further with the evidence his Lordship held it to be clear that the coal was lost through the negligence of the defendants.]

I would dismiss this appeal and with costs.

BENSON, J.—The plaintiffs are a firm of merchants at Madras and the defendants are the trustees of the Harbour of Madras. The learned Judge who tried the case on the original side of the Court found that in July 1896 the defendants, as bailees for hire, took charge of 3,385 tons of coal,ex S.S. *Graffoe*, consigned to the plaintiffs and (after making due allowance for wastage) failed to account for 640 tons of the same. He, therefore, gave judgment for plaintiffs for Rs. 16,000, the value of the coal. with interest from date of plaint.

Against this decree, the defendants appeal, partly on the facts and partly on the legal question as to their liability.

They contend that it is not shown that 3,385 tons of coal were given into their charge. They also contend that even if that question of fact is found against them, still the onus of affirmatively proving the negligence of the defendants lies on the plaintiffs, and that they have not discharged it.

[537] Lastly. the defendants contend that if the onus lies on them of showing that they are not guilty of negligence they have discharged the onus, and are protected by Sections 151 and 152 of the Indian Contract Act (IX of 1872), which provides that, in the absence of a special contract, a bailee is not responsible for the loss of the thing bailed if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of own goods of the same bulk, quality and value. . . .

[His Lordship then dealt with the evidence.]

The defendants contend that the plaintiffs must show affirmatively that the defendants were guilty of negligence. It seems to me that no evidence could establish the defendants' negligence more clearly and affirmatively than a bare statement of the fact that in the short space of

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(1) 5 C.B. (N.S.) 84 at p. 90 ; 27 L.J.C.P. 327.

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hundred days they lost no less than 640 tons of coal in their sole-custody without being able to give the slightest explanation of its loss.

In my view, when the loss is established it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss. In the present case the proved facts negative the existence of such care. It is not suggested that the 640 tons of coal evaporated into the air, or sank into the earth, or were washed away by floods, or were burned by fire for which the defendants were not responsible, or were carried away by violence. If the coal were lost in any of these ways the defendants might not be liable. But in the present case the only possible explanation seems to be that the coal was either stolen or was wrongly delivered to other persons, and neither of these things could, in the circumstances of this case, have happened if the defendants were not negligent in dealing with the coal. In other words, if the defendants had exercised ordinary care they could not have lost so great a quantity of coal in so short a time without knowing how the loss occurred. I would, therefore, confirm the decree and dismiss this appeal with costs.

Messrs. *Wilson & King*—Attorneys for appellants.

Messrs. *Barclay, Orr & David*—Attorneys for respondents.

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[538] APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

VENKATA NARASIMHA NAIDU AND OTHERS (*Defendants*), *Appellants* v. BHASHYAKARLU NAIDU AND ANOTHER (*Plaintiffs*), *Respondents.**
[21st, 24th, 25th and 26th April and 4th May, 1899.]

Authority of Counsel, vakils or other agents—Abandonment of issue—Scope of authority in conduct of litigation—Compromise—Civil Procedure Code—Act XIV of 1882, Sections 462—Hindu Law—Impartible zemindari—Son's legal incompetence to intervene in the suit on the footing of the impartibility of the estate—Partial partition—Omission to include some joint properties in plaint in suit for partition where they can be ascertained and decree given.

A vakil appointed to conduct a case on behalf of a client has power to ask for an issue to be framed, or to abandon one that has been framed, and in the absence of fraud or misconduct or of express instructions prohibiting the adoption of such a course, his action will be binding on his client. There is no distinction, in this respect, between the acts of Counsel, vakils and other agents. The abandonment of an issue does not amount to a compromise, and if the suit is being conducted by a guardian on behalf of a minor, leave of the Court is not necessary under Section 462 of the Code of Civil Procedure for such abandonment.

Where an estate is impartible, the sons of the present holder have, since the decision in *Sartaj Kuari* v. *Deoraj Kuari*, (L.R. 15 I.A. 51; 10 A. 272), recently affirmed as to this Presidency in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (L.R. 26 I.A., 83; 22 M. 383), no *locus standi* to question the acts of their father.

In a suit for partition, plaintiff, when filing his plaint and schedules, made no mention of certain jewels in the possession of his wife. Defendant having filed a schedule in his written statement showing the existence of the said jewels plaintiff admitted that they were with his wife but declined to allow them to be

* Appeal No. 238 of 1897.

divided unless a division were also made of the jewels which were in the possession of the defendants' wives and children. He, however, before the examination of witnesses, withdrew this condition and expressed his willingness to give defendant credit for half their value:

Held, that the suit was, on these facts, not one for partial partition.

Per O'FARRELL, J.—That were a suit is brought for division of the whole of the family properties, an omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition.

[F., 17 C.W.N. 156 (159) = 15 Ind. Cas. 156; 4 Ind. Cas. 812 (814); U.B.R. (1909) II Qr. C.P.C. 21; 15 M.C.C.R. 261; R., 17 C.P.L.R. 147 (154); 6 C.W.N. 82; 17 Ind. Cas. 391 (392) = 23 M.L.J. 381 (382) = 12 M.L.T. 348.]

[539] APPEAL against the decree of A. F. Pinhey, Acting District Judge of Kistna, in original suit No. 16 of 1896.

Suit by the younger of two sons of a deceased zamindar for partition of the zamindari. The first defendant, the elder son, on behalf of himself and the second and third defendants, his two minor sons, alleged that the properties described in the plaint were impartible properties appertaining to what was usually known as the zamindari of Vallur, and that the said properties had always been treated as impartible by the members of the family; and that the succession to the said zamindari had always been governed by the rule of primogeniture, the junior members of the family enjoying only such maintenance as might be granted to them by the zamindar for the time being. The first issue, framed on this plea, was as follows:—"Whether all or any and which of the properties sued for are partible or impartible for the reasons given in the written statement." At the District Court, the vakil for the defendants, after adducing some evidence and filing documents, abandoned this issue. The Acting District Judge declared plaintiff to be entitled to a half share in the family properties as prayed. The defendants preferred this appeal on the grounds, among others, that the so-called abandonment of the first issue was illegal, unauthorised and not binding on the defendants, whether it was made by the pleaders independently or under instructions from the dewan; that neither the pleaders, under the terms of their vakalats, nor the dewan, under the general power of attorney that he held, had authority so to abandon the issue as to prejudicially affect the defendants; and that the Court ought not to have recognised the so-called abandonment without calling for the production of proper power or authority in that behalf. The vakalats referred to authorized the vakils to appear and file documents and necessary statements for conducting and hearing the suit, to conduct all proceedings, to apply for and execute proceedings, to satisfy the order of or decree given by the Court, and to file, if necessary, razinamah or withdrawal petitions; and they declared that all proceedings carried on should be deemed to have been personally executed. The power of attorney given by first defendant to the dewan, and dated 26th May 1891, authorized him to conduct personally or through the agents and vakils appointed by him, all proceedings to be conducted in the civil, criminal, revenue and registry Courts in regard to first defendant's zamindari [540] or any other affairs belonging to him; and to do personally or through agents appointed by him everything in the matter of complaints, written statements, razinamahs, withdrawals, and affidavit and other petitions, whether the first defendant should be present or not in those Courts. It was claimed that defendants were entitled to a re-trial of the first issue, and that, at any rate, the abandonment of it ought not

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to bind the minor defendants. It was further alleged for the defence that plaintiff was in possession of property of great value in the form of jewellery which he had not mentioned in the plaint or brought into hotchpot so as to render it available for division with the rest of the family property. Plaintiff, while admitting that a portion of the said jewellery was with his wife, claimed that it was not liable to partition, but offered to bring it into hotchpot if certain jewellery belonging to first defendant were similarly treated. He subsequently offered to give first defendant credit for half the value of the jewellery. On the question whether a suit so framed would lie, the Acting District Judge referred to *Chinna Sanyasi* v. *Suriya* (1), *Venkatarama* v. *Meera Labai* (2), *Venkayya* v. *Lakshmayya* (3), *Hari Narayan Brahme* v. *Ganpatrav Daji* (4), *Haridas Sanyal* v. *Pran Nath Sanyal* (5), *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (6), *Nanabhai Vallabhdas* v. *Nathabhai Haribhai* (7), and Mayne's 'Hindu Law,' 5th edition, Section 444. He said:— "The earlier decisions against allowing a suit for partial partition were, no doubt, correct but it is very doubtful if it was ever anticipated that by applying such decisions the result would be ultimately arrived at that an omission, either by ignorance or accident, to include all the partible property would lead to the dismissal of a suit for partition. Yet that is the result to which a course of judicial decisions would seem to have led. If this is the correct view of the law, it is hardly intelligible how any suit can succeed. The accidental omission to include a fifty rupees note lying in plaintiff's cash box when the plaint is filed might result in the dismissal of a suit for lakhs of rupees. It is true that Petheram, C.J., in *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (6), gave permission to file another suit, but in the present **[541]** case even such a concession would press very hardly on the plaintiff, who would have to pay the costs on both sides to date,—a penalty out of all proportion to his laches. Such a decision would be not consistent with equity and good conscience, for I have already found that the omission to include plaintiff's own ornaments in the plaint schedule was originally a *bona fide* error, and his subsequent plea was the result of first defendant's action in the criminal Court, which apparently found that first defendant's charge was baseless, and there is little doubt in my mind that it was made for the purpose of defeating this suit. Such an attempt should not be allowed to succeed. On this ground I decide not to follow the authorities quoted, even if I have interpreted them rightly; I find that the suit is maintainable."

The defendants preferred this appeal.

Mr. *E. Norton*, for the first appellant.—The vakalats filed do not clothe the vakils with authority to compromise, and such authority cannot be implied (*Jagapati Mudaliar* v. *Ekambara Mudaliar* (8)); nor should the Courts act upon statements made by vakils out of the ordinary scope of their authority, (*Venkataramanna* v. *Chavela Atchiyamma* (9)). It is not within the scope of a vakil's authority to relinquish a portion of his client's case and the client is not bound by such relinquishment, (*Gour Pershad Doss* v. *Sookdeb Ram Deb*(10) and *Sheikh Abdul Sabhan Chowdhry* v. *Shibkisto Daw*(11)). See also *Chunder Coomar Deo* v. *Mirza*

(1) 5 M. 196. (2) 13 M. 275. (3) 16 M. 98.
(4) 7 B. 272. (5) 12 C. 566. (6) 14 C. 122.
(7) 7 B.H.C.R. (A.C.J.) 46. (8) 21 M. 274.
(9) 6 M.H.C.R. 127 (130). (10) 12 W.R. (C.R.) 279. (11) 3 B.L.R. Appx. 15.

Sudakat Mahomed Khan (1) and the observations in the first paragraph at page 83 in *Krishnasami Ayyangar* v. *Rajagopal Ayyangar* (2).

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Mr. *K. Brown*, for the second appellant.—The abandonment of the first issue amounted to a decree by consent. This appellant being a minor, sanction was necessary under Section 462 of the Code of Civil Procedure, and there being none, the compromise was invalid. Even if the estate were to be taken to be impartible it was still family property, (*Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu* (3) and *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (4)), and the second defendant's interests were therefore prejudiced.

[542] *Ramachandra Rao Saheb*, *Seshachariar* and *Ganapati Ayyar* also appeared for appellants.

Hon. *V. Bashyam Ayyangar*, with him Hon. *Subba Rao*, *Gopalasami Ayyangar* and *Subramania Ayyar*, for respondents.—The son of the holder of an impartible estate, though he be the eldest son, has no more rights than the eldest son in a family governed by the rule of primogeniture. If the estate is impartible the second defendant has no *locus standi*; if partible whatever is binding on the father is also binding on the son. If an inalienable custom be shown to exist, there can be a right by birth, and the holder for the time being is in the position of a manager with the right to take profits. Section 462 of the Code of Civil Procedure has no application. No collusion is alleged as between plaintiff and first defendant. The abandonment of the first issue is as much binding on the second defendant as it is on the first (*Chengal Reddi* v. *Venkata Reddi* (5)). The next friend of an infant can withdraw a suit provided there is no fraud or collusion (*Eshan Chundra Safooi* v. *Nundamoni Dassee* (6)). Even in the present appeal some of the issues have been abandoned by counsel for the first appellant; and there can be no difference between the authority of counsel and that of a vakil in the conduct of a suit. It would be impossible to conduct any case properly without power to exercise discretion as to matters that can or cannot be supported. Nor does the abandonment of an issue amount to a compromise or an agreement by consent. In the case of impartible estates the holder for the time being is the absolute owner (*Sartaj Kuari* v. *Deoraj Kuari* (7)). See also *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (8).

Ramachandra Rao Saheb in reply.—The nature of the estate will have to be decided before the cases of *Sartaj Kuari* v. *Deoraj Kuari* (7) and *Sri Raja Rao Venkata Surya Mahipati Rama KrishnRao Bahadur* v. *The Court of Wards* (8) can be applied. In this case the son's position is different from that of a samanodaka, who has no interest by birth, whatever the nature of the estate may be.

JUDGMENT.

[543] MOORE, J.—[After referring to the facts, and the first issue, and its abandonment by the defendants' pleader]. . . . . It is now pleaded that the vakils for the appellants (defendants) were not justified in abandoning the first issue and that they had received no instructions

(1) 18 W.R. (C.R.) 436. (2) 18 M. 73. (3) 24 I.A. 118=20 M. 256.
(4) 17 I.A. 128=18 C. 151. (5) 12 M. 483. (6) 10 C. 357.
(7) 15 I.A. 51=10 A. 272. (8) 26 I.A. 83=22 M. 383.

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from the zemindar authorising them to do so, and it is urged that the issue should now be tried. One of the main grounds on which Mr. Norton bases his application for the re-trial of this issue is that it was abandoned in consequence of certain remarks which the District Judge made with reference to some documents which had been received by him from the Board of Revenue, but which the vakils for the defendants had no opportunity of perusing. The District Judge's account of what took place with reference to these documents will be found in paragraphs 12 and 13 of his judgment, while the allegations made on behalf of the appellants are set forth in the affidavit of the 21st September 1897 by the late dewan of the zemindar and affidavits Nos. 9, 10, 11 and 12 by the zemindar and three of the vakils employed by him before the District Judge. It is perfectly clear that no weight can possibly be attached to the argument now put forward. Whether the vakils were influenced by the remarks of the Judge or not it is impossible to say, but the question, it is scarcely necessary to observe, is quite immaterial. The vakils deliberately abandoned the issue and it would be idle to enquire as to whether they were led to do so because they were apprehensive that the Judge would decide it against them or not.

It is further urged that the late dewan was not empowered to authorise the vakils, to abandon the issue. The power of attorney granted to him by the zemindar is among the printed papers, but it has not been filed as an exhibit. It is not, however, necessary to consider the question as to the dewan's power to instruct the vakils. The only point for consideration is as to whether it was within the ordinary powers given to the vakils for the conduct of the suit to abandon an issue when they, whether rightly or wrongly, arrived at the conclusion that their contentions as to it were untenable. I am clearly of opinion that this question must be answered in the affirmative. It must be held that a vakil appointed to conduct a case on behalf of his client has the power to ask for an issue or to abandon an issue, to get a witness summoned or to dispense with his evidence. Without such powers no **[544]** case could be tried without frequent adjournments and endless references to the parties.

Whether the vakils in the present case acted wisely or not in giving up this issue it is impossible to say in the absence of evidence as to it on the record, but it is perfectly clear that their action was taken deliberately and was not objected to by their client till he went to Madras to give instructions as to the filing of this appeal in September 1897. The record and the arguments now adduced show that the zemindar's legal advisers here have thought it advisable to adopt a very different line of action from that followed by his vakils in Masulipatam. There the issues that were keenly contested were Nos. 2, 3, and 4, while No. 1 was given up. Here Nos. 2, 3 and 4 are abandoned while it is urged that No. 1 is the most important issue in the suit. The zemindar (first appellant) in his affidavit (No. 9) of the 21st September 1897 drawn up in Madras, states that he was absent from Masulipatam when that issue was abandoned and did not return there till the 26th March 1897. He then ascertained for the first time that the issue had been given up and wanted to apply to the District Court to get it re-opened, but was informed that it was useless to do so. It is not easy to accept this statement. It is most improbable that if the zemindar really at the time objected to the action of his vakils, he would have done nothing to repudiate it till he was in Madras in the following September. It is difficult to resist the inference that the

relinquishment of the issue was not opposed to his wishes, and that it was not till he was arranging in Madras for the presentation of his appeal that he changed his opinion on this point. However this may be, I have no hesitation in holding that the zemindar's vakils did not exceed their powers in abandoning the issue before the District Judge, and that it cannot be re-opened now.

The sixth issue is as to whether the first plaintiff is in possession of any of the family properties in addition to those admitted by him in the plaint and whether, if so, this suit is maintainable. It is urged that the first plaintiff has been shown to be in possession of the jewels shown in Schedule II, that he has not brought these jewels into "hotch-pot" as it is called, so as to render them available for division with the rest of the family property and that consequently it should be held that this suit is one for a partial division of family property and as such should be dismissed. The [545] District Judge deals with this question in paragraphs 36 to 38 of his judgment. It is shown that the first defendant, with his written statement filed on the 7th December 1895, put in a schedule (II) of jewels alleged by him to be in the first plaintiff's possession. The first plaintiff on the 24th July 1896 filed a petition (miscellaneous petition No. 508 of 1896) in the Court of the District Judge in which he stated that some of the jewels mentioned in Schedule II were in the possession of his wife and that he had no objection to their being divided if the first defendant consented to the partition of the jewels which were in the possession of his wives and children. The order passed on this by the District Judge is as follows:—"The Hon. Mr. Subba Rao (who appeared for the plaintiffs) says that the property in Schedule II is not available for partition and that he declines to make any further statement in regard to its nature."

Subsequently, however, as will be seen from the Judge's B form diary, this line of action was abandoned. It will there be found that on the 15th March 1897 Mr. Subba Rao stated that his client was willing to give the first defendant credit for half the value of the property mentioned in miscellaneous petition No. 508 of 1896. It is quite clear from this recital of facts that this is not a case of a plaintiff suing for a partial division of property. What is shown is that the first plaintiff, when filing his plaint and schedules, made no mention of the jewels in the possession of his wife. When the first defendant filed a schedule with his written statement showing jewels alleged to be in the first plaintiff's possession the latter admitted that the greater portion of these jewels were with his wife, but declined to allow them to be divided unless the jewels in the possession of the first defendant's wives and children were also divided. He, however, subsequently withdrew this plea. Here it is evident that there is no suit for partial division. As regards certain property which he never denied was in his possession the first plaintiff in the first instance put forward a plea that it should not be divided except on certain conditions but subsequently abandoned that contention. The decision of the District Judge on the sixth issue must be upheld. . . . .

Nothing was heard of the allegations reflecting on the conduct of the first defendant as set forth in this petition from the date that it was filed till this appeal came on here for disposal. An appeal petition has been filed here on behalf of the three defendants [546] jointly in which no allusion has been made to those allegations and no separate petition urging them has been put in on behalf of the second appellant. When, however, Mr. Norton had finished his arguments in support of the first

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appellant, Mr. Brown on behalf of the second appellant reverted to the allegations made in the petition of the 30th March 1897 and urged *inter alia*, that the first appellant was not authorised to abandon the first issue in so far, at all events, as the second appellant was concerned. His argument briefly was that the abandonment of the first issue, which he maintained was the most important issue in the suit, amounted to a compromise, and that the guardian was not entitled to enter into any such agreement or compromise on behalf of the minor without the leave of the Court given under Section 462 of the Civil Procedure Code. It does not appear to be necessary to consider this argument at any length or to refer to the several decisions referred to by Mr. Brown as it is, in my opinion, absolutely impossible to hold that the giving up of the first issue amounted to an agreement or compromise. All the proceedings in the case show clearly that there was no such agreement between the first defendant or his vakils and the plaintiffs and that no compromise was entered into by them. What took place was, as has already been pointed out, that the vakils for the defendants, whether wisely or not it is impossible to say, came to the conclusion that it was hopeless to continue the contest on the first issue and allowed to be decided against them. There was no compromise or agreement it and no sanction of the Court was therefore required by Section 462 before the abandonment of the issue. This ground of appeal must be negatived. . . . .

O' FARRELL, J.— . . . . The only questions pressed upon us are those with which I now proceed to deal. The first is the contention covered by the first issue in the suit as to the alleged impartibility of the estate. The District Judge has recorded a finding adverse to the defendants on this issue in consequence of its abandonment by the defendants' pleader. It is contended before us that the abandonment was without authority and the result of remarks which fell from the Judge in the Court below and that the defendants are entitled to have the issue re-tried. Dealing first with this contention as it is put by counsel on behalf of the first defendant, the vakalats of the pleaders in the Lower Court have been read to us, but they appear to be in the general terms usual in such [547] documents and nothing seems to turn upon them. There is, further, no allegation of fraud or misconduct on the part of the vakils. The simple question, then, is whether a pleader's general powers in the conduct of a suit include the abandonment of an issue which, in his discretion, he thinks it inadvisable to press. No case has been cited which, in my opinion, goes the full length contended for by the learned counsel for the appellant of declaring, in distinct terms, that a pleader has no such general authority. On the contrary, it was held in a case decided by the Privy Council in 1839 (*Rajunder Narain Rac* v. *Bijai Govind Singh* (1)) that the admission and consent of a vakil made with due authority (which would appear to mean properly authorised to conduct proceedings in the suit) will bind his client though not present at the time of making it. In that case Lord Brougham observed that if it were held otherwise "it would not be safe to see any agent or counsel, without letting the parties appear in the most trifling matter. The Courts must in all cases see the parties themselves if they are not to be bound by their agents." No distinction is drawn, it will be observed, between counsel, whose consent, unless against the express wish of his client, will be binding (*Carrison* v. *Rodrigues* (2)) and vakils or other agents. The

(1) 2 M.I.A. 253. (2) 13 C. 115.

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principle enunciated in that case is followed in *Jagapati Mudaliar* v. *Ekambara Mudaliar* (1), where a distinction is drawn between giving up a right by way of compromise and "the power to bind by admissions which, in effect, is but dispensing with proof of the facts admitted, and is one of the well-recognised incidents of a pleader's general authority." In the light of that decision which is the only one of this Court of those cited to us which deals with the precise question at issue, I do not think there is any need to consider, so far as the first defendant is concerned, the Bengal decisions which have been cited. I may observe, however, that from the observations of Hobhouse, J., in *Gour Pershad Doss* v. *Sookdeb Ram Deb* (2), the case mainly relied upon by counsel for the appellants, it would rather seem that what the vakil there gave up was a claim already admitted or proved and which the Court below was prepared to decree in favour of the client. If so the case is not in point. I can see no valid ground for the distinction that has been attempted to be drawn between making admissions as to relevant facts and abandoning an issue, [548] which is only another form of admission. It is true that in the present case it is alleged that the defendants' pleaders improperly took certain documents off the record after the issue was abandoned, but the defendant was not prejudiced by their action, inasmuch as the learned counsel does not contend that on those documents coupled with the oral evidence still on the record, a finding in favour of his client could have been arrived at without further evidence.

As regards the allegation that the vakils were influenced by any remarks made by the District Judge in the course of the trial, I attach no importance to it. I entertain little doubt that the issue was abandoned, rightly or wrongly, because the pleaders thought it could not be sustained. In this connection I may refer to a decision of a Division Bench of this Court in 1893, the substance of which is embodied in the Privy Council decision in *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu* (3). In that suit, the subject-matter of which was an estate granted in 1803, it was held by Parker and Shephard, JJ., that evidence of conduct extending over a period of about seventy years was insufficient to prove a special custom. This decision applies strictly to the Vallur estate now in question which was founded in 1802 and is also alleged to be impartible by reason of a family custom. In the present suit there was the additional difficulty that all the cases of devolution prior to the death of the father of plaintiffs and defendants in 1869 had been to sole surviving heirs and could therefore afford no evidence of any special custom of impartibility. I mention these matters as showing the difficulties with which the defendants would have had to contend in the event of the issue having been pressed, and as removing any ground for the contention that the pleaders must necessarily have been influenced by any remarks which fell from the District Judge. The affidavits, Nos. 10, 11 and 12 of the pleaders in the Court below which are presented to us in support of the defendants' contention do not allege that the remarks attributed to the District Judge were more than one among several reasons for abandoning the issue. I would also remark that there were good grounds for inferring that the defendant himself at that time acquiesced in the abandonment of the issue. His own statement in the affidavit [549] No. 9 that he has filed before us is that he came to know of the adandonment on the 26th

(1) 21 M. 274. (2) 12 W.R. (C.R.) 279. (3) 24 I.A. 118=20 M. 256 (264).

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March 1897. Judgment was not delivered in the suit till the 22nd April, and the defendant made no attempt in the interval to move the Court to re-open the issue, I would, on all these grounds, hold that the first defendant is bound by the acts of his legal advisers in the Court below. As regards the second defendant (and the same thing applies to the third defendant also) it is ingeniously contended by his learned counse that the abondonment of the first issue amounted to a decree by consent for partition and as such falls within the spirit, if not within the strict letter, of Section 462 of the Civil Procedure Code, which prohibits the entering into a compromise so as to affect the interests of minors without the leave of the Court. I agree with the view taken by Mr. Justice Moore in the judgment just pronounced that Section 462, Civil Procedure Code, has no application to a case of this kind; but, without going into this question, I think a sufficient answer is found to the contention in the argument put forward by the learned vakil for the respondents, that if the estate is impartible, the sons have, since the decision of the Judicial Committe in *Sartaj Kuari* v. *Deoraj Kuari* (1) recently affirmed as to this Presidency in the Pittapur appeal, no *locus standi* to question the acts of their father. Of the two Privy Council cases cited by Mr. Brown for the second defendant on this point, one (*Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (2)), is explained by the Judicial Committee in their recent decision in the Pittapur case (*Sri Raja Rao Venkata Surya Mahipati Ramakrishna Rao Bahadur* v. *The Court of Wards*(3)) and the *dictum* to be fonnd in the other *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Naraydna Dhatrazu Bahadur Garu* (4) that "even if impartible the estate may still be part of the family property and descendible as such" is probably to be understood in the sense that it may be so by special custom. It is noticeable that the case of *Sartaj Kuari* v. *Deoraj Kuari* (1) was not referred to in the argument and it was probably tacitly assumed, according to the notion prevalent till recently, that that decision was inapplicable to the Madras **[550]** Presidency. I would, therefore, hold that the abandonment of the issue in the Court below cannot now be questioned by any of the defendants. . . . .

The next contention relied upon by the appellants is that the suit is, in effect, one for partial partition and ought to have been dismissed. The contention is based on the finding of the District Judge at paragraph 37 of his judgment, which is accepted for the purposes of this argument, to the effect that the plaintiff was in possession of certain jewels forming part of the joint family property, but which he falsely alleged were in his wife's possession. It is pointed out that he persistently refused to bring these into hotch-pot, except upon conditions and it is urged that he was therefore, in effect, seeking a partition of only a portion of the family property and his suit should, according to the decisions quoted by the District Judge in paragraph 38 of his judgment, have been dismissed. As a matter of fact, however, it is pointed out by the learned vakil for the respondents that the plaintiff did on the 15th March 1897 unconditionally agree to the division of the property in dispute, and the Judge has given a decree accordingly. I cannot see that the consent, which was given before decree, and before even the examination of witnesses began, was given too late. The District Judge rightly

(1) 15 I. A. 51=10 A. 272.
(2) 17 I.A. 128=18 C. 151.
(3) 26 I. A. 83=22 M. 383.
(4) 24 I. A. 118=20 M. 256 (264).

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observes that fraud or concealment of property will not disentitle a plaintiff from maintaining a suit for partition. He has, I think, misunderstood the scope of the cases cited by him which are all, with the exception of *Hari Narayan Brahme* v. *Ganpatrav Daji* (1) (where the point did not directly arise), authorities merely for the proposition that a suit brought expressly for the purpose of effecting a partition of a portion only of joint family property, will not lie. The present is not such a suit. It is one brought for the division of the whole of the family properties, moveable and immoveable, and the mere omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition. . . . .

Appeal dismissed.

(1) 7 B. 272.

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PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

ANNAPURNI NACHIAR (*Defendant No.* 2), *Appellant v.* FORBES AND MINAKSHI SUNDARA NACHIAR (*Plaintiff and Defendant No.* 1), *Respondents.*
[23rd June and 22nd July, 1899.]

Hindu Law—Adoption—Preference of the adoptive mother, in the inheriting the family estate through the adopted son, over a senior co-wife.

A Hindu, having two wives, adopted a son in conjunction with the co-wife who was the junior in marriage of the two, having chosen her to be present at the adoption with himself. The husband next died; and after him the adopted child, having inherited the impartible family estate, also died. The two widows survived them both:

Held, affirming the decisions of the Courts below, that the junior co-wife, having taken part in the adoption by her husband at his selection, inherited the impartible family estate upon the death of the adopted son, in preference to the co-wife who was senior in marriage, but who had not been conjoined in the adoption.

Kasheeshuree Debia v. *Greesh Chunder Lahoree* ((1864) W.R. (Sup. Vol.), 71), referred to and approved.

[R., 33 B. 452=11 Bom. L.R. 654; 26 M. 104 (109); 29 M. 437=16 M.L.J. 178=1 M.L.T. 12.]

APPEAL from a decree (10th April 1895) of the High Court, affirming a decree (25th November 1893) of the District Judge of Tinnevelly.

The plaintiff in the suit, now the first respondent, was the Collector of Tinnevelly, Agent of the Court of Wards, in possession of the impartible zemindari named Uthumalai. The first defendant, now the second respondent, was Minakshi Sundara Nachiar, [2] one of the two widows of the late Irudalaya Marudappa, Zemindar of Uthumalai; the other defendant, now the present appellant, having been Annapurni Nachiar, the other of the two widows of the zemindar.

This suit was instituted by the Collector against both the co-widows in order to their having to establish by interpleader, under Section 470 of the Code of Civil Procedure, which of the two should be held to inherit the impartible estate from a son whom their late husband had adopted shortly before his death. The proceedings accordingly were carried on throughout between the two co-widows.

Irudalaya, the husband, died on the 12th August 1891, having on the preceding 12th July adopted as his son a child, Navanitha Krishna Marudappa, who died on the 16th November following, aged about two

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years. The Collector took charge of the estate on behalf of the child before he died.

In carrying out the adoption on the 12th July 1891 the zemindar acted in conjunction with Minakshi Sundara Nachiar, the junior in marriage of the two co-wives, having chosen her to be present at the adoption. Annapurni was not conjoined therein.

The question for decision on this appeal was whether the High Court had been right in maintaining the judgment of the first Court that the junior wife, because she had been chosen to take part in the adoption and had done so, was entitled to inherit from the adopted son in preference to her co-wife, the junior being for that reason regarded as the adoptive mother.

Both the Courts below, Original and Appellate, concurred in finding that Annapurni Nachiar was the first wife, or Pattabha Sri; and that Navanitha Krishna was lawfully adopted by the late zemindar in conjunction only with his junior wife whom he chose to be present. The admission was recorded by the first Court that in the event of its being decided that the adoption was valid succession was to be traced from the adopted son and not from Irudalaya. The judgments of the Judges of the High Court (SHEPHARD and BEST, JJ.) are reported at length in I.L.R., 18 Mad., 277.

Mr. *J. D. Mayne*,* for the appellant, relied on the following principal points:—According to the theory of Hindu Law in such an adoption equal rights were conferred thereby on all co-wives to be regarded as adoptive mothers. The right therefore of the [3] appellant, as senior wife, should have received due effect; and she, and not the junior wife, should have been held entitled to inherit from the adopted son. The Courts below had been wrong in holding that Minakshi, the junior wife in virtue of her having alone as a wife, shared in the act of adoption by the husband acquired a status in regard to the adopted son which annulled the superior right of inheritance attaching to the seniority in marriage of Annapurni. In adoption the husband alone adopted. The co-wife having been associated with him, without that association having added anything effective to the ceremony, and not being in the least degree necessary, the argument was that no advantage was obtained by her from her being conjoined with the husband on the occasion. There appeared no authority for the proposition that a junior co-wife derived a right to be preferred. in the inheritance from the adopted son, over a senior co-wife, from the fact of her having been chosen to be present at the adoption. The question resolved itself into whether the selection of the junior co-wife to be present, without her presence having any effective operation, altered the right of the senior co-widow to inherit from the adopted son in preference to the other. It was submitted that there was no sufficient authority for the decision now appealed from, and on this subject the following authorities were cited and examined:—

Vasishtha and Baudhayana in the 'Sacred Books of the East,' volume XIV, pages 75 and 334, respectively; 'Dattaka Mimamsa,' Section I, verse 23; Section VI, verse 46; 'Dattaka Chandrika,' Section III, verse 17; Manu, Chapter IX, sloka 183; Colebrooke's 'Digest of Hindu Law,' volume II, pages 250-253, and *ibid*, Chapter IV, Section 8, verse 273; 'Principles and Precedents of Hindu Law' by W.H. Macnaghten, volume I,

* [For the fuller arguments of the Counsel, see 9 M.L.J. 209.—ED.]

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Preliminary Remarks, pages 10 to 13; *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (1); *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* (2); *Pudma Coomari Debi* v. *The Court of Wards* (3); *Rungama* v. *Atchama* (4).

The contention was that when once the adoption had been made the adopted boy occupied the same position in regard to all [4] the co-wives of the adopting father, and they to him. He cited W. H. Macnaghten's 'Hindu Law,' volume II, page 62; F. W. Macnaghten's 'Considerations on Hindu Law,' page 171, and *ibid*, Appendix, pages 10, 11; West and Buhler's 'Hindu Law,' 3rd edition, pages 1181 and 1182; and referred to the later edition of Jaganatha's 'Digest,' volume II, Chapter IV, Section 8, verse 273. And he reviewed *Kasheeshuree Debia* v. *Greesh Chunder Lahoree* (5) and *Teencowree Chatterjee* v. *Dinonath Banerjee* (6), cited in the judgments of the Courts below.

Mr. *J. Jardine*, *Q.C.*, and Mr. *J. H. A. Branson*, for the respondent Minakshi Sundara Nachiar, argued that in the texts of Hindu law, and in the works of the authorities on the subject, there was nothing of weight contrary to the proposition that a husband, in adopting a son, might favour one of several co-wives more than another, and, if he chose, place her in the relation of adoptive mother to the adopted son. The theory of adoption by Hindu law did not require that if there should be several co-wives they should all be deemed to be adoptive mothers, although the father by adoption might have conjoined one of them with himself in carrying it out. Where all was fiction it was perhaps not cogent to distinguish the impossibility of there being several such parents in reality. But what was argued was that the High Court had rightly concluded it to be justified, in principle and by authority, to hold that where a husband has associated one of his co-wives with himself in adopting a son, that co-wife is to be considered to be alone the adoptive mother.

They referred to Manu, Chapter IX, sloka 183, and to the passages in the works of Sir W. H., and of Sir F. W., Macnaghten, already mentioned, and pointed out that little was to be obtained from either the 'Dattaka Mimamsa' or the 'Dattaka Chandrika' on this point; the plurality of wives being hardly brought into connection with the subject at all. They referred to the Tagore lectures, 1888, of Golapchandra Sarkar on 'Adoption,' pages 215, 217, and relied on *Kasheeshuree Debia* v. *Greesh Chunder Lahoree* (5).

Mr. *J. D. Mayne* replied.

Afterwards, on the 29th July their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

[5] This suit is in form instituted by the Court of Wards; in substance it is one between the two widows of Irudalaya, late owner of the impartible estate of Uthumalai, who have interpleaded one another. They were both married on the same day; but it has been found that the appel-

(1) 10 I.A. 138 = 10 C. 232.
(2) 7 I. A. 250 = 6 C. 381.
(3) 8 I.A. 229 = 8 C. 302.
(4) 4 M.I.A. 1.
(5) (1864) W.R. Sup. Vol. 71.
(6) 3 W.R. C. R. 49.

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lant is the senior wife of the two. On the 12th July 1891 Irudalaya adopted a boy called Navanitha: on the 12th August 1891 he died; and on the 16th November 1891 the boy died, being then about two years old. The Court of Wards was then in possession of the estate as his guardian, and their only interest is to ascertain his heir.

The appellant's claim is rested on the fact that she was the senior wife; the respondent Minakshi's on the fact, which has been found by both Courts, that the boy was adopted by Irudalaya in conjunction with her and not in conjunction with the appellant. The District Judge held that the respondent was entitled to the estate as adoptive mother and nearest heir of the last holder Navanitha, and his judgment was affirmed by the High Court. That opinion is challenged in the present appeal. There has been a great deal of dispute in the Courts below upon matters of fact, but none are in dispute now. The disputed question of law is thus stated by the District Judge:—"Whether, when a man having more than one wife, "adopts a son in conjunction with one of them only, the other wives "acquire the same legal status with respect to the adopted son as the "wife who joins her husband in making the adoption?"

There is only one reported decision directly involving the proposition in question. It is to be found in *Kasheeshuree Debia* v. *Greesh Chunder Lahoree* (1). The plaintiff Kasheeshuree was the first wife of Kali Kant. His second wife was called Mohini. Kali Kant adopted a boy in conjunction with Mohini and without the concurrence of the plaintiff. After the deaths of Kali Kant and of Mohini and of the boy, the question arose whether the heir of the boy was the plaintiff, or the defendant who was Kali Kant's nephew and nearest collateral. It was argued for the plaintiff that both wives were equally adoptive mothers, and both entitled to inherit in preference to a collateral. The Court (consisting of Bayley and Jackson, JJ.) stated their opinion that this position was not borne out by Hindu law and precedent; and after [6] subjecting the cited authorities to examination they decided in favour of the defendant. So that according to those experienced Judges, when a man has selected one of his wives to adopt a boy in conjunction with him, other wives who do not participate in the act are so completely excluded from inheritance to the boy, that a collateral member of the family shall be preferred to them. That the other wives should be postponed to the one who joined in making the adoption is a less sweeping conclusion, but clearly involved in the wider one reached by the Bengal High Court.

Mr. Mayne has contended for the appellant that this Bengal decision is not warranted by law. He referred to sacred texts of Rishis, Manu and Baudhayana, for some fundamental principles of adoption, and to show that the good effects produced by the son of one wife enure to the benefit of other wives of the same man. But these texts are very far from showing that a wife who receives in adoption, and another who does not, stand on an equal footing as regards inheritance to the adopted boy. If applied to inheritance in the way contended for by the appellant, such texts would prove too much; they would be equally good to prove that a natural mother and her co-wife stand on an equal footing, which is clearly not the case. There is no advantage to be got from more minute criticism of these texts, nor indeed of the texts cited from the later books, 'Dattaka

(1) (1864) W. R. Sup. Vol. 71.

Chandrika' and 'Dattaka Mimamsa,' which are addressed to the question whether a wife's assent is necessary to an adoption, and not to this question of inheritance.

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A passage is quoted from Colebrooke's 'Translation of Jagannadha' (Digest, 4th edition, volume II, pages 252-53) in which the author considers the difficulty (seeming difficulty he calls it) occurring in oblations of funeral cakes to a maternal grandfather, either when the offerer has none from having been adopted by an unmarried man, or when he has more than one from having been adopted by a man with more than one wife. Both the difficulty and the plan suggested for meeting it are very abstruse, and so far as their Lordships can see, of a very formal nature; but the whole discussion clearly has reference to the religious aspect of the situation.

The authority most relied on for the appellant is a passage in the Preliminary Remarks of Sir W. H. Macnaghten in his work on Hindu law. It is rather curious that he approaches the question by way of illustrating his opinion that the Hindu law is generally [7] simple and free from difficulty. He supposes a case. A man dies childless leaving three widows. He gives permission to one to adopt a son. The adopted son dies without issue leaving the three widows surviving. To whom will the property go, to the widow adopting, or equally to the three? The law, he says, is silent. He then supposes an advocate of the adopting widow to admit that, if the husband had adopted, he could not have selected one of his wives as adopting mother and excluded the others from all maternal relation, but to contend that in the case stated the non-adopting widows were only step-mothers. He continues :—"The reason "is plausible but such is not the law. The three widows are one and the "same individual. The adopter has the privilege of selecting the boy; "but adoption once made, he necessarily holds the same relation to all "of them." This passage certainly gives the appellant a right to argue not only that the admission which Sir William puts into the mouth of the adopting widow's supposed advocate was deemed by him to be good law, but that he goes further and applies to the subject of inheritance the doctrine of Manu that all wives have male issue when one has it. This passage in Sir W.H. Macnaghten's preface is apparently the only authority in favour of the appellant. It must be taken with the respect due to his great reputation, but also with the drawback that he was avowedly giving his opinion on a hypothetical case of the first impression. He has no precise authority; the law, he says, is silent: he does not show by what process he arrived at his conclusion; and that which seemed to him so clear that it illustrated the perspicuity of the Hindu law has met with doubt and denial from others.

In fact Sir W. H. Macnaghten himself goes on (pages 12, 13 of his Preliminary Remarks) to make statements very difficult to reconcile with those which have just been quoted. He is speaking of a case in which a man leaving three widows has appointed one to make adoption :—" I here "merely allude to the rights and privileges accruing to the single widow "from the simple fact of her having made the adoption, independently of "any intention expressed or implied by the deceased, that such widow "alone should be considered as the mother of the adopted child. If he "declared this explicitly, the case would be different; or if such may be "reasonably gathered to have been his intention, from some unequivocal "indication of his will that his other wives should [8] have no concern

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"with the adoption. But the simple fact of his having commissioned any "one of the three to select the boy, cannot be considered as sufficient to "deprive the two others of their maternal rights, or to debar them from "taking the shares to which they would have succeeded had no adoption "taken place." If both these passages are sound law we have as the result that a man may by a posthumous act give a prefereence to one wife which he cannot do when living.

Sir F. W. Macnaghten in page 171 of his treatise speaks of the adoption of a boy to a man who left three widows, with directions for joint adoption about which they could not agree. The Court selected a boy and then the question was which widow had the right to receive him? "The law is clear and was undisputed. The boy could not be received "by the three widows jointly. He must be received by one of them—and "would then be considered as the son of the father and of the widow by "whom he had been received—about this there was not, because there "could not be, any dispute."

In the appendix of the same work, page 11, occur the answers of a pandit examined by the Court in the same case. Among those answers occur the following:—"Only one (widow) can adopt; the three (widows) "may agree upon the child to be adopted, but only one of the widows can "adopt." "The child becomes the child of all three. The widow adopting "him, if he should die under age, she will be called the mother and the "others the step-mothers."

The actual decision, which was in favour of the senior wife, throws no further light on the question now before the Board. But here are opinions given on an actual case under judicial decision, and they are to the effect that the adopting widow would become the mother of the boy in a sense in which her co-wives would not be mothers, in effect that she would be in the place of a natural mother, which would lead to the conclusion that she was the boy's heir. Those opinions related to a case in which, so far as any action of their husband was concerned, the widows stood on an equality, and became unequal only by the ceremony of adoption after his death.

More recent text-books referring to the Bengal decision of 1864 have been cited to their Lordships, such as West and Buhler's 'Hindu Law,' 3rd edition, pages 1181, 1182, and Golapchandra **[9]** Sarkar on 'Adoption' (Tagore Law Lectures for 1888), page 153, and they were referred to by the learned Judges in the Courts below. They do not show that any dissatisfaction with that decision has been felt by Indian lawyers, but on the contrary state the law in accordance with it.

It seems to their Lordships that the decisions in the Bengal case and in this case accord with principles well recognised as applicable to other points of Hindu law. Reference has been made to the text of Manu (Chapter IX, sloka 183), in which he declares that if of several wives one brings forth a male child, all shall by means of that child be mothers of male issue. In the preceding sloka he declares that if among several brothers of the whole blood one have a son born they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purposes of inheritance the natural mothers and fathers respectively are preferred. Again it seems not to be doubted that a man may authorise a single one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother. If he can do that, it would be

very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy, with the same effect on her relations with that boy. It is true that some rules of Hindu law, resting perhaps on religious tenets or ancient customs, appear to be quite arbitrary; but when this Board is asked to affirm a rule of that nature they require some cogent authority for it. It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widow's relative to adoption and the consequences of it. To unite one wife with himself in adopting is one way; and it is satisfactory to find that besides the one direct judicial decision there is so much reason and opinion in its favour and so little against it. They hold that the High Court of Bengal in 1864 and the Madras Courts in this case have decided rightly, and they will humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

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Appeal dismissed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitors for the second respondent: Messrs. *Lawford, Waterhouse & Lawford.*

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[10] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, Sir Richard Couch and Sir Edward Fry.

[*On appeal from the High Court at Madras.*]

INNASIMUTTU UDAYAN (*Defendant*) v. UPAKARATH UDAYAN AND OTHERS (*Plaintiffs*). [29th June and 20th July, 1899.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 142.

A suit for the proprietary possession of land was defended on the ground of limitation, resting on the defendant's possession, displacing the plaintiff's case that her predecessor in title had possessed the land within twelve years before the suit.

The defendant had a possession which was admitted to have extended back for seven years before the suit. The documentary evidence showing that he had been in possession for more than five years immediately preceding those seven years was exactly similar to the evidence which accompanied his possession during that period. This evidence consisted of a series of documents such as were usually given to and received by the possessor of lands, and they extended throughout the period in dispute, going back far behind the twelve years which would bar.

It was not necessary to consider whether the burthen of proof was shifted merely by the seven years' admitted possession, as the additional evidence raised the inference that the same possession had continued for more than twelve years: *Held*, that the burthen of rebutting this inference had not been discharged by evidence given by the plaintiff, while the evidence for the defendant had amply sustained the burthen originally laid upon him to show his twelve years' possession.

[R., 7 C.L.J. 414=12 C.W.N. 273=3 M.L.T. 212.]

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APPEAL from a decree (4th October 1895) of the High Court reversing a decree (7th March 1894) of the Subordinate Judge of Madura.

The plaintiff in this suit, filed on the 2nd November 1892, Savuri Ammal, who died while it was pending, and who was now represented by the eight respondents, sued for the proprietary right of lands in Madura. She claimed to be heiress on the death of her mother Avammal in 1884, since whose death the property had been, as was admitted, in the possession of the defendant. The relationship of the parties appears in the judgment of their Lordships, where the facts of the case are stated.

[11] The only question was whether the period of the defendant's possession, anterior to the death of Avammal in 1884, had been proved to have been long enough to make up the period required, *viz.*, twelve years, to establish the bar of limitation.

The Subordinate Judge, on issues raising the question, found that Avammal had not had possession at any time, and that the defendant had been in possession for more than the twelve years; and decided that thus the plaintiff's suit was barred by limitation.

On an appeal by the plaintiff the High Court reversed this decision. They found that there was evidence that Avammal had been in possession till she died in 1884.

The defendant, Innasimuttu II, appealed.

Mr. *J. D. Mayne*, for the appellant, submitted that the High Court's decision was against the weight of the evidence as to the possession of Avammal; and that the decree should be set aside because the suit was barred by limitation.

The respondents did not appear.

Their Lordships' judgment was delivered by SIR EDWARD FRY.

JUDGMENT.

This is an action brought to recover an estate which was formerly in the possession of one Innasimuttu Udayan (a man of the same name as the appellant), who died many years ago. He had two sons; of these, one was Jacob, distinguished as Jacob I. This Jacob had a son, Jacob II, who appears to have died in the sixties, and is said by the appellant to have adopted him and to have left a will in his favour. The other son of the original Innasimuttu was Rayar, who, about 1820, was transported for some crime. He appears to have died sometime in the sixties, but whether before or after Jacob II is not shown. He left a widow, Avammal, who died in the year 1885. Savuri Ammal, the late plaintiff, in this action now represented by the respondents, was the daughter of Avammal, and claimed in some way (though in what way is not clear) through her mother. In the course of these proceedings it seems to have been admitted that the plaintiff had a title to maintain the action if she could get over the case made under the Statute of Limitations by the defendant who is the present appellant.

The question for decision is a question of fact, *viz.*, has the appellant shown possession of the estate in question during twelve years before the 2nd November 1892, the date when this action [12] was commenced. The plaintiff herself in her plaint states that the appellant, after the death of Avammal in 1885, took possession of the property in question, and the appellant is sued as being in possession. The appellant's own statement is that he has been in possession from 1865 or 1870. It is not

necessary to consider whether the mere fact of possession for seven years before suit throws on the plaintiff the burthen of showing when that possession began; for in the present case the admitted fact of possession is accompanied by a series of documents of the kind usually given to and received by the possessor of an estate, and bearing the appellant's name as the possessor of the estate, and that series of documents does not commence with the year 1885, but from dates covering the period in controversy; and it appears to their Lordships that this case might be decided on the short ground that the documentary evidence of possession, exactly similar in character to that which accompanies the admitted possession, goes back far behind the twelve years in question, that this throws on the plaintiff the burthen of rebutting the inference arising from the fact of possession accompanied by these documents, and that this burthen has not, in their Lordships' estimate of the conflicting evidence, been sustained by the plaintiff.

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Their Lordships, however, are unwilling to decide the matter without a more detailed discussion of the evidence, especially as this case has been heard *ex parte*.

The estate in question included holdings in the following six villages :—(1) Aniki, (2) Yeranikottai, (3) Panjamari, (4) Nettendal, otherwise Sadir Nettendal, (5) Manakkudi or Chabram Manukudi, (6) Thiruppakottai, otherwise Tiruppakottai.

According to the plaintiff her mother Avammal was in possession of the estate on her death in 1885; the appellant's case is that the estate descended from the original Innasimuttu Udayan to Jacob I, then to Jacob II, and that on his death it fell into the possession of his adopted or quasi-adopted child the appellant, that it was managed by the appellant's father during his minority, and that then somewhere from 1865 to 1870 he entered into possession, and has so remained ever since.

The first class of documents which are produced by the vakil of the plaintiff consist of number chits showing the cultivation and collection of money in the four villages of Aniki, Yeranikottai, Panjamari and Nettendal; they all bear the name of Innasimuttu [13] Udayan as the possessor and they extend in a broken series from the year 1845 to the year 1870, and then they cease; these documents confirm the statement made by some witnesses that no mutation of names had taken place on the death of the original proprietor; but what is more noteworthy is the date at which the series of documents ceases, *viz.*, 1870. If the appellant be correct that he got into possession at or about that date, the cesser of this stream of documents is perfectly natural; if, on the other hand, the story of the plaintiff were true that the appellant only got into possession on the death of Avammal in 1885, the absence of any document later than the year 1870 in the possession of the plaintiff is inexplicable.

The following sets of documents relating to the estate are produced by the appellant :—

First there are muchalkas or undertakings to pay a share of produce and a money rent in respect of Aniki, Yeranikottai and Panjamari given to the Collectors, and extending in a broken series from 1877 to 1889; these are given in many cases to English civilian officers acting as Assistant Collectors in the Madura district; they purport to be signed in most cases by the appellant, in some cases by an elder brother, in one case by a younger brother, in two cases by his wife and in two cases by Michael Udayan his father, all on behalf of Innasimuttu Udayan. Now

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it may well be that the name of Innasimuttu Udayan appearing in the heading of these papers may have been continued without change from the original proprietor; but their Lordships hesitate to believe that the signatures to which they have referred would have been accepted by the civilian officers unless a living Innasimuttu Udayan had been in possession of the land in respect of which the obligation was accepted and the persons whom the appellant has described as his relatives had been known to the officials to be such relatives. The practice in such cases is described by Attavanai Pillai, the karnam of Aniki, which shows that muchalkas are accepted only from the pattadar or some person supposed to be able to act for him. These documents come from the right custody as they were filed in the District Court by a representative of the Ramnad zemindari under which the villages are held, and they appear to their Lordships to be evidence of much weight.

The next series of documents consists of pattas granted by the Deputy Collector or other person from time to time representing [14] the Ramnad zemindari in respect of the five villages of Aniki, Yeranikottai, Panjamari, Nettendal and Manakkudi. These are all, with one exception to be hereafter mentioned, granted to Innasimuttu Udayan as the proprietor; they extend, though in a broken series as regards Aniki, from 1877 to 1891; as regards Yeranikottai from 1877 to 1891; as regards Panjamari from 1877 to 1889; as regards Nettendal from 1878 to 1891; and as regards Manakkudi from 1879 to 1888. In the Nettendal series, however, there is a patta granted to Rayar Udayan, and this seems to correspond with the fact that one of the holdings in this village which the plaintiff sought to recover from the appellant is described as in the name of Rayar Udayan as pattadar. But the circumstances relative to this holding are not before us.

In 1877 some difficulties arose between the Collector and the appellant in respect of the grant of pattas in the villages of Panjamari and Aniki, and from the documents before their Lordships it appears that in March 1877 the appellant succeeded, as pattadar of Panjamari, in obtaining a judgment for a new patta against the Assistant Collector; and in the following June a patta in respect of Aniki was offered to the appellant as being the person entitled to receive it and was refused by him on an objection as to its form.

Another class of documents consists of formal receipts given to the appellant on behalf of the Ramnad estate for rents in respect of the villages. These documents are, like all the others, not continuous, but they extend over the following periods; in relation to Aniki from 1886 to 1890; in respect of Yeranikottai from 1880 to 1890; in respect of Panjamari from 1878 to 1892; and in respect of Nettendal for 1879 to 1892. In all cases, therefore, except with regard to Aniki, they cover the disputed period, *viz.*, from 1880 to 1885.

None of the documents hitherto referred to relate to the sixth village, Tiruppakottai. This village belongs to a mutt institution in which it is not usual to exchange pattas and muchalkas. But the accountant under the hakdar has produced accounts from the mutt of the hakdar which refer to various plots as in the name of Innasimuttu. This may be the name of the original proprietor, but the entries are at least consistent with the appellant's case.

The evidence of the native village officers standing alone may probably be of little weight, but as concurring with the series [15] of

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documents to which their Lordships have referred they do not regard it as negligible. They therefore take notice of the fact that the karnams of Aniki and Nettendal and the accountant for Tiruppakottai support the appellant's contention as to his possession of lands.

One other document is produced by the appellant, *viz.*, a usufructuary mortgage of lands in Nettendal executed by him on the 13th April 1880.

Against this body of documentary evidence the plaintiff produced only evidence to which their Lordships attach little weight.

On this review of the evidence on both sides their Lordships are of opinion that the burthen of proving possession for twelve years before 2nd November 1892 which originally rested on the appellant has been amply sustained by him and they concur in the view of the Subordinate Judge that the muchalkas especially are very cogent evidence of the possession by the appellant for a stretch of time covering the period in dispute; and although they do not relate to all the six villages, yet as according to both sides the six villages were held together, they support the appellant's title to all the lands. Their Lordships are not able to accept as of much weight the evidence that the appellant came sometimes and assisted Avammal in the cultivation of the land, but even if this were the case their Lordships think that it does not explain or account for the existing body of documentary evidence.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the judgment under appeal, to dismiss the respondents' appeal to the High Court with costs and thereby to restore the judgment of the Subordinate Judge of Madura with a direction that all sums of money including costs which may have been paid under the judgment of the High Court at Madras be repaid, and with a further direction that, if possession of the lands in controversy has been delivered to the respondents, possession be restored to the appellant and mesne profits be paid by the respondents to the appellant. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

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23 M. 16.

[16] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Subramania Ayyar.

KARUPPANNAN CHETTI AND ANOTHER (*Plaintiffs*), *Appellants v.* BULOKAM CHETTI AND OTHERS (*Defendants Nos.* 1 *to* 5 *and* 8 *to* 13), *Respondents.** [26th April, 1899.]

Hindu Law—Sudras—Sons born of a kept woman entitled to equal shares with legitimate sons in partition, the father so desiring.

Sons born of a woman continuously kept by their father as a concubine (and whose connection with their father is neither adulterous nor incestuous), are, in the case of a Sudra's estate, entitled to equal shares with legitimate sons in a suit for partition, if it is the wish of the father that they should so participate.

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* Second Appeal No. 1437 of 1898.

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Clause 2 of Section XII, Chapter I, Part II, of the Mitakshara, does not refer alone to the self-acquired property of the father.

[R., 25 M. 519=11 M.L.J. 399; 34 M. 277 (282); 16 C.L.J. 335=17 C.W.N. 442 (444).]

SECOND appeal against the decree of S. Russell, District Judge of Madura, in appeal suit No. 407 of 1897, modifying the decree of T. Sadasiva Ayyar, District Munsif of Dindigul, in original suit No. 376 of 1896.

Suit for partition by first plaintiff and his son against first plaintiff's father (first defendant) and younger brothers and their sons. Defendants Nos. 8 to 13 were illegitimate sons of first defendant by a concubine who had lived permanently with him. The question was whether defendants Nos. 8 to 13 were entitled to any and what share in the partition. First defendant, the father, wished the illegitimate sons to share equally with the legitimate. The District Munsif referred to *Kirpal Narain Tewari* v. *Sukurmoni* (1), *Krishnayyan* v. *Muttusami* (2), *Parvathi* v. *Thirumalai* (3), *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (4), and *Chinnammal* v. *Varadarajulu* (5); Manu, Chapter III, slokas 23 to 25, and Chapter IX, sloka 179; and held that the son of a Sudra, born of a permanent concubine, is, strictly speaking, not an illegitimate son, but a legitimate aurasa son born of a [17] gandharva marriage. He found that defendants Nos. 8 to 13 were each entitled to half the share of a legitimate son at the partition of ancestral property. Plaintiff appealed, contending that the illegitimate sons were not entitled to any share at all, or at most to a smaller share. The illegitimate sons filed a memorandum of objections claiming full shares with the legitimate sons. The District Judge said:—"There is no direct ruling as to the share to be allotted to an illegitimate son when partition is sought to be enforced through the Court in the lifetime of the father. There is ample authority that the illegitimate sons are entitled to a half share on a division after the death of the father. I agree with a great deal of the relevant matter which the District Munsif has written as to the fact that the illegitimate sons are entitled to a share. In my opinion this case should be decided on the following text:—'The son begotten by a Sudra on a female slave obtains a share by the father's choice, or at his pleasure. But after the demise of the father if there be sons of a wedded wife, let these brothers allow the son of a female slave to participate for half a share, that is, let them give him half (as much as is the amount of one brother's) allotment'—Mitakshara, Part II, Chapter I, Section XII, Clause 2. This text is relied upon by the Bombay High Court—*vide* *Sadu* v. *Baiza* (6): also by the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (4). Both these cases refer to the rights of an illegitimate son after the death of his father. The text quoted settles the point. It equally settles what the right is during the father's lifetime. It is a full share at the father's pleasure. In the present case it is not denied—it is admitted, that the father's pleasure is that the illegitimate sons should share equally with the legitimate sons, and this is my decree in appeal." He modified the decree of the District Munsif and gave the illegitimate sons equal shares with the legitimate.

Plaintiffs preferred this second appeal.

Sivasami Ayyar, for appellants.

Sundara Ayyar, for respondents.

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(1) 19 C. 91. (2) 7 M. 407. (3) 10 M. 334.
(4) 18 C. 151. (5) 15 M. 307. (6) 4 B. 37.

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JUDGMENT.

It is found that the defendants Nos. 8 to 13 are the illegitimate sons of the first defendant by a woman kept by him continuously, and his connection with whom was neither adulterous [18] nor incestuous. It is also found that the first defendant wishes that his illegitimate sons should taka equal shares with his legitimate sons, the plaintiffs, in the partition.

Upon these findings the District Judge was perfectly right in holding that the illegitimate sons are entitled to full shares. There is no foundation whatever, for the suggestion that the Mitakshara, Part II, Chapter I, Section XII, Clause 2, refers only to the self-acquired property of the father. The second appeal fails and is dismissed with costs.

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23 M. 18.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

BEST AND ANOTHER (*Plaintiffs*), *Appellants v.* HAJI MUHAMMAD SAIT AND OTHERS (*Defendants*), *Respondents.**
[10th and 18th October, 1899.]

Negotiable Instruments Act—Act XXVI of 1881, *Sections* 79, 80—*Interest on promissory note—No mention of interest or rate of interest in instrument—Indent of goods —Failure to take delivery and re-sale in consequence—Liability for loss.*

Certain promissory notes, on which a suit was brought, were in the following terms:—"On demand we promise to pay———or order the sum of Rupees " ———for value received." Plaintiffs claimed interest. On its being contended that where an instrument is completely silent about interest, Section 80 of the Negotiable Instruments Act, 1881, has no application, and no interest can be allowed:

Held, that the mercantile usage which would have enabled the Court to award interest on such an instrument prior to the passing of the Negotiable Instruments Act, 1881, has not been abrogated by that Act, though the interest that can now be awarded is limited by Section 80 to six per cent. Section 80 governs, alike, the case in which interest, but no rate of interest, is mentioned in the instrument, and that in which interest is not mentioned. In the case of a note payable on demand, the date of the demand, and not that of making the note, is the date from which interest must be taken to run.

Plaintiffs had procured certain goods in pursuance of indents signed by defendants which provided that, in the event of defendants failing to take due delivery of the goods, plaintiffs should be at liberty to re-sell them on defendants' [19] account and that defendants should pay to plaintiffs any deficiency arising from such re-sale. Goods were re-sold at a loss, and in a suit to recover such loss it was contended, in defence, that the property in the goods had not passed to the defendants and that plaintiffs' only remedy was by way of damages:

Held, that a clause such as that contained in the indent came into operation notwithstanding that the property had not passed to the buyers; and that plaintiffs were entitled to recover the deficiency arising from the re-sale.

APPEAL against the decree of Mr. Justice Boddam, sitting on the original side of the High Court, in civil suit No. 305 of 1897.

Suit for two sums of Rs. 11,958-6-9 and Rs. 6,521-4-0, respectively; the former in respect of nine promissory notes and interest, and the latter for losses sustained on the re-sale of goods indented by defendants

* Original Side Appeal No. 24 of 1898.

1899 Oct. 18. — Appellate Civil. — 23 M. 18.

through plaintiffs, and of which defendants had taken only partial delivery. By the indents in pursuance of which plaintiffs had ordered the goods for defendants, the latter undertook to take deliveries at specified intervals, and agreed to pay plaintiffs certain specified charges, together with interest at nine per cent. per annum on goods not duly taken. The indents also provided as follows :—"Should the dealers fail to take delivery as aforesaid the merchants shall be at liberty at such time or times after such failure as they shall in their uncontrolled discretion think desirable to re-sell on the dealers' account by public auction or private contract either the whole or any portion of the goods as shall not have been taken delivery of and the dealers shall forthwith pay to the merchants any deficiency arising from such re-sale with interest thereon at the rate of nine per cent. per annum until payment, together with all charges for godown rent and fire insurances up to and expenses connected with such sale and interest at the rate of nine per cent. per annum until such re-sale and shall forefeit any advantage which may arise from such re-sale and also any deposit made by them." Plaintiffs ordered and received the goods in packages branded with the shipper's mark, and placed them with other goods in their godowns for delivery to defendants as required, promissory notes being given by the latter as each delivery was taken. Twenty-seven packages which had not been taken were ultimately sold by plaintiffs under the provision in the indent, the said sum of Rs. 6,521-4-0 being made up of losses on such sale and charges. Interest was claimed at nine per cent. on the promissory notes. Defendants denied their liability in respect of such interest inasmuch as it was not provided for in the promissory notes, and [20] they contended that it was not otherwise recoverable. With regard to the loss sustained by the re-sale of goods, defendants denied that the property in such goods had passed to them and claimed that the goods should not have been sold on their account, and that plaintiffs were not entitled to recover the loss sustained by such sale, or the charges connected therewith. The sixth issue dealt with the question of liability for interest on the promissory notes. The promissory notes were in the following terms.—"On demand we promise to pay Messrs. Best & Co. or order the sum of "Rs.——for value received." The judgment of the Court was that plaintiffs were not entitled to interest, and it proceeded as follows:—"As regards their claim on the promissory notes, the plaintiffs claim that they are entitled to the amount of these promissory notes and interest upon them at nine per cent. per annum. The notes themselves are on-demand notes and bear no interest. The plaintiffs, however, say that they are entitled to claim interest under Section 80 of the Negotiable Instruments Act. This section says that where no rate of interest is mentioned, interest may be claimed. Here no interest at all is mentioned. The rate of interest is not omitted. So that the section does not apply at all. Had the Legislature intended that where interest is omitted it should be allowed, it could have said so, but it has not. It says where the 'rate' of interest is omitted. That applies in my judgment only to those cases where the note is drawn payable with interest without saying at what rate. In my opinion, therefore, the plaintiffs are not entitled to any interest upon these promissory notes." The third issue was :—"Did the property in any of the said goods pass to the defendants?" On this, his Lordship said :—"These twenty seven packages of goods were re-sold by the plaintiffs in October 1897. As I have already said, the plaintiffs do not suggest that anything was done with the goods on their arrival to specially appropriate

them to the defendants, but it was contended, though not with much force, that the fact of their bearing the shipper's mark when they were received and placed in the plaintiffs' godown was an appropriation sufficient to pass the property in them, though it was admitted by the plaintiffs' Counsel that had they been destroyed by fire in the plaintiffs' godowns the day before the plaintiffs re-sold them, the loss would have been the plaintiffs', and not the defendants'. I find as a fact that [21] no property passed to the defendants in any of the twenty-seven packages of goods resold by plaintiffs. The plaintiffs nevertheless, contend that they are entitled under the above set out clause to recover in this action from the defendants the difference between the indent price and the re-sale price and the interest and charges mentioned in that clause. At the time that I settled the issues I called the attention of the plaintiffs' Counsel to the decisions in the Calcutta Courts upon this clause and suggested that he should amend his plaint and claim damages for breach of contract; but he declined and, indeed, had any amendment been made, no evidence was tendered before me at the hearing to show the market price at any time of these goods so that I could not in any case have ascertained the damages. Until the property in the goods passed to the defendants the goods remained with the plaintiffs, and their only remedy against the defendants was to sue for damages for breach of contract and the proper measure of damages for breach of contract is the difference between the contract price and the market price at the time of breach. It was argued that there was no breach of contract until shortly before the re-sale in October 1897, but even if that were so, there is no evidence of what was then the market price. It is idle to suggest that the price obtained at a private sale is evidence of the market price. So far, therefore, as the plaintiffs' claim for the loss by re-sale is concerned, their action must be dismissed." Judgment was given for the amount due on the promissory notes (less a sum paid and a deficiency on one of the indents).

The plaintiffs preferred this appeal on the grounds, among others, that interest on the promissory notes, and the loss sustained by the re-sale should have been allowed. First and third defendants each lodged a memorandum of objections.

Mr. *K. Brown*, for appellants.

The Advocate-General (Hon. *C. Arnold White*), for respondent No. 2.

Mr. *E. Norton*, for respondent No. 1.

Sankaran Nayar, for respondent No. 3.

JUDGMENT.

On the part of the appellants, two questions are raised in this appeal. The learned Judge has refused to allow interest on the promissory notes given by the defendants from [22] time to time on taking delivery of the cases of piece-goods. In the promissory notes there is no mention of interest and accordingly the learned Judge, having regard to the language of Section 80 of the Negotiable Instruments Act, has held that no interest is chargeable. Section 79 provides for the case in which by the terms of the instrument interest is made payable at a specified rate. Section 80 provides for the case "when no rate of interest is specified in the instrument." This section, it is said, does not cover the case in which, as in the present case, the instrument is completely silent about interest, and hence it is inferred that in the case of such an instrument

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the Legislature did not intend that any interest should be allowed. Inasmuch as it is clear that before the Act was passed, the Court would have followed the law laid down in the English books and in accordance with mercantile usage would have allowed interest from the date of the maturity of the note, the construction which it is sought to put upon Section 80 is tantamount to saying that the usage of trade has been abrogated by the Act. We cannot think that was intended, nor do we think the language of the section compels us to adopt this view. On the other hand, we do not think we can treat the case as a *casus omissus* in which the Court is free to award interest as it would have done before the Act was passed. The language used is perhaps not the most felicitous, but we think it may be taken to denote alike the case in which interest, but no rate of interest, is mentioned and the case in which interest is not mentioned.

This construction avoids on the one hand the difficulty already mentioned of supposing that the Legislature meant to alter the old law and, on the other, the difficulty of supposing that it was intended to leave the Courts discretion to award interest at a higher rate than six per cent. in the case not covered by the section. Applying Section 80 to the present case, we think we must allow interest to the plaintiff at six per cent. from the dates at which the several notes ought to have been paid. The notes being payable on demand, it is not the date of the making, but the date of demand, that must be taken as the point from which to calculate interest.

The other point taken by the appellant's Counsel turns on the clause in the indents giving the plaintiffs liberty to sell the goods on the defendants failing to take due delivery and to charge [23] against the defendants the difference between the amount so realized and the contract price of the goods. The learned Judge, following a Calcutta decision (*Yule & Co.* v. *Mahomed Hossain* (1)), held that, as the property in the goods had not passed to the defendants, the only remedy of the plaintiff was in damages calculated in the ordinary way according to the market rate at the time of breach. Since judgment was given the law has been reviewed in the Calcutta High Court (*Moll Schutte & Co.* v. *Luchmi Chand*(2)), and the Full Bench has decided that a clause such as that contained in the indent before us comes into operation notwithstanding that the property has not passed to the buyers, and the same view has been adopted in this Court in a case referred by the Chief Judge of the Presidency Small Cause Court (*Ronaldson* v. *Chella Pillai Chetti* (3)). Following this authority, we hold that the appellants are entitled to charge the deficiency resulting from the re-sale of the several lots of goods. It is admitted that the figure showing the deficiency can be taken from the plaint. Interest on that amount must be added. Except as regards these two points, we see no reason to differ from the learned Judge.

The decree must be modified by adding to the amount decreed the amount of the deficiency arising on the several re-sales and also interest at six per cent. on the notes from the respective dates of demand. If there is no evidence as to dates of demand, we must ask the learned Judge to find on that question.

As to costs, the appellants having in the main succeeded must have their full costs in both Courts.

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(1) 24 C. 124. (2) 25 C. 505. (3) Referred Case No. 29 of 1897 (unreported).

The memorandum of objections must be dismissed with costs.
Messrs. *Wilson & King.*—attorneys for appellants.
Messrs. *Barclay, Orr & David*—attorneys for respondent No. 1.
Mr. *A. E. Rencontre*—attorney for respondent No. 2.

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23 M. 24.

[24] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

NARAYYA (*Plaintiff*), *Appellant* v. SESHAYYA AND ANOTHER (*Defendants*), *Respondents*.*
[3rd March, 1899.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 23—*Malicious prosecution—Termination of prosecution—Presentation of revision petition against acquittal—Commencement of period of limitation.*

A suit for damages for malicious prosecution was brought more than one year from the date of the plaintiff's acquittal, but within a year from the dismissal of a revision petition which had been filed against the acquittal. On its being contended that the period of limitation should be calculated from the date of the dismissal of the revision petition, as the prosecution was only then terminated within the meaning of Article 23 of Schedule II of the Limitation Act.

Held, that time began to run from the date of the acquittal.

Whether it would be so in a case in which an appeal is preferred by Government against an acquittal, *Quare*.

SECOND appeal against the decree of P. S. Gurumurti Ayyar, Acting Subordinate Judge of Cocanada, in appeal suit No. 159 of 1897, reversing the decree of D. Raghavendra Rao, District Munsif of Peddapur, in original suit No. 241 of 1896.

Suit to recover damages for malicious prosecution. The defendants, while traversing all the allegations in the plaint, pleaded that the suit was barred by limitation. After the charge in question had been dismissed by the Magistrate, one of the defendants had filed a revision petition before the District Magistrate, which was also dismissed. This suit had been filed more than a year from the dismissal of the charge by the Magistrate, but within a year from the date of the dismissal of the revision petition. The District Munsif held that the criminal proceedings were brought to a termination with the dismissal of the said revision petition, and that the suit was, in consequence, not barred by limitation. He further found that there was an absence of reasonable and probable cause; and that the prosecution had been malicious. He awarded damages. The defendants appealed to the Acting Subordinate Judge, who allowed the appeal in the [25] following judgment:—"The main point pressed here is limitation. The prosecution of plaintiff terminated in his favour on 2nd July 1895, and the suit for damages was filed by him on 20th July 1896, *i.e.*, later than the time (one year) allowed by Article 23 of Schedule II of the Limitation Act. This article requires the period to be calculated from the time 'when the plaintiff is acquitted or the prosecution is otherwise terminated'. Plaintiff's vakil contends that the clause 'prosecution is otherwise terminated' includes petitions for re-trial of the accused and argues that as the defendants' revision petition to the

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* Second Appeal No. 979 of 1898.

1899 MARCH 3. — APPELLATE CIVIL. — 23 M. 24.

District Magistrate for the re-trial of the case was dismissed in September 1895, limitation should be computed from the date of the dismissal of this petition ; but the argument does not seem to me to be acceptable, as there is no time fixed for filing revision petitions and a man may move for re-trial even after the period of one year allowed under the article for suits for compensation. I think it covers only cases of appeal by an accused to get his conviction quashed. . . . I accordingly find that the suit by the plaintiff for damages for malicious prosecution was filed a little too late, and therefore allow this appeal with costs in both the Courts."

Sivasami Ayyar, for appellant.

Hon. *Ananda Charlu*, for respondents.

JUDGMENT.

The Subordinate Judge's view that limitation began to run when the appellant was acquitted is, in our opinion, right. No appeal against that acquittal was preferred by the Government, aud it is therefore unnecessary to consider when limitation would have begun to run if an appeal against the acquittal had been preferred. We cannot agree with the contention on behalf of the appellant that on the respondents' moving the District Magistrate to make a reference to the High Court with reference to the acquittal, the order acquitting the appellant had ceased to be final and the prosecution should be treated as one which had not terminated within the meaning of Article 23 of the Limitation Act.

The second appeal fails and is dismissed with costs.

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23 M. 26.

[26] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar (Officiating Chief Justice), and Mr. Justice O'Farrell.

RAMANNA NAIDU (*Deponent of an Affidavit*), *Appellant v.* BRAHMAYYA CHETTI AND OTHERS (*Purchasers and Counter-Petitioners, and Petitioner to set aside sale*), *Respondents.**
[24th July and 15th August, 1899.]

Insolvent Act—11 & 12 Vic., Cap. XXI, Section 30—Bankruptcy Rules of (1848), Rule XXV—"Person interested"—Liability for costs of unsuccessful motion—Deponent of an affidavit.

A sale of property forming portion of the estate of certain insolvent debtors having been authorised by the Court, the Official Assignee moved to set it aside, relying in support of his application on affidavits which had been filed in Court and in which the deponents alleged that the property was worth a great deal more than the price at which the sale had been authorised. The Court having dismissed the motion, and ordered the deponents to pay the costs of the Official Assignee and the purchasers:

Held, that the deponents could not be made liable for costs, and that Rule XXV of the Bankruptcy Rules of December 1848 did not apply to such a case. The deponents were not "persons interested in the insolvent's estate," nor could they be said to have "applied" or appeared on an application. The Official Assignee should be made liable for the costs of such an unsuccessful application, he being left to take such steps as might be necessary to indemnify himself.

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* Original Side Appeal No. 44 of 1898.

1899 AUG. 15. APPELLATE CIVIL. 23 M. 26.

APPEAL against an order passed in insolvent case No. 18 of 1894.

Certain immoveable property belonging to Sunka Ragavalu Chetti and others, insolvents, having vested in the Official Assignee of Madras, an affidavit, dated 21st March 1898, was filed in which the deponent valued the said property at Rs. 2,000, at which price certain persons were stated to be willing to purchase it. On 28th March 1898, the Court made an order for the sale of the said property. Affidavits, dated 13th May 1898, by D. Ranga Charlu and Y. Ramanna Naidu, were then filed, in which the deponents valued the property at Rs. 6,000; and an order was made on 5th September 1898 directing the purchasers above referred to not to proceed with its purchase at the first-mentioned price of Rs. 2,000. On 25th October 1898 the Official Assignee moved to set aside [27] the sale with reference to the said affidavits of D. Ranga Charlu and Y. Ramanna Naidu, and the Court, after hearing Counsel for the purchasers, dismissed the motion, and withdrew the order of 5th September 1898 directing the purchasers not to proceed with the purchase, and ordered all costs, both of the Official Assignee and of the purchasers, to be paid by the said D. Ranga Charlu and Y. Ramanna Naidu.

Y. Ramanna Naidu preferred this appeal.

Kumarasami Sastri, for appellant :– There was no jurisdiction for the order directing appellant to pay the costs, as he was not a party to the proceedings. The motion to set aside the sale was moved by the Official Assignee, and appellant only filed an affidavit as to the value of the property, and merely occupied the position of a witness. Section 73 of the Insolvent Act confers the right to appeal on any person "aggrieved" and does not confine itself to parties. Even if appellant was no party to the proceedings before the Insolvent Court, yet the order in so far as it directed him to pay costs made him a party thereto. The order appealed against is a "judgment" within the meaning of Section 15 of the Letters Patent. Costs can only be allowed as between parties.

Mr. *R. F. Grant*, for respondents Nos. 1 to 3 :—Rule XXV of the rules framed under Section 3 of the Insolvent Act gives the Commissioner power to grant costs in such cases. Though appellant was not a party to the proceedings, yet his undivided brother was a creditor. He was, therefore, interested in the insolvent's estate. It has been held that the Official Assignee is an agent of the creditors. The order is, therefore, right.

Kumarasami Sastri in reply :—Rule XXV requires (1) that the person should be interested, and (2) that he must appear, apply or oppose in proceedings before the Commissioner. Here, appellant did absolutely nothing beyond swearing the affidavit.

JUDGMENT.

The application to set aside the sale was made by the Official Assignee, and the appellant who has been made to pay the costs of the respondents (purchasers and the Official Assignee), so far as appears, did nothing except make an affidavit in support of the motion. We are unable to see how he could be held liable for costs. Reference is made to Rule XXV of the Bankruptcy Rules of 22nd December 1848, but we are unable to hold that that rule applies. The appellant is not a person "interested in the insolvent's estate," nor can he be said to have "applied" or appeared [28] on an application. The proper course in such case is, we

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think, to make the Official Assignee liable for the costs of the unsuccessful application made by him, leaving him to take such steps as are necessary to indemnify himself. We set aside the order of the learned Judge so far as it directs that the costs of the respondents (purchasers and Official Assignee) be paid by the appellant. There will be no costs of this appeal.

Messrs. *Branson & Branson*—attorneys for respondents Nos. 1 to 3.

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23 M. 28=7 M.L.J. 281.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

SRINIVASA CHARIAR AND OTHERS (*Plaintiffs*) *v.* RAGHAVA CHARIAR AND OTHERS (*Defendants*).* [13th September, 1899.]

Religious endowment, suit relating to—Civil Procedure Code—Act XIV of 1882, *Section* 30—*Suit by worshippers—No leave to sue—Non-joinder of Advocate-General—Maintainability of suit.*

Four worshippers at a temple, who were also entitled to vote at the election of dharmakartas, filed a suit for a declaration that the election of certain persons to that office was void. Notice had not been given to the other worshippers, nor had leave of the Court been obtained prior to the institution of the suit:

Held, that the suit was maintainable notwithstanding that the Advocate-General had not been joined as a party;

that Section 30 of the Code of Civil Procedure being permissive and not prohibitive and dealing with procedure only, and not affecting substantive rights the omission to state in the plaint that the suit was instituted on behalf of other worshippers having similar rights to sue as the plaintiffs was not fatal to the maintainability of the suit;

that the Court was competent, with a view of adjudicating completely and definitively on the matter in dispute, to require an amendment of the plaint, and that the suit need not necessarily be dismissed;

that the omission to apply for leave under Section 30 of the Code of Civil Procedure is not in itself ground for dismissing a suit, but, on objection being taken, the suit should not be allowed to proceed except on the terms of the plaint being amended and the requisite leave being obtained; and

that the granting of leave under Section 30 is not a condition precedent, and may take place after the institution of the suit.

Jan Ali v. *Ram Nath Mundul* (8 C. 32) and *Thackersey Dewaraj* v. *Hurbhum Nursey* (8 B. 432) considered.

[F., 15 Ind. Cas. 399 (400)=11 M.L.T. 257=(1912) M.W.N. 105; **Appr.**, 25 M. 399; R., 33 C. 905=10 C.W.N. 867; 24 M. 219 (232); 11 A.L.J. 265 (P.C.)=17 C.L.J. 360=13 M.L.T. 318=(1913) M.W.N. 279=27 P.R. 1913=1 P.W.R. 1913; 16 C.P.L.R. 161; 9 P.R. 1904; 78 P.L.R. 1908=52 P.W.R. 1908.]

[29] SUIT by four worshippers of the tengalai sect at the temple of Sri Parthasarathi Swami in Triplicane for a declaration that second and third defendants were not duly elected as "dharmakartas" of the said temple. First defendant was the surviving dharmakarta, by whom the said election had been conducted. In civil suit No. 161 of 1891, it was decreed that all future appointments of dharmakartas in the said temple should be made by election, and that a list of persons entitled to vote at such election should be entered in a register and that none others should vote. The number of persons whose names appeared on that register was 2,068. The election at which second and third defendants had been elected had

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* Civil Suit No. 122 of 1897.

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taken place in 1897; and the plaintiffs alleged that it was void and of no effect by reason of various informalities charged. They prayed as above. First defendant took objection to the maintainability of the suit as brought by only four worshippers and electors, and contended that it was not in conformity with Section 30 of the Code of Civil Procedure. He also claimed that the sanction of the Advocate-General should have been obtained, and that the suit should be dismissed for want of such leave. This defendant, as well as the second and third, also put in other defences. An issue having been framed as to whether the suit was not maintainable for any of the reasons assigned in the written statement, the Court first considered the point so raised.

* Mr. *E. Norton*, for plaintiffs.

Seshagiri Ayyar, for defendant No. 1.

Mr. *R. F. Grant*, for defendant No. 2.

Hon. *Ananda Charlu*, for defendant No. 3.

JUDGMENT.

The issue which I have to try refers me to the written statements of the defendants and the objections therein stated to the maintenance of this suit. The written statement of the first defendant states two grounds of objection. It says that "the suit is bad, as it was not brought in conformity with Section 30 of the Civil Procedure Code," and the objection is taken that the sanction of the Advocate-General was not obtained. This latter objection was abandoned by the defendant's vakil in deference to the ruling of this Court in *Rangasami Naickan* v. *Varadappa Naickan* (1). In lieu of it, however, he took a point which is not raised in the pleadings, namely, whether the Advocate-General ought not to be **[30]** made a party to the suit. It will be convenient to dispose of that point at the outset. In England there can be little doubt that a suit framed as this is, alleging no proprietary right in the plaintiffs and no particular injury suffered by them but complaining of a grievance common to an indefinite number of persons, could not be maintained. A suit of such a character could only be instituted by the Attorney-General (*London Association of Ship-owners and Brokers* v. *London and India Docks Joint Committee* (2) and cases cited). I think it is rather to be regretted that there has been in the Courts of this country a departure from the English practice, but that certainly appears to be the case, and the authorities cited by the defendants' vakil do not go beyond showing that the Advocate-General may be a party to suits relating to charitable endowments in the same manner as the Attorney-General in England. In *Attorney-General* v. *Brodie* (3), the question arose on a petition presented by a private individual entitled in a cause instituted by the Advocate-General for the administration of certain charitable trusts created under a will. On this petition coming before the Court the Advocate-General claimed the right to appear and be heard. The Supreme Court held that he had no right to appear and accordingly refused to hear him. All that was decided by the Judicial Committee was that this singular decision, as they call it, was wrong.

In the Bombay case (*Advocate-General* v. *Vishvanath Atmaram* (4)) the question was seriously argued before the Supreme Court whether the

* For the arguments of the Counsel, See 7 M.L.J. 281—ED.

(1) 17 M. 462.
(2) [1892] 3 Ch. 242 at pp. 257, 270.
(3) 4 M.I.A. 190.
(4) 1 B. H. C. R., Appx., 9.

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Advocate-General could institute a suit for the administration of a Hindu religious trust.

While it was held that the suit was maintainable in the name of the Advocate-General, it was not decided that he was an indispensable party. In more recent times it has been distinctly held both in Calcutta and in Bombay that a suit which in England would be instituted only in the name of the Attorney-General may be maintained by persons interested in a religious endowment in their own name and without joining the Advocate-General (*Panchcowrie Mull* v. *Chumroolall* (1), and *Thackersey Dewaraj* v. *Hurbhum Nursey* (2)). In the Calcutta case decided in 1878 the [31] plaintiffs were merely representatives of the sect interested in the temples benefited by the will for the construction of which the suit was instituted. In the Bombay case the plaintiffs were subscribers to the temple fund and devotees of the idol. They were held to have a sufficient interest to entitle them to sue in their own name for the proper administration of the temple fund.

In the present case the plaintiffs describe themselves as worshippers at the temple known as Sri Parthasaradhi Swami and entitled to vote on the election of dharmakartas. I am of opinion that the suit is maintainable notwithstanding that the Advocate-General has not been joined.

I now come to deal with tho objection founded on Section 30 of the Civil Procedure Code. It is objected that the suit cannot be allowed to proceed in its present form and without notice being given to the other members of the class to which the plaintiffs belong. It is further objected that the permission of the Court indicated by the section must be obtained before the institution of the suit and cannot be given afterwards.

Now in the first place it is to be observed that the section is permissive and in no way prohibitive in its terms; and furthermore that it is a section dealing with procedure only and not affecting substantive rights.

The rule of the Court of Chancery, to which the section owes its origin, appears to have been made applicable in two classes of cases. There are the cases in which the number of persons, claiming concurrent interests in the subject-matter, and, therefore, according to strict rule, necessary parties to the suit, is so large that they cannot all be conveniently joined with any chance of bringing the suit to a conclusion. And there are the cases in which numerous persons have distinct but similar rights which might be prosecuted in separate suits. For instance, there is the case of numerous creditors of the same person, or that of many persons, claiming a right of common or right of fishing in respect of the same property (*Smith* v. *Earl Brownlow* (3) and Daniell's 'Chancery Practice,' page 207). In the latter class of cases, for the sake of convenience and to prevent multiplicity of suits, the Court allowed one person or a few persons to prosecute or defend suits on behalf of all the persons similarly interested. The judgment obtained in a [32] suit so framed is binding on all the parties so represented in it. The present case appears to me to belong rather to the latter than the former class of cases. If I am right in considering that the plaintiffs, as worshippers at the temple and entitled to vote on the election of dharmakartas,

(1) 3 C. 563. (2) 8 B. 432 (452). (3) L.R., 9 Eq., 241.

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possess an interest entitling them to sue, I think it is clear that they can sue without joining the other persons similarly entitled. That being so and there being no words either imperative or prohibitory in the section, I think it cannot be a fatal objection to the suit that it is not expressed to be instituted on behalf of those other persons. If the course prescribed by Section 30 is not followed in a case like the present, the only consequence, in my opinion, is that the judgment does not bind the persons whose names are not on the record; see *Thanakoti* v. *Muniappa*(1); *Ragava* v. *Rajaratnam*(2); and *May* v. *Newton* (3). To obviate this inconvenient consequence I think it is competent to the Court with the view of adjudicating completely and definitively on the matter in dispute to require an amendment of the plaint.

The language of the judgment chiefly relied on by the defendants' counsel (*Jan Ali* v. *Ram Nath Mundul* (4)) indicates a different view of the section, for it is said that inasmuch as the plaintiffs claiming an interest in common with others had not obtained leave under Section 30 their suit must necessarily be dismissed. It seems to have been considered that the granting of leave under the section would have made up for the insufficiency of interest disclosed in the plaint. With great deference that view appears to me incorrect. Nor do I fully understand the judgment in the Bombay case relied upon by the plaintiffs' counsel. (*Thackersey Dewaraj* v. *Hurbhum Nursey* (5)). As far as I can ascertain the facts of the case, I should have thought it was a case for the application of Section 30.

The conclusion at which I arrive is that the omission to apply under Section 30 is not by itself ground for dismissing the suit, but that nevertheless now that the objection has been taken it ought not to be allowed to proceed except on the terms of the plaint being amended, and the requisite leave under Section 30 being obtained.

[33] The granting of leave under the section is not made a condition precedent and, may, therefore, I think, take place after the institution of the suit (*Ramayyangar* v. *Kishnayyangar* (6)).

I understand there is no objection on the plaintiffs' part to the course which I indicate. If, as the defendants' counsel suggests, there are worshippers who differ from the plaintiffs as to the propriety of the election, the Court will know to deal with them. See *Watson* v. *Cave* (7). Costs reserved.

Messrs. *Wilson & King*, attorneys for plaintiffs.

Mr. *James Short*, attorney for defendant No. 2.

(1) 8 M. 496. (2) 14 M. 57. (3) L.R. 34 Ch. D. 347.
(4) 8 C. 32 (41). (5) 8 B. 432 (450). (6) 10 M. 185.
(7) L.R. 17 Ch. D. 19.

1898
Nov. 22.

ORIGINAL CIVIL.

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23 M. 33.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

ROSE AMMAL AND ANOTHER (*Plaintiffs*) v. RAJARATHNAM AMMAL (*Defendant*).* [22nd November, 1898.]

Transfer of Property Act—Act IV of 1882, *Sections* 60, 62—*Mortgage containing covenant to repay " within " a given time—Right to redeem before the expiration of that time—Mortgagee's right to foreclose.*

Certain premises were mortgaged with possession in 1896, the mortgagor, in the instrument of mortgage, covenanting to repay the mortgage money " within 20th of April 1904." In 1898 the mortgagor sold the mortgaged premises and called upon the mortgagee to receive the principal and interest due and to deliver up possession. On the mortgagee refusing on the ground that the mortgage was not redeemable till 1904 :

Held, that the mortgagor was entitled to reedem. A stipulation for the postponement of payment of mortgage money is *prima facie* intended for the benefit of the mortgagor ; the parties to an instrument of mortgage may, however, by the language of their contract, show their intention that redemption may take place only at the end of a given term. The covenant, as worded, so far from showing an intention to preclude the mortgagor from redeeming, reserved the liberty to redeem at pleasure.

Vadju v. *Vadju* (5 B. 22) and *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (16 M. 486) considered.

[Rel., 39 C. 828=17 C.W.N. 149=15 Ind. Cas. 287 ; R., 16 C.P.L.R. 59 (62) ; 6 Ind. Cas. 997 (999)=13 O.C. 128 ; 16 M.L.J. 146 ; 17 M.L.J.83 ; 17 M L J. 177 ; 18 M.L.J. 235 (238) ; 203 P.L.R. 1912=4 P.W.R. (N.W.F.P.) 1912.]

ASHA BI, by an instrument of mortgage dated 18th April 1896, mortgaged certain premises to defendant with possession, and [34] covenanted to repay the mortgage money " within the 20th of April 1904." On 14th May 1898, the said Asha Bi sold a portion of the mortgaged premises to the first plaintiff, and the remainder to second plaintiff ; and in July 1898 called on the defendant to receive the principal sum and interest due under the mortgage and to deliver up the premises. Defendant declined on the ground that the mortgage was not redeemable till 20th April 1904. Plaintiffs filed this suit for a declaration of their right to redeem and other relief. The first issue framed was " whether the mortgage is redeemable before 20th April 1904 ? " Upon this preliminary issue the Court delivered the following

JUDGMENT.

Objection is taken to the further maintenance of this action on the ground that the time for payment of the mortage money has not yet arrived. According to the mortage instrument, dated the 18th April 1896, the plaintiff having said that she has mortgaged with possession the properties therein mentioned to the defendant, covenants to pay the mortgage money "within the 20th of April 1904." On the strength of these words in the mortgage,—and there are no others which assist the defendant's case,—it is argued that the plaintiff is not entitled to redeem until after the 20th of April 1904. In support of this contention two cases are cited. The first case, decided by the Bombay High Court in 1880, is similar to the present so far as regards the words of the instrument. The mortgage deed stipulated that the mortgagor would pay the debt within ten years and redeem

* Civil Suit No. 177 of 1898.

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the property. The suit for redemption was brought before the lapse of ten years, and it was dismissed on the ground that, in the absence of any stipulation to the contrary, the right to redeem and the right to foreclose should be regarded as co-extensive. Inasmuch as the defendant in that case could not have brought an action against the plaintiff it was held that the plaintiff was not in a more favourable position, and was not entitled to redeem. It is necessary to consider this case inasmuch as it appears to have been approved in a later Madras case although it cannot be reconciled with the earlier Madras cases. Westropp, C.J., in his judgment in *Vadju* v. *Vadju* (1) refers to *Brown* v. *Cole* (2) and to a general observation of Lord Kingsdown in *Prannath Roy Chowdry* v. *Rookea Begum* (3). In an English mortgage drawn in the ordinary way, there can **[35]** be no doubt that the mortgagor's right to redeem can only arise after the date fixed for payment has passed. In *Brown* v. *Cole* (2), the mortgage appears to have been in the ordinary form except that the date fixed for payment was a year instead of six months from the date of the execution of the mortgage. It is difficult to see how in such a case the mortgagor could possibly be entitled to redeem before the day mentioned in the proviso. When it is intended that the money should remain outstanding and the property should remain unredeemed for a considerable time, which, however, may not exceed seven years, the English practice appears to be to insert two covenants—one binding the mortgagee not to call in the money until the day mentioned, the other binding the mortgagor not to redeem until the same day. As to the term during which redemption may be postponed, see *Teevan* v. *Smith* (4). It is possible that exception might be taken to a mortgage instrument in which the latter covenant was inserted and the former omitted, but it would be difficult to suggest a reason why, if the parties so chose, the mortgagor should not stipulate for postponement of the payment and yet reserve to himself the right of paying the money at his option. There is, moreover, authority to the effect that the rule of mutuality is not an inflexible and universal one. It is possible for the parties to agree that the mortgagor may be at liberty to redeem at a time when the mortgagee is not at liberty to foreclose (*Talbot* v. *Braddil* (5)) ; and in the case of the Welsh mortgage redemption is always possible while the mortgagee is altogether precluded from foreclosing, *Longuet* v. *Scawen* (6). In the Madras case (*Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (7)) the Court, after referring to the Bombay case and the authorities there cited, observes with reference to Sections 60 and 62 of the Transfer of Property Act that "the Legislature "appears to have adopted the principle that in the absence of a stipulation to "the contrary, the presumption is that the right to redeem and the right to "foreclose arise at the same time, and that when a date is fixed for payment "of the mortgage debt before which the mortgagee cannot foreclose, the "mortgagor also cannot redeem before the appointed time." Section 60 provides that at any time after the principal **[36]** money has become payable the mortgagor has the right of redemption. I fail to see how the language of that section or Section 62 can be read as altering the law laid down before the Act was passed. If before the Act was passsd the mortgagor was at liberty to redeem before the day on which his mortgagee could have sued him, I cannot see what there is in Section 60 to prevent a mortgagor adopting the same course now. Before the

(1) 5 B. 22 (24). (2) 14 Sim. 427. (3) 7 M I.A. 323 (355)
(4) L.R. 20 Ch. D. 724. (5) 1 Vern. 394. (6) 1 Ves. Sen. 402 (406).
(7) 16 M. 486 (489).

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Act the mortgagor could not redeem before the money became payable, neither can he do so now. That is no reason why, when the money is payable, he should not be allowed to redeem before it has become due. Inasmuch as the observations on the Act and on the Bombay case are not strictly necessary for the decision of this case, I do not think that I am bound to follow it in disregard of earlier cases in which the law is clearly laid down in favour of the mortgagor's right to redeem. I think the principle to be deduced from the cases of which *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Surianarayanaraju Bahadur* (1) is the chief is that while the stipulation for the postponement of payment is *prima facie* intended for the benefit of the mortgagor, the parties may, by the language of their contract, show their intention that redemption should take place only at the end of a given term. In the present case the only indication of such an intention is contained in the words which I have mentioned. So far from showing that the mortgagor intended to preclude herself from redeeming before the 20th of April 1904, the language, I think, shows that she meant to reserve the liberty of redeeming at her pleasure. That being so, I must rule, in favour of the plaintiff, and the case must proceed to trial. The defendant must pay the costs of the day.

Messrs. *Branson & Branson*, attorneys for plaintiffs.

Ethiraja Mudaliar, vakil for defendant.

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23 M. 37 = 9 M L.J. 258.

[37] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

NALLAMUTTU PILLAI (*Defendant*), *Appellant v.*
BETHA NAICKAN (*Plaintiff*), *Respondent.**
[14th March and 11th April, 1899.]

Registration Act—Act III of 1877, *Section* 50—*Unregistered sale of land valued under Rs.* 100—*Subsequent registered hypothecation—Possession of first purchaser for over twelve years—Registered hypothecation defeated by such possession.*

The owner of land having, in 1876, sold and given possession of it for Rs. 95 to the plaintiff under an instrument which was not registered, hypothecated it in 1878 to a third party, under a bond that was registered. The land was wrongly represented in the hypothecation bond as being in the original owner's possession. The third party in 1882 sued the original owner on the hypothecation bond without making plaintiff a party, and obtained a decree, which, in 1893, he assigned to defendant, who purchased the land in the course of execution. On plaintiff suing for a declaration of his right to the land :

Held, that the hypothecation had been defeated by plaintiff's possession for a period exceeding twelve years prior to the institution of the suit. A hypothecation right so created is liable to be affected not only by lapse of time as between creditor and debtor, but also by possession of the hypothecated property for the requisite period by a third person on a claim inconsistent with the rights of both the creditor and the debtor. Nor does Section 50 of the Registration Act interfere with the operation and effect of limitation and prescription governing such a case as this.

[R., 34 A. 640 (647) = 10 A.L.J. 278 = 17 Ind. Cas. 632 ; 26 M. 72 = 12 M.L.J. 410 ; 35 M. 231 (238) = 9 Ind. Cas. 791 = 21 M.L.J. 467 = 9 M.L.T. 399 = (1911) 1 M.W.N. 201 ; 12 Ind. Cas. 169.]

SECOND appeal against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 155 of 1896, affirming the

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* Second Appeals Nos. 1310 and 1311 of 1898.

(1) 2 M. 314.

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decree of T. R. Kuppusami Ayyangar, District Munsif of Kulitalai, in original suit No. 878 of 1895.

Vadamalainatha Pillai, having assigned certain land to plaintiff in 1876 for Rs. 95, by an absolute deed of sale, which was not registered, executed in 1878 a hypothecation debt bond over the same (with other) land in favour of Virappa Chetti, which was registered. Plaintiff had been in possession of the land since his purchase in 1876; though the hypothecation bond of 1878 described it as being in the enjoyment of Vadamalainatha Pillai. In 1882, Virappa Chetti sued Vadamalainatha Pillai on the hypothecation bond and obtained a decree which he assigned, in 1893, to defendant, who purchased the land in the course of [38] execution. Plaintiff sued for a declaration of his right to the land, which defendant disputed on the ground that his decree had been obtained on a registered instrument, which had priority over the unregistered sale-deed under which plaintiff claimed; and that neither defendant nor his assignor had any knowledge of plaintiff's right to or alleged possession of the land. The District Munsif found the sale to plaintiff and the subsequent hypothecation to Virappa Chetti to be genuine; that plaintiff was in possession of the land: and that Virappa Chetti had taken the hypothecation of 1878 with notice of plaintiff's rights. He referred to *Krishnamma* v. *Suranna*(1); Specific Relief Act, 1877, Section 27, illustration(3); *Dinonath Ghose* v. *Auluck Moni Dabee* (2); *Nani Bibee* v. *Hafizullah* (3); and *Lakshmandas Sarupchand* v. *Dasrat* (4); as showing that possession is cogent evidence of notice, if not notice in itself. He considered that in any case Virappa Chetti had notice of plaintiff's claim to the land in 1882, when he obtained the decree against Vadamalainatha Pillai on the hypothecation bond. Plaintiff had not, however, been made a party to that suit. He held that defendant's title could not prevail against that of plaintiff, and declared plaintiff's right to the land. The District Judge, on appeal, though finding no evidence to show that Virappa Chetti had notice of plaintiff's possession when he took the hypothecation bond in 1878, held him to have been negligent in not enquiring, as it was not shown that he had been deceived by the mortgagor. He ruled that Virappa Chetti must be held to have had notice of plaintiff's title, and dismissed the appeal.

The defendant preferred this second appeal.

V. Krishnasami Ayyar, for appellant.

Kothandarama Ayyar and Mr. *A. D. Zaccheus*, for respondent.

JUDGMENT.

SUBRAMANIA AYYAR, J.—This is a suit for a declaration of the plaintiff's right to the land in dispute which was purchased by him for Rs. 95 from the admitted original owner, one Vadamalainatha Pillai, under an unregistered instrument, dated the 2nd October 1876, but which having been included among the properties hypothecated to one Virappa Chetti by the said Vadamalainatha Pillai under a registered instrument of June 1878, was [39] sold in execution of the decree obtained on the hypothecation by Virappa Chetti and assigned to the defendant, and at such sale was purchased by the defendant himself. The plaintiff, who has been in possession of the land ever since his purchase, was not however made a party to the said litigation.

The Lower Courts granted the declaration prayed for; the decision of the Lower Appellate Court being based on the ground that though Virappa

(1) 16 M. 148. (2) 7 C. 753. (3) 10 C. 1073. (4) 6 B. 168.

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Chetti was, at the time he took the hypothecation, aware neither of the sale of the disputed land to the plaintiff nor of the latter's possession thereof, yet he, Virappa Chetti, had omitted to make due inquiry from his mortgagor about the matter or the possession of the land, that consequently he should be held to be in the position of one who had taken the hypothecation with notice of the sale to the plaintiff and that the defendant, the Chetti's assignee, cannot therefore set up the hypothecation as against the plaintiff.

It was contended before us on behalf of the defendant that even if Virappa Chetti had omitted to make due enquiry, as supposed by the Lower Appellate Court, that does not preclude the defendant from relying on the hypothecation as against the plaintiff since nothing short of actual, clear and distinct notice of a prior unregistered transfer should be held to affect the right, given by Section 50 of the Registration Act, to a person claiming under a registered instrument as against a prior transferee under an unregistered instrument. It is not, however, necessary to enter into a consideration of this contention inasmuch as it appears from the hypothecation instrument itself, the provisions whereof as to the matter under discussion the District Judge apparently overlooked, that Virappa Chetti did not omit to make the enquiry which the Judge thought it was his duty to make and that the Chetti was misled by Vadamalainatha's untrue representation that the possession of the land was with himself.

Though, therefore, the decision in favour of the plaintiff cannot be supported on the ground suggested by the District Judge, yet it is clearly sustainable on the ground that by virtue of the plaintiff's possession of the land for over twelve pears prior to the institution of the present suit the hypothecation in question has, in so far as the disputed land is concerned, been defeated. The contention of the learned vakil for the defendant, if he was rightly understood, that a hypothecation right is not a species of right [40] liable to be affected by prescription such as that established in this case, is unsupported by authority and opposed to principle. There can be no doubt that such a right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor. In support of this proposition reference may, in the absence of decided cases on the point, be made to the Roman Law, which fully recognized that prescription like that established in the present instance had the effect of extinguishing even a hypothecation right, as appears from, among other authorities, the following passage of the Code:—"Long "standing silence, supported by regular limitation, renders nugatory the "action for creditors taking proceeding for their pledge, unless the debtors, "or those who have entered into their rights, command possession of "the security." (Salkowski's 'Roman Law' by Whitfield, 503; see also Mackeldey's 'Roman Law' by Dropsie, 287, Hunter's 'Roman Law,' 2nd edition, 447.)

The learned vakil for the defendant next contended that taking the rule, applicable to cases where the mortgagor has under the general law a right to hypothecate the property given as security, to be as stated above, still such rule should not be extended to a case like this where a person, not having, under the ordinary law, any right to the property of which he makes a transfer, is nevertheless enabled by the special provisions of Section 50 of the Registration Act to make a valid transfer of such property by means of a registered instrument.

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That section, however, so far as we are now concerned, confines itself to the single case of competition between a right created by an instrument that is registered and a right created by an instrument that is not registered. And neither the registration law nor any other enactment in force in this country contains a provision analogous to Section 21 of the English Land Transfer Act of 1875, which lays down that "a title to any land adverse to or in derogation of the title of the registered proprietor, shall not be "acquired by any length of possession." The import of the words just quoted does not appear to have been judicially explained. But in "Lightwood on Possession," it is suggested that that provision does nothing more than prohibit the entry of an adverse title on the register (see pages 303 and 304).

[41] Be this as it may, in the absence of any enactment to support the argument put forward on behalf of the defendant, there is absolutely no warrant for holding that Section 50 of the Registration Act interferes in any way with the operation and effect of the established principle of limitation and prescription governing such cases.

For these reasons the decree of the Lower Courts must be sustained and the second appeal dismissed with costs.

MOORE, J.—I concur.

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23 M. 41.

ORIGINAL CIVIL.

Before Mr. Justice Michell.

KUPPUSAMI PILLAI (*Plaintiff*) v. MADRAS ELECTRIC TRAMWAY COMPANY, LIMITED (*Defendants*).* [17th July, 1899.]

Interest Act—Act XXXII of 1839, *Section* 1—*Notice of intention to claim interest—Demand of interest already due.*

A letter demanding interest on an outstanding debt, from which the intention of the creditor to claim interest up to date of payment is made clear, is a sufficient notice, within the meaning of the Interest Act, 1839, to entitle the creditor to claim interest prospectively from the date of the letter, though the demand be made retrospectively in respect of interest alleged to be then already due.

[R., 181 P.L.R. 1901.]

SUIT for Rs. 2,802-9-7 due by defendants to plaintiff for materials supplied and labour performed in pursuance of a contract entered into between the parties in 1894. The sum claimed included interest in respect of the overdue account. Defendants admitted the claim on the contract, but denied liability to pay interest. The contract made no provision for the payment of interest. The work was finished in February 1895. On 24th July 1895, plaintiff's attorney made a written demand for the immediate payment of Rs. 3,440-4-3, "being the amount of principal and interest due by the company to my client." In January 1896 a payment on account was made. On 25th April 1897 plaintiff applied to defendants for a further payment by a [42] letter in which he said :—" I humbly beg to request that you will be so good as to arrange for the adjustment of Rs. 2,351-10-3, being the amount due on my bills with interest." To this, the defendants replied on 29th April, that no funds were then available for the purpose and asked that the account might be allowed to stand

* Civil Suit No. 54 of 1899.

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over for a while. On 28th March 1898, plaintiff made further application for the balance of account then amounting to Rs. 2,597-15-5, which sum also included interest, and to his letter was appended a statement setting out particulars of principal and interest, and threatening proceedings if his claim for such interest should be disputed. On 4th April 1898 plaintiff wrote again in similar terms; and on 17th November 1898 Rs. 2,761-1-6 was claimed, that sum also including interest then accrued due. Defendants tendered the amount admittedly due on the contract. Plaintiff refused to accept it and filed this suit for that sum together with interest thereon since completion of the contract.

Krishnamachariar, for plaintiff.—The plaintiff is entitled under the Interest Act, 1839, to claim interest on his overdue accounts. He is also entitled to rest his claim on Section 73, Illustration (*n*) of the Contract Act, 1872, the money not having been paid him when the work was completed.

Mr. *D. Chamier*, for defendants.—The letters relied on do not constitute notices of claim for interest within the meaning of the Interest Act. The notice there contemplated is prospective only, whereas the letters produced are retrospective, being mere demands for interest alleged to have already accrued due. The amount rightly due is that specified in the contract, which has been tendered.

JUDGMENT.

This is a suit for recovery of Rs. 2,802-9-7 claimed to be due to plaintiff from the defendant company for materials supplied and work done by the plaintiff for the defendants. The sum claimed includes interest as well as principal, and the only question in dispute between the parties is, whether the plaintiff is entitled to interest. . . . .

There was no contract, nor is it the plaintiff's case that there was any, between the parties for payment, of interest, but he relies for his claim to interest upon the Interest Act, XXXII of 1839, and certain letters written by and on his behalf, respectively, to the defendants' assistant secretary and the defendants, and also upon Section 73 of the Contract Act . . . . Though **[43]** no specific time was fixed by contract between the parties for payment of the bills, it is clear that the unpaid ones were left unpaid and without tender of payment for long after the reasonable time for payment had elapsed. When plaintiff wrote to defendants' assistant secretary on 25th April 1897 requesting payments (Exhibit D), he was informed in reply that there were no funds available (Exhibit E). In his letter (Exhibit F) he stated that he had been obliged to borrow money at an exorbitant rate of interest; in his evidence in Court he said at 12 per cent. per annum, in order to execute his contract with defendants. I am inclined to think that in a case such as this, when a contractor is for no fault of his own kept out of his money—the principal sum—for a long time after it is due, it would be reasonable that the law should admit of interest being recoverable, by way of damages, for the period for which he is kept waiting for the principal sum due, after demand made, whether that demand is coupled with a claim to interest or not. I should, however, perhaps hardly venture to express this opinion, were it not that it is consonant, it appears to me, with that expressed by the House of Lords in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (1), wherein their Lordships appear to have

(1) (1893) A.C. 429.

considered the doctrine laid down in the older cases that interest was recoverable by way of damages on any debt or sum certain due, payment of which was wrongfully withheld after demand made, from date of demand, a just and reasonable doctrine, but held that they were bound by the provisions of the Statute 3 and 4 Willm. IV, cap. 42, Section 28, and by the decision of the Exchequer Chamber in *Merchant Shipping* Co. v. *Armitage* (1). It is contended, however, for the plaintiff, that he has complied with the provisions of the Interest Act, XXXII of 1839, (which are *verbatim* the same as those of Section 28 of Statute 3 and 4 Willm. IV, cap. 42) except that the discretionary power to allow interest is vested in the jury under the latter Act and in the Court under the former. In plaintiff's attorney's letter to the defendant company of 24th July 1895 (Exhibit A), he calls upon defendants "for the immediate payment of Rs. 3,440-4-3, being the amount of "principal and interest due by the company to my client for gravel, sand, "stones, &c., supplied and brickwork done between November 1894 and " [44] February 1895." and states that if this sum be not paid within a week from receipt of the letter, legal proceedings will be instituted without further notice. In his letter to defendants' assistant secretary of 25th April 1897 (Exhibit D), plaintiff says :—" I humbly beg to request "you will be so good as to arrange for the adjustment of Rs. 2,351-10-3, "being the amount due on my bills with interest." In his letter to defendants' assistant secretary of 19th March 1898 (Exhibit F), plaintiff reminds the assistant secretary " of the balance of account for "Rs. 2,597-15-5 between myself and the company, which has been of long "standing, in my favour, and request you will be good enough to arrange "for its early adjustment ; " then follows a statement of particulars of principal and interest, making up that sum after deducting part payment ; and he adds that if the company disputes his claim for interest, he has no other means of redress than to go to law. In his letter to defendants' assistant secretary of 4th April 1898 (Exhibit G) plaintiff reminds the assistant secretary of his (plaintiff's) letter of March 1898 and adds that he will be compelled to place his case in his solicitor's hands if he is not favoured with the assistant secretary's reply within three days. In plaintiff's attorney's letter to defendants' assistant secretary of 17th November 1898 (Exhibit B), the former demands payment of Rs. 2,761-1-6, "being the amount of principal and interest due to my client for work done "and materials supplied between November 1894 and February 1895 and "for payment of which my client has repeatedly made demands," and states that, if payment is not made within three days, a suit will be filed. In none of these letters is there an express notice that interest will be claimed from the date of the demand, but interest is claimed, retrospectively, up to date of demand, and it is contended on defendant's behalf that none of these letters therefore comply with the provisions of the Interest Act, so as to entitle the plaintiff to claim interest under that Act. On the other hand, it is contended on the plaintiff's behalf that by claiming interest for the past, the plaintiff impliedly claimed interest for the future also. No reported cases, Indian or English, were cited on either side. In *Earl of Londesborough* v. *Mowatt*(2) the plaintiff by letter to the defendant claimed a certain sum, and added that he should expect to be paid five per cent. interest [45] from a time specified, which was prior to the date of the letter, and it was held that there was a sufficient demand

(1) L.R. 9 Q.B. 99 at p. 114.

(2) 4 E. & B. 1.

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of payment within the English enactment to entitle the jury to give interest from the date of the demand until the date of payment. But in that case the demand, in its wording, though retrospective, was also prospective. The nearest case in resemblance to the present case which I have found, is, I think, the case of *Geake* v. *Ross*(1), in which the plaintiff, who had for some years supplied coal to an unregistered mining company, wrote a letter to the defendant, who was a shareholder, containing the following passages :—"I feel it my duty to write to you about my claim "on this company. They owe me, for balance of account and interest, "over £1,100 . . . Now, I must ask the plain question, why is not "my account paid? . . . I must give you notice that if my account "with this mine be not settled on or before the 1st day of November "next, I shall instruct my solicitor to take the necessary proceedings "to recover the money this company owes me." It was held that there was a sufficient demand within Statute 3 and 4 Willm. IV cap, 42, Section 28, to justify a jury in giving interest from the date of the letter. Although the letters of the plaintiff and his attorney do not expressly claim interest prospectively from their respective dates, yet from their claiming interest up to those dates, I think they, by implication, made it sufficiently clearly appear that it was the plaintiff's intention to claim interest up to the date of payment, and having regard to the terms of the Interest Act of 1839 in question (identical with those of the English enactment) and to the decision in *Geake* v. *Ross* (1) above referred to, I am of opinion that all the letters of the plaintiff and his attorney sufficiently complied with the requirements of the Act, so as to entitle him to claim interest under the Act prospectively from their respective dates. . . . . . .

If he is not entitled to claim interest under the Interest Act, there is no other law, I think, under which he can claim it. His vakil referred to illustration (*n*) of Section 73 of the Contract Act, but the case there put is that of a contract to pay a sum on a specified day, and therefore not a case in point. No local custom **[46]** has been proved or set up. In *Kisara Rukkumma Rau* v. *Cripati Viyanna Dikshatulu* (2) which, however, was a mufassal case, the High Court considered the effect of the proviso in Act XXXII of 1839, "that interest shall be payable in all "cases in which it is now payable by law," and found that "the practice "which has unquestionably prevailed in the mufassal Courts for a long "series of years of awarding interest upon all demands of which the "payment has been illegally delayed was not shown to be based upon any "existing Regulation or positive rule of law by which interest would, at "the time the Act passed, have been payable in respect of the debt in "question," and as the requirements of the Interest Act as to a demand in "writing had not been complied with, disallowed the claim for interest.

The only question remaining is as to the rate of interest to be allowed. The rate which the Court may allow under the Act is a rate not exceeding the current rate. The plaintiff has sworn that the current rate is 12 per cent. per annum, and there is no evidence *contra*. I award the plaintiff interest at that rate upon the sum of Rs. 3,215-13-4, the aggregate principal of his then unpaid bills from 24th July 1895, the date of the letter (Exhibit A), down to 7th January 1896, the date of his bills (Exhibits I, II and III), and upon Rs. 1,230 8-2, the balance of principal then remaining due, from 7th January 1896 down to date of institution of suit, and plaintiff will have a decree for the principal sum of Rs. 1,280-8-2, admitted

(1) 44. L. J. C. P. 315. (2) 1 M.H.C.R. 369.

to be due to him, together with the interest awarded; and the suit is dismissed as to the remainder of the sum claimed. [The judgment concluded with directions as to costs.]

Mr. *Rowlandson*—attorney for defendants.

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23 M. 47=9 M.L.J. 160.

[47] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SUBBARAYA MUDALI AND ANOTHER (*Plaintiffs*), *Appellants v.* KAMU CHETTI (*Defendant No.* 1), *Respondent.**
[27th February, 1899.]

Service inams—Enfranchisement in favour of widow—Right of widow.

Lands which had been held by a deceased as moniem service inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life estate:

Held, that the right of the widow under the grant was not limited to that of a widow's estate.

[R., 30 M. 434=17 M.L.J. 101=2 M.L.T. 101.]

SECOND appeal against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in appeal suit No. 17 of 1897, affirming the decree of W. Gopala Chariar, District Munsif of Arni, in original suit No. 506† of 1895.

Suit for a declaration that a sale of land to first defendant by second defendant, the widow of one Kandasami, was inoperative after the expiration of her life estate, as against plaintiffs, who were reversioners. The lands in question were formerly moniem service inam which had been enfranchised after the death of the second defendant's husband; and it was contended that because these were service inams, the holders had not full ownership until enfranchisement, and that the patta after enfranchisement amounted to a grant to the widow, the second defendant, personally. The District Munsif held that though the inam deed raised no doubt that the enfranchisement was in favour of second defendant, this alone was not sufficient to vest it in her personally. Her husband and his forefathers had been in enjoyment without power of alienation, and the enfranchisement, in his view, meant no more than that the restriction was removed and that the holder was allowed to enjoy it thenceforth with all the rights of a pattadar. The benefit derived by second defendant by the enfranchisement had accrued by virtue of her position as the heir of her late husband, Kandasami, and he held that any advantage due to that position [48] must be considered to have been gained for the benefit of the family to which she belonged; and that, in consequence, the property must still be held to be family property and not the second defendant's personal property. He declared that plaintiffs, as next heirs to Kandasami (second defendant's late husband), had a reversionary interest in the property and that the sale complained of would not be valid or binding on plaintiffs after the death of second defendant. The District Judge, on appeal, regarded this as directly opposed to the principle laid down in

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* Second Appeal No. 819 of 1898. † 596 ?-ED.

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Venkatarayadu v. *Venkataramayya* (1). He reversed the decree of the District Munsif.

The plaintiffs preferred this second appeal.

Kothandarama Ayyar, for appellants.

Sundara Ayyar, for respondent.

JUDGMENT.

The case of *Narayana* v. *Chengalamma* (2) is not in point, as the inam there was not attached to a village office as in this case. There is no reason to suppose that the Government in granting the inam to the widow of Kandasami (second defendant) intended to limit her rights to a widow's estate. We do not find anything in the judgment in *Sitapati* v. *Narasimham* (3) to warrant the raising of such a presumption in this case. Our present conclusion is in accordance with the decisions in *Venkatarayadu* v. *Venkataramayya*(1) *Dharanipragada Durgamma v. Kadambari Virrazu*(4), and *Selamma* v. *Lutchmana Reddi* (5).

The second appeal fails and is dismissed with costs.

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23 M. 49 (P.C.)=4 C.W.N. 117=26 I.A. 262=7 Sar. P.C.J. 597.

[49] PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Davey, Sir Richard Couch and Sir Edward Fry.

[*On appeal from the High Court at Madras.*]

SRI VENKATA SVETA CHALAPATI RANGA RAO, RAJA OF BOBBILI (*Plaintiff*), *Appellant v.* INUGANTI CHINA SITARAMASAMI GARU (*Defendant*) *Respondent.*
[22nd and 29th June and 13th July, 1899.]

Stamp Act—Act I of 1879, *Section* 34—*Penalty chargeable only on the original. unstamped, or insufficiently stamped, instrument—Document tendered as secondary evidence not within the section and not admissible.*

By the terms of the Indian Stamp Act, 1879, the provisions of Section 34, which apply to documents either unstamped or insufficiently stamped, have no application when the original instrument, which ought to have been properly stamped but was not, has not been produced. The clauses of that section deal with, and exclusively refer to, the admission in evidence of original documents which have been either not stamped at all, or have been insufficiently stamped.

[R., 16 Ind. Cas. 950=33 P.R. 1913=11 P.L.R. 1913=279 P.W.R. 1912; U.B.R (1897—1901) 365; U.B.R. (1907) 4th Qr. Execution signing 5.]

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(1) 15 M. 284. (2) 10 M. 1.

(3) Second appeal No 222 of 1896 (unreported). The judgment of their Lordships (COLLINS. C.J., and SHEPHARD, J.), dated 7th September 1897, was (so far as it is material to the reported case) as follows:—"According to the plaintiff's contention the office of karnam belonged to the family of which plaintiff and first defendant are members, and it is found that the enfranchisement took place when the first defendant was the actual holder of the office. If these are the real facts, we do not think the case of *Venkatarayadu* v *Venkataramayya* (I.L.R., 15 M. 284) applies, for the judgment shows that there was no intention to go beyond the decision in *Venkata* v. *Rama* (I.L.R.. 8 M. 249), and the facts in the latter case are clearly distinguishable from those in the present."

(4) 21 M. 47. (5) 21 M. 100.

APPEAL from a decree (4th April 1894) of the High Court affirming a decree (18th November 1892) of the District Judge of Vizagapatam.

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The suit, in the course of which a question of the stamp law arose, was brought by the present Raja of Bobbili to obtain the proprietary possession of an estate once belonging to the family. The defendant was Bhavayyammi, who died pending this appeal and was succeeded on the record by the reversionary heir, the respondent abovenamed. He was a minor, and the Collector of Vizagapatam who, as agent of the Court of Wards, was manager on behalf of the original defendant, and was a co-defendant with her now appeared for the minor. The original defendant was the widow of Sitaramasami, the son of the sister of the plaintiff's paternal grandfather, a former Raja of Bobbili, by whom the estate now the subject of dispute was granted by deed of the 5th of April 1848 to a cousin who had married the then Raja's sister. That donee died in 1872, and his widow thereupon restored the estate to the Raja of Bobbili on the footing that the grant had been only for her husband's life. The Raja then granted the [50] estate to another cousin who died in the same year. This was the above-mentioned Sitaramasami, who left the widow Bhavayyammi from whom as the original defendant the present Raja of Bobbili sought to recover the estate. It was necessary for the Raja to show that the grant of 1848 was absolute and unconditional. The deed of grant was, however, not forthcoming, having been lost. The question was raised whether the draft, or a copy, of the instrument, which the document tendered as secondary evidence of its contents showed to have been insufficiently stamped, could be subjected to the penalty prescribed by Section 34 of the Indian Stamp Act, 1879, as a preliminary to its being admissible in evidence.

The facts are stated in their Lordships' judgment.

The District Judge having fixed the first issue to be whether the grant of 1848 by the then zemindar of Bobbili, in favour of Gopal Rao his cousin, was an unconditional grant, decided that, as evidence of the nature of that grant, the draft or copy of the instrument of grant could not be received as secondary evidence.

The High Court concurred in the opinion of the first Court that the secondary evidence tendered of the first transfer could not be received. They held that the onus of proving that it was unconditional was upon the plaintiff. There was a concurrence of opinion by both Courts that the suit must be dismissed.

On this appeal, Mr. *J. D. Mayne*, for the appellant, argued that the draft of the actual deed of transfer executed in 1848, had been wrongly rejected as inadmissible in evidence. On the question whether the document tendered could be understood to come within the meaning of Section 34 of Act I of 1879, the Indian Stamp Act, he referred to decisions in the English Courts, not as supporting the appellant's case, but as showing how analogous questions had been there dealt with, and as clearing the subject, *Rippiner* v. *Wright* (1) a case adverse to the view in favour of the appellant; as also was *Smith* v. *Henley* (2). He referred to the discussion in two cases in the House of Lords, *Marine Investment Company* v. *Haviside* (3), *London and County Bank* v. *Ratcliffe* (4).

The Indian Stamp Act followed generally the scheme of the English statute, in force at that period, the 33 & 34 Vic., cap. 97. Stamp laws

(1) (1819) 2 B. & Ald. 478.
(2) (1844) 1 Ph. 391.
(3) (1872) L.R. 5 H.L. 624 (630).
(4) (1881) L.R. 6 App. Cas. 722 (730).

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were intended only to affect the rights of litigants with [51] a view to the protection of the stamp revenue. It could not be argued that anything gathered from several writings could be stamped. But it was a different case where the transaction was contained in a specified document, the terms of which transaction had been accurately written in it, a state of things which could be established by evidence. In such a case, where the original had been lost, the copy might be considered to be the legal document representing the lost one, becoming an instrument within the meaning of Section 34 of Act I of 1879, as denoting the rights of the parties.

Mr. *A. Cohen*, Q.C., Mr. *J.H.A. Branson*, and Mr. *Kenworthy Brown*, for the respondent, were not heard.

JUDGMENT.

Their Lordships' judgment was afterwards, on the 13th July, delivered by

LORD WATSON:—In the year 1848, the then Raja of Bobbili, Sri Raja Sveta Chalapati Ranga Rao Bahadur Garu, who was owner of the estate of Chidikada Jagannadhapuram, situated within the zamindari of Magdole, made a grant of it to his cousin, Sri Inuganti Rajagopala Rayanin Garu, the husband of his sister Sri Gopayyammi Garu. The estate was registered in the name of the donee, who died upon the 4th April 1856, survived by his widow Gopayyammi, and by their daughter, Lakshmi Chellayyammi Garu, who was at that time a minor, eight years of age.

Upon the death of Sri Inuganti Rajagopala Rayanin Garu, the estate was, with the consent of his widow, Gopayyammi, retransferred into the name of the original donor, upon the footing that the interest conferred upon Inuganti by the grant of 1848 was for his lifetime. The original donor, Sri Raja Sveta Chalapati Ranga Rao Bahadur Garu, on the 19th February 1862, made a second grant of the estate, in terms absolute and unqualified, to Sri Inuganti Sitaramasami Garu, the son of one of his sisters, who was registered as owner and continued to possess the estate, until his death, without leaving issue, in September 1873. His widow, the original respondent, Sri Inuganti Bhavayyammi Garu, thereupon entered into, and continued to enjoy possession of the estate, under the management of the Court of Wards. She died during the dependence of this appeal, and her representative, Inuganti China Sitaramasami Garu, has been substituted as respondent.

The donor died, after making his second grant of the estate of Chidikada, in the year 1862, and was succeeded in the Raj of [52] Bobbili, by his son, Sri Raja Sitaramakrishna Ravandappa Ranga Rao Bahadur Garu, who was married to Lakshmi Chellayyammi Garu, the daughter of Rajagopala, the first donee. Her husband, the Raja, died without issue on the 18th May 1868, but authorised his widow Lakshmi to adopt a son. In virtue of that authority, his widow adopted the appellant in February 1871. In 1881, the appellant attained majority, and he has since been in full possession of the estate and Raj of Bobbili.

The present suit was brought by the appellant, in order to recover possession from the original respondent of the estate of Chidiga Jagannadhapuram, in December 1890, his main ground of action being that by the terms of the first grant of 1848, Sri Inuganti Rajagopala Rayanin Garu became absolute owner of the estate, and that his interest was not restricted to his lifetime. The appellant maintained that, by

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Hindu Law, on the death of Rajagopala, his widow Gopayyammi became entitled to a life estate, that on her decease, their daughter Lakshmi became entitled to enjoy the estate in question during her life, and that her right of succession had now devolved upon the appellant, under an arrangement with Lakshmi.

In the course of the proof taken in the present suit, the appellant proposed to establish by means of secondary evidence the terms of the grant of 1848, which he alleged to have been executed in the shape of a formal deed of gift. The respondent denied that such a deed ever was executed, and averred that the gift consisted in transferring the estate to the donee's name in the register, upon the footing that the estate was to revert to the donor, in the event of the donee leaving no heir male of his body.

What took place at the trial appears from an order passed by the District Judge of Vizagapatam, which is thus quoted in the final judgment delivered by him :—" The plaintiff offered in evidence what " purported to be an unauthenticated copy, said to be the original " draft, of a deed of gift of the plaint land, dated 5th April 1848, and " executed by the plaintiff's paternal grandfather in favour of the " plaintiff's maternal grandfather. The defendants object to the admis- " sion of this document on the ground that it is the copy of a docu- " ment which was insufficiently stamped. The copy bears on its " face an entry to the effect that the document of which it is a copy " bore a stamp of Rs. 8. [53] The defendants' Exhibits I and II (admit- " ted by the plaintiff) show that in 1835 the plaint land was sold " for Rs. 40,000. The document produced, and which the defendants say " is a copy of a document insufficiently stamped, does not contain any " mention of the value of the property. It contains an entry to the effect " that the peshcush, or revenue payable to Government, was Rs. 4,800. " If this could be shown to be the value of the property, the stamp of " Rs. 8 would, under Regulation XIII of 1816, be sufficient. But there is " no connection, of which I am aware, between the revenue payable to " Government and the value of the property, except that the former may, " to some extent, be an indication of the latter. The lower the revenue, " the higher is the market value of a given piece of property."

The learned Judge, accordingly, refused to receive the document tendered as secondary evidence or to allow it to be proved. He referred to two decisions of the High Court of Madras (*Arunachellum Chetty* v. *Olagappah Chetty*(1) and *Kopasan* v. *Shamu*(2) as establishing the rule that secondary evidence could not be admitted (even on payment of a penalty) of the contents of the original deed of gift of the 5th of April 1848. The appellant having thus failed to support his claim by competent evidence, the District Judge, on the 18th November 1892, dismissed his suit with costs.

The present appellant appealed from that decision to the High Court of Madras, on the ground that the District Judge had erred in refusing to receive the draft tendered as secondary evidence of the contents of the original deed of 1848. On the 4th April 1894, Mr. Justice Sir T. Muttusami Ayyar and Mr. Justice Best affirmed the decree of the Court below and dismissed the appeal with costs. The learned Judges of the High Court agreed in holding " that the copy should not be admitted on payment

(1) 4 M. H. C. R. 312. (2) 7 M. 440.

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"of a penalty, for the provision of the Stamp Act regarding penalty "(Section 39 of Act I of 1879) prescribes that such payment shall "be endorsed on the document, and pre-supposes that the document is "forthcoming."

Upon the hearing of this appeal, counsel for the appellant admitted that he was not in a position to dispute that the original deed of gift, dated in 1848, had not been sufficiently stamped, [54] in terms of the Madras Regulation No. XIII of 1816; and that he would be unable to maintain his claim for the estate of Chidikada unless he were permitted to prove the copy of the deed which he had tendered, and to use it as secondary evidence either on due payment of a penalty into Court, or upon its endorsement by the Collector. His right to have that remedy allowed him was rested upon the provisions of the Stamp Act, No. I of 1879.

Accordingly the only question arising for decision in this appeal is,—Whether the Courts below were right in holding that the provisions made by the Act of 1879, for the case of deeds either unstamped, or insufficiently stamped, have no application when the original deed, which ought to have been stamped or was insufficiently stamped, has not been produced? That is a question which must depend upon the terms of the Statute itself.

Their Lordships are satisfied, by an examination of its clauses, that the construction of the Act of 1879, adopted by the Court below, is correct. These clauses throughout deal with, and exclusively refer to, the admission as evidence of original documents which, at the time of their execution, were not stamped at all, or were insufficiently stamped. It is only upon production of the original writ, that the Collector has the power given him, or the duty imposed upon him, of assessing and charging the penalty, a duty which he must, in that case, perform by writing an indorsement upon the writ submitted to him, which then, and not till then, becomes probative in law. By Section 33, it is made the duty of "every person having, by law, or consent of parties, authority to receive evidence," to impound any document coming before him in the course of his functions, which appears to him to be chargeable with duty, and not to have been duly stamped. Section 34 provides that no instrument which has not been duly stamped shall be received in evidence or acted upon by the persons described in the preceding section except (1) on payment of the duty chargeable, or of the amount required to make up such duty, together with a penalty, and (2) in any proceeding in a criminal Court, other than a proceeding under Chapter XL or Chapter XLI of the Code of Criminal Procedure, or Chapter XVIII of the Presidency Magistrates Act. When the original has been admitted in evidence by a person having authority under the preceding section, upon payment of duty and penalty, it is made the duty of such person to send to the Collector an authenticated copy of the instrument, [55] together with a certificate in writing stating the amount of the duty and penalty levied in respect thereof, and also to send such amount to the Collector. In every other case, the person impounding the instrument is required "to send it in original to the Collector."

In the opinion of their Lordships, the effect of granting the remedy which the appellant maintains he is entitled to, would be to add to the Act of 1879, a provision which it does not contain, and which the Legislature of India, if the matter had been brought under their notice, might possibly have declined to enact.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

1899 JULY 13.

PRIVY COUNCIL.

23 M. 49 (P.C.)=4 C.W.N. 117=26 I.A. 262=7 Sar. P.C.J. 597.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Surr, Gribble & Oliver.*
Solicitor for the respondent—*The Solicitor, India Office.*

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23 M. 55.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Michell.

APPA RAO (*Petitioner*), *Appellant v.*
VENKATARAMANAYAMMA (*Counter-petitioner*), *Respondent.**
[2nd and 4th August, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 244—*Retention by the Court of property not the subject-matter of a decree in the course of its execution—Dismissal of petition for delivery of possession—Appeal from order of dismissal.*

A decree having been passed awarding to a plaintiff in a suit a moiety of certain jewels which were stored in family boxes in the possession of the defendant, the boxes containing the jewels were taken possession of by an officer of the District Court and a division was effected by a commissioner appointed for that purpose by that Court. After the division certain jewels remained which had been set aside by the commissioner as not forming part of the subject-matter of the decree, and these continued in the custody of the District Court. The defendant thereupon presented a petition to the District Court praying that the jewels so remaining undivided might be returned to him. Plaintiff resisted the application but both parties were agreed that the said remaining jewels were not part [56] of the subject-matter of the suit and were not dealt with by the decree. The petition was dismissed; whereupon the petitioner appealed. On objection being taken that no appeal lay against the order of dismissal on the ground that, since the jewels in question were not part of the subject-matter of the suit and were not dealt with in the decree, the question was not one relating to the execution of a decree and was not governed by Section 244 of the Code of Civil Procedure:

Held, that the question as to what should be done with the boxes and their contents arose between the parties to the suit and related to the execution of the decree; that the order was passed under Section 244 of the Code of Civil Procedure and that consequently an appeal lay.

Per MICHELL, J.:—The property having been interfered with in the course of the execution of a decree the question involved was one "relating to the execution of the decree." The general words in the section should be construed liberally.

Muttuvelu Pillai v. *Vythilinga Pillai* (5 M.H.C.R. 185), and *Madhan Mohan Singh* v. *Kangee Doss Chuckerbutty* (12 B.L.R. 201), referred to.

[R., 5 P.R. 1907=23 P.L.R. 1908=40 P.W.R. 1907.]

APPEAL against the order of M. D. Bell, District Judge of Godavari, in Civil miscellaneous petition No. 367 of 1898 (execution petition No. 32 of 1897 in the matter of original suit No. 8 of 1893).

Petitioner was defendant in a suit in the District Court in which counter-petitioner, who was plaintiff, had obtained a decree for partition. During the pendency of that suit the Court had, on counter-petitioner's application, issued a commission for the preparation of an inventory of certain jewels which were contained in boxes of the family in the possession of the petitioner. The inventory having been duly prepared, counter-petitioner had obtained a decree for, *inter alia*, a moiety of the jewels

* Appeal against Order No. 123 of 1898.

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specified in it. In pursuance of that decree, the boxes containing the jewels had been brought by an officer of the Court from the custody of the petitioner to Court for division, and the jewellery specified in the inventory divided accordingly and handed to the parties by the commissioner. After the division had been effected certain jewels still remained in the boxes, having been rejected by the commissioner as not answering exactly to the description of them given in the inventory. These continued in the custody of the District Court. Petitioner thereupon presented a petition to the District Court under Section 244 of the Code of Civil Procedure, praying that the said remaining jewels might be handed over to him. Against this counter-petitioner presented a counter-petition asking for delivery of the said remaining jewels to him. Both parties agreed that they did not form part of the subject-matter of [57] the suit and were not dealt with in the decree. Counter-petitioner contended that if petitioner had any right to the jewels he could establish it only by a suit brought for the purpose. The District Court dismissed the petition, making no order on the counter-petition.

The petitioner preferred this appeal under Sections 244 and 540 of the Code of Civil Procedure.

Hon. *Bhashyam Ayyangar*, *Seshachariar*, and *Ayya Ayyar*, for repondent.—There is a preliminary objection to this appeal being heard. It is submitted that no appeal lies against the order of the District Judge. Admittedly the jewellery in question is not part of the subject-matter of the suit, and is not dealt with by the decree. This petition, therefore, relates to property not the subject-matter of the decree. In *Venkata Ramanayamma* v. *Appa Rao* (1) it was held that no appeal lay in such a case.

Sundara Ayyar, for appellant.—It is sufficient to establish petitioner's right of appeal that the Court deprived him of the possession of the jewellery in the course of execution. The possession now complained of was taken in the course of execution and the petitioner's remedy against the wrongful retention is under Section 244. *Muttuvelu Pillai* v. *Vythilinga Pillai* (2) was decided under the corresponding section of the former Act. It is immaterial that in the case cited the property in question was alleged to be included in the decree. See also *Rani Kattama Nachiar* v. *Bothagurusāmi Tevar* (3) and *Jogendro Narain Koonwar* v. *Ranee Surno Moyee* (4). In *Venkata Ramanayamma* v. *Appa Rao* (1) the Court was not executing the decree when handing over the property to defendant. Here, the Court has wrongly taken possession of the property iu the course of execution. The broadest construction should be placed on Section 244, *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (5).

Hon. *Bhashyam Ayyangar*, in reply.—In cases under Section 244 there must be a question, (1) that must relate to the execution of the decree and (2) that arises between the parties to the suit. In all the cases cited the property in dispute was alleged to be included in the decree, which allegation was denied.

JUDGMENT.

[58] MOORE, J.—A preliminary objection is raised that there is no appeal against the order of the District Judge. I am of opinion that that

(1) Appeal against Order No. 162 of 1895 (unreported).
(2) 5 M.H.C.R. 185. (3) 6 M.H.C.R. 293. (4) 14 W.R. C.R. 39.
(5) 19 I. A. 166=19 C. 683 (689).

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order was passed under Section 244, Civil Procedure Code, and that consequently there is an appeal. In execution of a decree the sheristadar of the District Court, acting under orders of the Judge, took possession of a box containing certain jewels and had it removed to the District Court. It was there opened and some of the jewels in it were disposed of in accordance with the directions contained in the decree. It is admitted that the jewels remaining in the box were not included in the property dealt with in the decree. As regards this box and what is left in it the first defendant put in a petition requesting the Court to deal with the property in one manner while the plaintiff presented a counter-petition pleading that it should be dealt with in another manner. On these petitions the District Judge has passed an order.

In my opinion it must be held that this order is one under Section 244, Civil Procedure Code. The question arising as to what should be done with the box and its contents is one between parties to the suit, *i.e.*, the plaintiff and the first defendant. No one unconnected with the suit has put forward any claim. It must also, I consider, be held that that question is one relating to the execution of the decree. It was in execution of the decree that the box was taken possession of by the sheristadar and brought to the Court and that subsequently certain of its contents were handed over to certain parties to the decree. It is in consequence of these execution proceedings that the District Judge has been called on to decide what should be done with the remainder of the property and the question that has thus arisen must therefore I consider be held to be one relating to the execution of the decree.

The Judge has rejected the application made to him but has given no reasons for his order. The result is that it is impossible for us in appeal to say if that petition has been rightly dismissed or not. We accordingly set aside the order of the District Judge and remand the matter to him for disposal on the merits. Costs of this appeal will be provided for in the final order.

MICHELL, J.—I agree. I think the case *Muttuvelu Pillai* v. *Vythilinga Pillai* (1) is not distinguishable from the present case [59] and that the decision in that case is therefore authority for holding the order in question in the present case to be appealable. That was a decision on Section 11 of Act XXIII of 1861, but the words in that section "any "other questions arising between the parties to the suit in which the "decree was passed and relating to the execution of the decree" on which the decision in that case turned are reproduced in Section 244 (*c*) of the Code now in force (with an addition of some words not affecting the question in the present case). In that case the plaintiff sued for recovery of certain land of which, along with other lands, the defendant had been put in possession in execution of a decree in a suit for recovery of lands brought by him against the plaintiff and others, although it did not form part of the lands sued for and for which the decree was obtained in such former suit. If, as was held in that case, the question was one "relating to the execution of the decree," although the land sued for and which had been wrongly put in possession of the defendant by the Nazir in course of execution of the decree in the former suit was not part of the subject-matter of that former suit nor included in the decree therein, then the question in the present case appears to be similarly one "relating to the

(1) 5 M.H.C.R. 185.

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execution of the decree" notwithstanding the fact that the particular jewels in question did not form part of the jewels which were the subject-matter of the suit between the parties nor of the decree therein.

As in the case of *Muttuvelu Pillai* v. *Vythilinga Pillai* (1) so in the present case it was in course of execution of the decree by the Court officer that the property in question, which did not form part of the property included in the decree, was interfered with. The only difference is that in that case the property in question was put by the Nazir in the possession of the judgment-creditor whereas in this case it has been brought into the Court-house. But that difference is, I think, on an immaterial point. The material point is, I think, that the property in question was interfered with in course of execution of the decree and therefore the question involved is one "relating to the execution of the decree." These general words have always been construed liberally and such construction has been approved by their Lordships of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2). The case of **[60]** *Madhan Mohan Singh* v. *Kanee Doss Chuckerbutty* (3) is, I think, clearly distinguishable from the present case; because in that case the property in question was taken possession of not by the officer of the Court but by the decree-holder.

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23 M. 60=9 M.L.J. 284.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

VIRARAGHAVA AYYANGAR (*Defendant No.* 1), *Appellant v.* PONNAMMAL (*Plaintiff*), *Respondent.**
[10th July and 15th August, 1899.]

Limitation Act—Act XV of 1877, *Schedule II, Article* 179, *Clause* (2)—*Final decree of Appellate Court—Decree against joint defendants—Appeal by one of two defendants against part of the decree—Decree against non-appealing defendant " imperilled."*

Plaintiff having, on 31st March 1891, obtained in a District Munsif's Court a decree rendering liable the property of two defendants, the second defendant appealed, making the plaintiff alone respondent, with the result that the District Court set aside the decree against the second defendant, and remanded the suit for trial as to his liability. Plaintiff appealed unsuccessfully to the High Court against this order of remand, the first defendant again not being made a party. On 23rd July 1894 the District Munsif delivered a revised judgment, in which he again held the second defendant's share liable, but gave both defendants two months' time for payment, which provision was not contained in the original decree. This revised judgment was upheld by the District Court on appeal, on 25th March 1895: and by the High Court on second appeal on 22nd February 1897, with the modification that the decree as against second defendant should be treated as a money decree. First defendant was again not a party to either appeal. On 7th August 1897, plaintiff applied for execution, whereupon first defendant pleaded limitation:

Held, that the decree as against the first defendant was not barred by limitation inasmuch as it had been imperilled by the appeal of the second defendant.

Per MOORE, J.—Under Article 179, Clause (2), of Schedule II of the Limitation Act, it is immaterial whether some only or all of several judgment-debtors prefer an appeal. There is only one decree that can be executed and that is the final decree of the Appellate Court.

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* Letters Patent Appeals Nos. 66 and 67 of 1898.

(1) 5 M.H.C.R. 185. (2) 19 I.A. 166=19 C. 683. (3) 12 B.L.R. 201.

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Per O'FARRELL, J.—On the general question as to the construction of Article 179, Schedule II, of the Limitation Act, the plain words of the Act have been unduly narrowed by the decision in *Muthu* v. *Chellappa* (12 M. 479); the consideration of such subtle points as whether a decree was or was not "imperilled" by an appeal was foreign to the intention of the Legislature.

[F., 26 M. 91 (F.B.).]

[61] APPEALS under Letters Patent, Section 15, against the orders of Davies, J., on civil miscellaneous second appeals Nos. 21 and 22 of 1898, presented against the orders of F. H. Hamnett, Acting District Judge of Tanjore, in appeals against orders Nos. 899 and 909 of 1897.

Application by decree-holder in original suit No. 358 of 1889 to execute the decree by the sale of the first defendant's share of the hypothecated property made liable by the decree. The petitioner had instituted original suit No. 358 of 1889 against first defendant and his undivided son, the second defendant, to recover a sum due on hypothecation bond executed by first defendant in favour of plaintiff's husband. On 31st March 1891 the Court of the District Munsif decreed that the plaintiff should recover Rs. 1,523-2-0 from first defendant and by sale of the mortgaged property with interest and costs, and that second defendant's share in the mortgaged property should also be liable to the plaintiff's claim. Against this decree second defendant appealed, making petitioner (as plaintiff), alone respondent in that appeal, with the result that, on 26th October 1891, the District Court set aside the decree against second defendant and remanded the case for trial as to the second defendant's liability. Petitioner then appealed to the High Court against this order of remand, but the order was upheld. First defendant was not made a party to this appeal either. On 23rd July 1894 the District Munsif delivered a revised judgment in which he observed that "the first defendant did not appeal and the decree of the Court so far as he is concerned is in force;" he again held second defendant's share of the mortgaged property to be liable to petitioner's claim and added a provision, not contained in the original decree, that first and second defendants should be allowed two months' time for payment. This revised judgment was confirmed by the District Court, on appeal, on 25th March 1895; and on 22nd February 1897 the High Court passed a decree on second appeal containing the following modification:—"The first defendant do pay to the plaintiff Rs. 1,523-2-0 with interest thereon at 6 per cent per annum from 17th December 1889, the date of plaint, up to date of payment and that in default of payment of the sum aforesaid on or before the date specified (*viz.*, three months from the date of the decree), the first defendant's share of the hypothecated properties or a sufficient portion thereof be sold . . . . and that the plaintiff be at liberty to proceed [62] against the second defendant's share of the said properties in execution of this decree treating it as a money decree." First defendant was not a party in either of the last-mentioned appeals. On 7th August 1897 petitioner applied for execution of the decree: whereupon first defendant pleaded that it was barred by limitation so far as it affected him. The District Munsif held that the execution of the decree as against first defendant was not barred under Article 179 of Schedule II of the Limitation Act and ordered the execution to proceed. The District Judge, on appeal, upheld the order. The first defendant preferred a second appeal, which, on 27th September 1898, was dismissed by Mr. Justice Davies in the following judgment:—"I think the orders of the Courts below are right. In this case it appears that the decree against the first defendant, the father,

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was imperilled by the appeal of his son, the second defendant, which distinguishes it from the case of *Muthu* v. *Chellappa* (1). I therefore dismiss this appeal with costs."

Against the last-mentioned order, first defendant preferred this appeal under Section 15 of the Letters Patent.

Sundara Ayyar and *Gopalasami Ayyangar*, for appellant.—The question is whether the decree against first defendant was imperilled by the appeal preferred by second defendant. Under Article 179 of Schedule II of the Limitation Act, 1877, the period of limitation is three years from the date of the decree or order, or, where there has been an appeal, the date of the final decree or order of the Appellate Court. Under the Act of 1859, time ran only from the date of the original decree. It is contended that the decree became barred as against first defendant on 1st April 1894, namely, three years from the date of the Munsif's judgment of 31st March 1891. He was not a party to any proceedings subsequent to that decree, and should not be affected by them. The true principle is that where portion of a decree is appealed against, whether there be one or more defendants, the Court will decide whether the portion not appealed against has been imperilled. If not, the decree-holder must execute his decree within three years or lose his remedy. The Court is not bound to reverse a decree against a person who does not appear, and the District Judge did not do so as against first defendant in the **[63]** decree of 26th October 1891. It is submitted that the decree against first defendant was not imperilled by that appeal to the District Court but even if it was, it became final on 26th October 1891. In the case of an appeal by a defendant, a decree against a co-defendant may be reversed; but on a plaintiff's appeal, the District Court could not have exercised such a discretion under Section 544 of the Code of Civil Procedure. Under that section the Court may benefit a person not a party, but cannot alter a decree to his prejudice. This application for execution was made more than three years after both original and appellate decree; and when the case was remanded on 26th October 1891, the District Munsif treated the decree as still in force as against first defendant. If the decree against first defendant was ever imperilled, it was only until the decree of the District Court was passed on appeal on 26th October 1891. A decree dealing with the liability of one of two co-defendants cannot be said to affect the position of the other co-defendant. Here, the first defendant could not have appealed, and he did not do so; and he did not appear in the second defendant's appeal; nor was there any reason for the petitioner to appeal so far as first defendant was concerned, the original decree being in petitioner's favour. That was a final decree as against first defendant in every sense. The decree that must be imperilled is that against the non-appealing defendant. The period of limitation will not be extended if it is the decree of the appealing defendant alone that is imperilled. He referred to *Ragunath Pershad* v. *Abdul Hye* (2). [O'FARRELL, J.—The test applied in that case seems to have been whether there were in effect two separate decrees : see the judgment of Couch, C.J., cited on page 31.] No doubt it was so, but the principle was whether the portion not appealed against had been imperilled. [O'FARRELL, J.—These decisions modify the words of the statute ; where is the line to be drawn ?] In a case in which several reliefs are claimed and a plaintiff appeals only with respect to one of them, and carries his appeal to the Privy Council,

(1) 12 M. 479. (2) 14 C. 26.

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it could not be contended that limitation would be extended in regard to the reliefs in respect of which no appeal was brought. *Sreenath Mojoomdar* v. *Brojonath Mojoomdar*(1) was a decree for lands and for moveables. [O'FARRELL, J.—That decision seems never to have been referred **[64]** to or followed.] In *Muthu* v. *Chellappa* (2) an application for execution was held to be barred as against two defendants, the plaintiff having appealed against that portion of the decree which exonerated two other defendants. The same view was taken in *Ponnambala Tambiran* v. *Sami Chetti* (3), though it was there held that the portion of the decree not appealed against was imperilled. [MOORE, J.—What is your definition of "imperilled"?] It means liable to alteration; and the portion not appealed against must be liable to alteration if the period of limitation is to be extended as against it. In *Sriram Ghatak* v. *Brajamohan Ghosal* (4), which was decided on Section 544, it was held that the suit must be common to all, non-divisible, and it shows that the District Court could not have altered the decree against first defendant when hearing second defendant's appeal; so that the original decree of 31st March 1891 would be the final one. [MOORE, J.—The modification of second defendant's liability under that decree renders the position of the first defendant worse than it was. First defendant was, from the first, liable for the whole amount of the decree. If Article 179 is construed in its literal sense the Court will be departing from the ruling in *Muthu* v. *Chellappa* (2), which has hitherto been regarded as the opinion of this Court on the point. (He also referred to *Gopal Chunder Manna* v. *Gosain Das Kalay* (5) and *Harkant Sen* v. *Biraj Mohan Roy*(6).)

J. L. Rosario, for respondent.—The litigation continued after the judgment in 1891. The case came back to the District Court on 25th March 1895 on appeal from the District Munsif's revised judgment; and the second defendant again appealed to the High Court, and the decree was altered on 27th February 1897 to the prejudice of the petitioner. Limitation should run only from the date of the modification by the High Court. The decision of the Full Bench in *Gopal Chunder Manna* v. *Gosain Das Kalay* (5) is conclusive.

Sundara Ayyar, in reply.

JUDGMENT.

MOORE, J.—In the decree passed in original suit No. 358 of 1889 on the 31st March 1891, the District Munsif of Valangiman directed that the plaintiff should recover Rs. 1,523-2-0 from the first defendant and by sale of certain mortgaged property with interest and costs and that the second defendant (the undivided son **[65]** of the first defendant) should be held personally liable for the plaintiff's costs. The second defendant appealed to the District Judge (appeal suit No. 319 of 1891), his main contention being that his share of the property should not have been held to be liable. The first defendant was not joined as a party to this appeal. The District Judge of Tanjore on the 26th October 1891 set aside the decree of the District Munsif in so far as the second defendant was concerned and remanded the suit for re-trial with respect to his liability. An appeal was preferred against this order, but the High Court declined to interfere with it. In accordance with the directions contained in the remand

(1) 13 W.R. C.R. 309. (2) 12 M. 479.
(3) Letters Patent Appeal No. 95 of 1896 (unreported).
(4) 3 B.L.R. App. 41. (5) 25 C. 594. (6) 23 C. 876.

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order, the District Munsif delivered a revised judgment on the 23rd July 1894. In the heading of this judgment, the defendants are set forth as Viraraghava Ayyangar (first defendant) and two others. It is, however, admitted that the first defendant did not appear either in person or by pleader before the District Munsif in connection with the second trial, and there appears also to be no doubt that notice was not served on him. In the decree his name is given, but while it is mentioned that the second defendant appeared by vakil, nothing is said as to whether the first defendant appeared or not. In the decree it was directed that the plaintiff should recover the amount sued for with costs on the security of the mortgaged property including the second defendant's share and a provision, not to be found in the original decree, was added to the effect that the first and second defendants were allowed two months' time for payment. The second defendant appealed to the District Judge against this decree, but his appeal was dismissed (appeal suit No. 504 of 1894). To this appeal also the first defendant was no party. A second appeal to the High Court was filed by the second defendant, the first defendant not being joined, and the final appellate decree was passed on the 22nd February 1897 (*Sami Ayyangar* v. *Ponnammal* (1)). In this decree it was directed that the first defendant should pay to the plaintiff Rs. 1,523-2-0 with interest, and it was further ordered that on the first defendant paying the amount due within three months, the plaintiff should deliver up all documents in his possession relating to the mortgaged property and that in default of payment the first defendant's share of the mortgaged property should be sold, and it was finally directed that the plaintiff should be permitted to proceed [66] against the second defendant's share of the properties in execution of the decree treating it "as a mere money decree." When, on the 7th August 1897, the plaintiff applied to the District Munsif for execution of the decree, the first defendant pleaded that it was barred by limitation in so far as he was concerned. The District Munsif held that there was no bar, and on appeal this order was confirmed by the District Judge. Mr. Justice Davies in appeal against appellate order No. 21 of 1898 refused to interfere with the order of the District Judge, and against his decision the present two Letters Patent appeals have been preferred.

The main contention urged on behalf of the first defendant is that as he was no party to any of the proceedings in this case subsequent to the decree of the 31st March 1891, that decree is the only one that can be held to be binding on him, and that such being the case the plaintiff's claim as against him is barred by limitation. On behalf of the plaintiff it is contended that this question is to be decided in accordance with Article 179 of the second schedule attached to the Limitation Act, which provides that when an appeal has been preferred against a decree, time begins to run in so far as execution proceedings are concerned from the final decree of the Appellate Court, *i.e.*, in the present case from the 22nd February 1897. Mr. Justice Davies dismissed the appeal presented to him on the ground that as the decree against the first defendant, the father, was imperilled by the appeal of his son, the second defendant, the case was distinguished from that disposed of by the decision in *Muthu* v. *Chellappa* (2). It appears to me that this finding to the effect that the decree against the first defendant was imperilled, by which I suppose nothing more is meant than rendered liable to alteration or reversal, by the appeal preferred by the second

(1) 21 M. 28. (2) 12 M. 479.

defendant, must be upheld. The decree of March 1891 made the shares of both the first and second defendants liable. Against it the second defendant appealed, and if his contentions had prevailed and he had been relieved from liability, the result would have been to increase the liability of the first defendant. A similar remark applies to the revised decree of July 1894 and the appeal preferred by the second defendant from it to the District Judge. In this revised decree it may be noted that a slight modification of the original decree was made in so far as the first defendant was [67] concerned, as it gave him two months' time in which to pay. The result of the second appeal preferred to the High Court from the decision of the District Judge was that a most important alteration was made in the decree of the District Munsif, and that it was directed that the share of the first defendant alone should be liable to be sold in satisfaction of the mortgage amount, the plaintiff, however, being permitted to proceed against the second defendant's share "in execution of the decree treating it as a mere money-decree." The effect of this the final appellate decree is certainly, as the District Judge points out, to throw an extra burden on the first defendant's share and, such being the case, it must be held that the decree as against the first defendant was imperilled by the subsequent proceedings taken in appeal. This finding is sufficient for the disposal of the present appeals. I may however add that, with all due deference to the learned Judges who decided the case in *Muthu* v. *Chellappa* (1), I am of opinion that in all cases such as the present where all the judgment-debtors do not appeal no question arises, in so far as the bar by limitation with respect to execution proceedings is concerned, as to whether the decree as against the remaining judgment-debtors is imperilled by the appeal or not. The words of the second clause of Article 179 of the second schedule attached to the Limitation Act are, in my opinion, clear and should be followed by the Courts. What is there laid down is that where an appeal is preferred from a decree, the period of limitation with respect to execution is three years from the date of the final decree of the Appellate Court. Whether all the judgment-debtors or some only of them have appealed makes, in my opinion, no difference. There is only one decree that can be executed and that is the final decree of the Appellate Court. There has in the past been a considerable conflict of authorities as to this, but of late the decisions are strongly in support of this view. Reference may be made, *inter alia* to the decisions in *Sakhalchand Rikhawdas* v. *Velchand Gujar* (2), *Abdul Rahiman* v. *Maidin Saiba* (3), *Harkant Sen* v. *Biraj Mohan Roy* (4), and *Gopal Chunder Manna* v. *Gosain Das Kalay* (5). This last is a decision of a Full Bench, and in the order of reference from a [68] Divisional Bench the greater number of the conflicting decisions above referred to are noted. I may also draw attention to *Chinnaya Rao* v. *Krishnama Charyalu* (6), in which the law, as laid down in *Gopal Chunder Manna* v. *Gosain Das Kalay* (5), is approved and followed. These appeals should, in my opinion, be dismissed with costs.

O' FARRELL, J.—I concur in the judgment just pronounced by Mr. Justice Moore. On the general question as to the construction of Article 179, Schedule II of the Limitation Act, I think that the plain words of the Act have been unduly narrowed by the decision in *Muthu* v. *Chellappa* (1), and that the consideration of such, subtle points as whether a decree

(1) 12 M. 479. (2) 18 B. 203. (3) 22 B. 500.
(4) 23 C. 876. (5) 25 C. 594.
(6) Appeal against Appellate Order No. 7 of 1898 (unreported).

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was or was not "imperilled" by an appeal was foreign to the intention of the Legislature. There has always been a considerable body of judicial opinion adverse to the earlier Calcutta decisions which the Madras decision followed, and these Calcutta decisions have now been overruled by an unanimous decision of a Full Bench of five Judges of the Calcutta Court itself. I have little doubt that when the question comes to be considered by a Full Bench of this Court the latest Calcutta decision will be followed. Limitation in respect of execution proceedings rests, I think, on somewhat different grounds from limitation in regard to suits. In the latter case it is contrary to public policy that a matter in dispute resting upon testimony should be agitated after a period when that testimony may have grown dim or opposing testimony be difficult or impossible to be procured. In the case of execution proceedings, there is ordinarily no matter in dispute at all. The only ground for refusing execution of a decree after a certain lapse of time is that it is not considered fair that a judgment-creditor should lull his debtor into a false sense of security and then suddenly execute a decree which the debtor may have thought he intended to forego. In a case where the law provides that the period for execution of a decree is prolonged by an appeal being preferred, the debtor cannot be misled. A suspension of execution, so far from being an injury to him, is in such cases a positive advantage, as it gives him further time for satisfaction of the decree. Moreover, by the making of merely formal applications for execution, a decree-holder can, in any case, [69] keep a decree alive for twelve years—a longer period than is likely to elapse during the pendency of an appeal. The mischief of the view which I am now contending against is that it needlessly introduces an element of uncertainty into the execution of decrees, of which the present protracted litigation is an apt example.

In the present case, however, I do not think it necessary to go beyond the four corners of the decision in *Muthu* v. *Chellappa* (1). On any view, the decree as against the first defendant was "imperilled" when the second defendant appealed on grounds which went to the root of the whole transaction. It is, however, ingeniously contended that if this was the case at first, it ceased to be so when the Appellate Court in its order of remand declined to disturb the decree as against the first defendant and remanded the suit for re-trial as regards the liability of the second defendant only. It is urged that, on 26th October 1891, when this order of remand was passed by the District Court, the decree against the first defendant ceased to be imperilled. The fallacy, however, seems to me to consist in looking upon an order in remand, refusing to disturb a decree as regards one defendant and directing a re-trial as regards another, as equivalent to a final decree in favour of the former defendant. This is, I think, not so. Until the original Court has re-tried the question remanded there is no final decree in the suit, and if, against the decree finally passed in remand a fresh appeal is preferred by one defendant, the Appellate Court is again seized of the whole subject-matter of the appeal, and may in a proper case alter the decree in favour of the defendant who has not appealed, and this despite its former refusal to interfere on his behalf. In this view the whole decree has throughout been imperilled by the appeals preferred by the second defendant, and the period from which limitation has to be reckoned is the date of the final decree of the High Court in second appeal. I concur in the order proposed by Mr. Justice Moore that both these appeals should be dismissed with costs.

(1) 12 M. 479.

23 M. 70=9 M.L.J. 185.

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[70] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

MUHAMMAD ESUPH RAVUTAN (*Defendant*), *Appellant v.* PATTAMSA AMMAL (*Plaintiff*), *Respondent.**
[17th and 21st March and 13th April, 1899.]

Muhammadan Law—' Hiba-bil-Iwuz '—Settlement in lieu of dower—Possession not transferred—Validity on passing of consideration.

A Muhammadan executed a deed of settlement of certain land in lieu of dower on his wife, who left him shortly thereafter without ever acquiring possession. On his contending that the settlement was invalid :

Held, that a *bona fide* transaction by way of 'Hiba-bil-Iwuz' (as this was found to be) is supported by proof of the actual passing of the consideration agreed to be given ; that the consideration in this case was the release by the wife of her right to dower from her husband, and that such release was completed by her acceptance of the transfer under the settlement.

[R., 23 P.R. 1906=107 P.L.R. 1906 ; 86 P.R. 1910=171 P.L.R. 1910=130 P.W.R. 1910 ; D., 13 C.W.N. 160=4 Ind. Cas. 466 ; 13 Ind. Cas. 689.]

SECOND appeal against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 646 of 1897, modifying the decree of V. T. Subramania Pillai, District Munsif of Tiruturaipundi, in original suit No. 374 of 1896.

By a deed of settlement, dated 29th December 1894 (filed as Exhibit A), defendant settled certain land on plaintiff, his wife, in lieu of dowry (mahar), the deed reciting that possession had been given to plaintiff on that date. Plaintiff alleged that she had obtained possession of the said land under the deed, but that defendant, her husband, forced her to relinquish the same and held it for himself. She sued for possession and mesne profits. Defendant denied that possession had been given and contended that the deed was invalid for that reason and others. It appeared that plaintiff had left her husband soon after the execution of the deed. The District Munsif found that no physical possession had been given to plaintiff, but held, following *Amina Bibi* v. *Khatija Bibi* (1) and *Azim Un Nissa Begum* v. *Clement Dale* (2), that in the case of a gift by a husband to his wife, actual transmutation of possession was not necessary, and that possession by her husband was tantamount to possession by plaintiff, the husband being [71] considered to hold it as agent for his wife. He awarded plaintiff possession of the land. On appeal by defendant, the Subordinate Judge said :—

"If the consideration for the document is partly, as recited in it, the dower debt owed to the respondent by the appellant, it is not a pure and simple gift, and it may be difficult to say, that even if the respondent never had possession under it, it can be avoided upon that ground. As remarked by Mr. W. H. Macnaghten in his work on the Muhammadan Law, it is what is termed by Muhammadan Law a 'Hiba-bil-Iwuz' which resembles a sale 'in all its properties ; the same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary' (Chapter V, Sections 14 and 15). In *Doe dem Ramtonoo Mookerjee* v. *Bibee Jeenut* (3),

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* Second Appeal No. 1316 of 1898.

(1) 1 B. H. C. R. 157 (161.) (2) 6 M.H.C.R. 455.
(3) 1 Fult. Rep. 152=I. D. O. S. Vol. I, p. 736.

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I find it was remarked 'that such a deed will be construed according to the rules affecting the laws of sale; and the validity of a sale is derived, not from the seizin but from the contract,' (see also Appendix under title Gifts Nos. 2, 9, 10 and 11). That the deed in question was executed in satisfaction also of the respondent's claim for dower is proved by the appellant's own evidence, who stated distinctly that 'the arrangement was that the 15 mahs of land to be given to my wife was to cover her dower debt as well as her share' in his estate." He upheld the decree.

Plaintiff preferred this second appeal.

V. Krishnasami Ayyangar, for appellant, referred to W. H. Macnaghten's 'Muhammadan Law.' Chapter IV. Section 14, and *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*(1). The deed of gift, Exhibit A, was not in lieu of dower alone and possession was not transferred by it, for the wife, having left her husband, could not enjoy possession jointly with him. He argued that the deed was not 'Hiba-bil Iwuz' as held by the Subordinate Judge and that the land could be resumed by the husband; and even if it was of that description it was invalid as portion of the consideration had failed. Deeds of gift and sale are governed by the same rules; *Rahim Bakhsh* v. *Muhammad Hasan*(2) and W. H. Macnaghten's 'Muhammadan Law,' Chapter III, page 43. Moreover, under the Muhammadan Law every gift must be followed by possession. **[72]** He referred to *Amina Bibi* v. *Khatijs Bibi* (3) and *Azim Un Nissa Begum* v. *Clement Dale*(4), and distinguished *Sajjad Ahmad Khan* v. *Kadri Begum* (5), as here there was no change of possession.

V. Krishnasami Ayyar, for respondent, relied upon *Ranee Khujooroonissa* v. *Mussamut Roushan Jehan* (6) decided by the Privy Council as being conclusive, and referred to *Morraji Cullianji* v. *Nenbai* (7) and *Kalidas Mullick* v. *Kanhaya Lal Pundit* (8).

JUDGMENT.

The District Munsif holds that Exhibit A is a deed of gift, that possession was not transferred by the husband to his wife, but that it has been held that in the case of a gift by a husband to a wife actual transmutation of possession is not necessary and he refers to the decision in *Azim Un Nissa Begum* v. *Clement Dale* (4). What, however, was there held was that all that was necessary to render a gift by a Muhammadan husband to his wife valid was that it should be accompanied with such a change of possession as the subject was capable of and as was consistent with the continuance of the relation of husband and wife. In a case where, for example, a husband made a gift of the house, in which he and his wife were living, to her and after the gift they both continued to reside in the building, it might be held that the gift was accompanied with such change of possession as was consistent with the continuance of the relation of husband and wife between the donor and donee. In the present case, however, it is shown that the husband and wife separated almost immediately after the gift was made, that the subject matter of the gift was land and that the donee never got possession of these lands in any way or received any of the produce obtained from them. It is not easy to see how it can be said that any possession passed.

(1) 11 A. 460. (2) 11 A. 1. (3) 1 B. H. C. R. 157 (161.)
(4) 6 M. H. C. R. 455. (5) 18 A. 1. (6) 3 I. A. 291=2 C. 184.
(7) 17 B. 351. (8) 11 C. 121.

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The Subordinate Judge holds, in our opinion rightly, that the transaction evidenced by Exhibit A constituted what is known as 'Hiba-bil-Iwuz' or a gift for consideration. That in such a case transfer of seizin is unnecessary is clear from the Privy Council case of *Ranee Khujooroonnissa* v. *Mussamut Roushan Jehan*(1) cited for the respondent. The Muhammadan Law rules relating to sales or exchanges, on which the appellant's vakil laid much stress have really no bearing in a case like this. For where a transaction by way of 'Hiba-bil-Iwuze, is shown to be a real transaction [73] and it is unaffected by undue influence, fraud or the like, all that has to be shown to support the transaction is, as will be seen from the case already referred to, the actual passing of the consideration agreed to be given. That such was the case in the present instance cannot be denied, since the consideration moving from the respondent was the release by her of the right to dower, which she was entitled to get from the appellant, her husband, and that release was complete when the transfer in question was accepted by her.

The second appeal fails and is dismissed with costs.

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23 M. 73 = 9 M.L.J. 265.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Michell.

COLLECTOR OF TRICHINOPOLY (*Petitioner*), *Appellant v.* SIVARAMAKRISHNA SASTRIGAL (*Counter-petitioner*), *Respondent.**
[28th July, 4th and 14th August, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 211, 212, 244—" *Parties to the suit in which the decree was passed*"—*Application for sale of property of next friend in suit* in forma pauperis —*Dismissal—Appeal against order of dismissal.*

An order having been made, in a decree dismissing a suit against the next friend of a minor plaintiff, to pay the Court fee due to Government in respect of the suit, the Collector attached the property belonging to the said next friend with a view to bringing it to sale. While the attachment was subsisting, the next friend died, and his son was thereupon brought upon the record. An application for an order for sale of the property of the son, as the legal representative of his father, having been dismissed, the Collector appealed against the order of dismissal :

Held, that the Collector was not a party to the suit in which the decree was passed within the meaning of Section 244 (*c*) of the Code of Civil Procedure and that he had, therefore, no right of appeal ; also, that in proceedings relating to the enforcement of an order under Section 412 against a next friend, the next friend cannot be considered to be a party to the suit, and that, in consequence, there is no appeal under Section 244 (*c*) of the Code of Civil Procedure from an order passed in such proceedings. Nor does Section 440 apply to a case of an order passed under Section 412.

[R., 23 M.L.J. 676 = 13 M.L.T. 19.]

[74] APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in execution petition No. 3 of 1898 in the matter of original suit No. 32 of 1894.

Application under Section 287 of the Code of Civil Procedure praying that the properties of the next friend of a certain minor, attached for stamp

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* Appeal against Order No. 122 of 1898.

(1) 3 I.A. 291 = 2 C. 184.

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fees due to Government, might be sold. One Egnasami Sastrigal, now deceased, as the next friend of his niece had sued six defendants *in forma pauperis*. The suit was dismissed, and he was ordered to pay the Court fee payable to Government. The Collector, in execution of the order, attached his property with a view to bringing it to sale; but while the attachment was subsisting, Egnasami Sastrigal died. His son, the counter-petitioner, was thereupon brought on the record, but denied his liability and an application for the sale of his property for the Court-fee, as the son and legal representative of Egnasami Sastrigal, was dismissed by the District Court on the ground that such property had devolved on the counter-petitioner by survivorship unaffected by either attachment or decree.

The petitioner preferred this appeal.

V. Krishnasami Ayyar, for respondent, took the preliminary objection that no appeal lay from the order of the District Court, on the grounds (1), that the Collector (petitioner) was not a party to the suit in which the decree ordering the counter-petitioner's father to pay the Court fee was passed, and (2) that the counter-petitioner's father, as next friend, was not a party either. He argued that the right of appeal must depend on Section 244 (*c*) of the Code of Civil Procedure, and on the definition of "decree" in Section 2 and in Section 540, and that those sections did not apply to such a case as this. He relied on *Collector of Ratnagiri* v. *Janardan Vithal Kamat* (1) and *Collector of Kanara* v *Rambhat* (2), which were followed in *Collector of Vizagapatam* v. *Abdul Kharim Sahib* (3). He referred to *Janki* v. *The Collector of Allahabad* (4) and *Secretary of State for India in Council* v. *Bhagwanti Bibi*. (5), which laid down a different rule, but contended that the Bombay and Madras cases were rightly decided.

[75] Mr. *N. Subramanyam*, for appellant.—The cases are conflicting and afford no authority. In *Collector of Ratnagiri* v. *Janardan Vithal Kamat* (1) there had been no decree or dismissal of suit; and the plaint had been returned for presentation to a proper Court, no costs being provided for. The Collector could not be entitled to an order in such circumstances, and the case contains a mere dictum. In *Collector of Kanara* v. *Rambhat*(2), it was held, on the authority of the above case, that no appeal by Government would lie, and that the Court in the exercise of its extraordinary jurisdiction would rectify the decree by directing the plaintiff to pay the costs of Government. In *Secretary of State for India in Council* v. *Bhagwanti Bibi*(5), an appeal by Government for the recovery of Court fees was held to lie following *Janki* v. *The Collector of Allahabad*(4), where it was said that a Collector must be deemed to be a party to the suit in which the decree was passed within the meaning of Section 244 (*c*) of the Code of Civil Procedure. The Full Bench case in *Ram Dial* v. *Ram Das* (6) supports that view though it was decided with reference to another section. So does the case of *Amir Baksha Sahib* v. *Venkatachala Mudali* (7), decided on Section 293, which is very similar in its terms to Section 411; see the judgment of Shephard, J., at page 440. There the question related to an auction-purchaser who had made default in completing his purchase and was not on the record, and the Court said it made no difference whether he was a party or not. See also *Baijnath Sahai* v. *Moheep Narain Singh*(8) and *Vallabhan* v. *Pangunni* (9). In *Shek Suleman* v. *Shivram Bhikaji* (10), decided on Section 253, a surety was

(1) 6 B. 590. (2) 18 B. 454. (3) 21 M. 113. (4) 9 A. 64. (5) 13 A. 326. (6) 1 A. 181. (7) 18 M. 439. (8) 16 C. 535. (9) 12 M. 454. (10) 12 B. 71.

regarded as not being a party, but an appeal was held to lie under Section 244 as if he were. The cases decided on Sections 253, 287, 293 and 411 are analogous, and show that an appeal lies in such a case as this. A "party" in the absence of definition in the Code should be defined as any person to whom notice is sent of any proceeding on the record. The definition of "party" in Section 100 of the Judicature Act, 1873, (36 & 37 Vic., cap. 66), is "every person served with notice of or attending any proceeding, although not named on the record." Here the Collector was served [76] with notice of the proceedings, and he should be heard. How can Section 408 of the Code give him that right unless it also makes him a party? It would seem to have been held in *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog* (1) that a proceeding in execution is a proceeding which terminates in a decree as defined by Section 244 of the Civil Procedure Code (Act X of 1877), and is, therefore, a suit within the meaning of the Code. The only difference between Sections 411 and 412 is that Section 411 provides for the case in which plaintiff succeeds, and Section 412 for that in which he fails. With regard to the counter-petitioner's father's position as next friend, Section 440 provides that he may be ordered to pay the costs as if he were the plaintiff. This is a case under Section 412 and the order is not a separate one, but is entered in the decree. It cannot be contended that the only means of recovering an amount ordered to be paid under Section 440 is by separate suit. A pauper suit commences under Section 408 with the petition, notice of which is served on the Government Pleader ; and Government or the Collector thereupon becomes a party. The suit continues as such until decree, and the appellant is in the decree. Section 415, which makes the costs of an application to sue *in forma pauperis* costs in the suit, is a further indication that the enquiry into the fact of alleged pauperism is part of the suit itself, and the Collector was a party to that enquiry, being represented by the Government Pleader on notice being served under Section 408.

V. Krishnasami Ayyar in reply.—The question is concluded by the decision in Collector of *Vizagapatam* v. *Abdul Kharim Sahib* (2), which was dealt with on revision under Section 622—a procedure only possible in the absence of a right of appeal. Section 244 speaks of "parties to a suit" and not merely parties ; and the definition of a plaintiff in the rules under the Judicature Act, 1873, shows that it and the definition of a defendant are too wide to be a safe index to the meaning intended to be attributed to the same words in the Code of Civil Procedure. A decree is an adjudication upon any right claimed or defence set up when it decides the suit or appeal ; and Section 412 does not direct that costs are recoverable as costs of suit, but merely that the Court may [77] order a plaintiff to pay them. In *Secretary of State for India in Council* v. *Jillo*(3), the Full Bench held that parties to an application for leave to sue *in forma pauperis* prior to the registration of a suit were only parties to the application and not to the suit. With regard to the analogy relied on with reference to Section 293, *Deoki Nandan Rai* v. *Tapesri Lal*(4) shows that no appeal would lie, that section only providing a *modus operandi* of recovering and not conferring a substantive right. With reference to Section 211, the remarks of Shephard, J., in *Amir Baksha Sahib* v. *Venkatachala Mudali*(5) were not necessary for the decision of the case. The wording of Section 411 differs from that of Sections 315 and 293, but that of

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(1) 6 B. 54. (2) 21 M. 113. (3) 21 A. 133.
(4) 14 A. 201. (5) 18 M. 439.

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Sections 293 and 315 is similar, and *Kunhamed* v. *Chathu*(1) is in favour of my contention as regards Section 315, though the case of *Amir Baksha Sahib* v. *Venkatachala Mudali* (2) is against it as regards Section 293. So the cases afford no guide by way of analogy. The question depends not upon whether the order is contained in the decree, but upon whether the person is a party to the suit within the meaning of Section 244 (*Deoki Nandan Rai* v. *Tapesri Lal* (3)). The Privy Council case (*Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(4)) was decided on Section 311 and goes on a different principle. Moreover the purchaser was a party respondent. Section 440 provides that costs may be recovered from a next friend as if he were a plaintiff, thus indicating merely the mode by which recovery is to be effected and not making the next friend a party to the suit. See also *Gopalasami Mudali* v. *Janadas Mudali* (5).

JUDGMENT.

MICHELL, J.—This is an appeal by the Collector of Trichinopoly against an order of the District Court dismissing the appellant's application for issue of a sale proclamation under Section 287 of the Civil Procedure Code, in respect of certain properties which had been attached upon a previous application made by him, and for sale thereof and payment to him from the sale proceeds of the amount of certain stamp-duty ordered by the decree in suit No. 32 of 1894 on the file of that Court to be paid to the Government, and of the costs of the two execution applications. That suit was brought by certain minors by their next friend, the respondent's [78] father, *in forma pauperis*. The suit was dismissed, and by an order contained in the decree, the respondent's father, as the next friend of the plaintiffs, was ordered to pay the sum of Rs. 315, being the stamp-duty which would have been payable by the plaintiffs if they had not been allowed to sue as paupers. The respondent's father died while the attachment of his properties, effected on the appellant's former application, was subsisting, and the application, against the order passed on which the present appeal was preferred, was made against the respondent as the son and legal representative of such next friend, and was heard and decided on the merits and was dismissed by the Acting District Judge on the ground that the properties passed to the respondent on his father's death by survivorship unaffected by the attachment as well as by the decree.

A preliminary objection is raised to this appeal, that the order appealed against is not appealable, because the appellant, the Collector, was not a party to the suit in which the decree, by which the respondent's father was ordered to pay the Court fees, was passed, and also because the respondent's father, as the next friend of the minor plaintiffs in the suit, was not such party, and therefore Section 244, sub-Section (*c*), of the Code, on which together with the definition of "decree" in Section 2, and Section 540, the appellant relies, as giving him a right of appeal, does not, it is contended, apply to this case.

In support of the first of these grounds of preliminary objection to this appeal, two decisions of the High Court of Bombay are relied on. In *Collector of Ratnâgiri* v. *Janardan Vithal Kamat* (6) it appears that the plaintiff was allowed under Section 409 to sue *in forma pauperis*, but the Court finding that it had no jurisdiction to try the suit, returned the

(1) 9 M. 437. (2) 18 M. 439. (3) 14 A. 201. (4) 19 I. A. 166=19 C. 683.
(5) Appeal against Orders Nos. 111 and 112 of 1898 unreported).
(6) 6 B. 590.

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plaint for its being presented in the Court having jurisdiction, and ordered the plaintiff to pay the Court fees from payment of which he had been exempted on the ground of pauperism. That order must have been an order purporting to have been made under Section 412. The Collector applied to the Court which passed that order for its execution. The application was rejected, and on appeal to the District Judge, the order of rejection was upheld. On second appeal by the Collector to the High Court, it was held that no appeal lay against the original order refusing execution of the order for payment of **[79]** Court fees, and therefore no second appeal lay, because the question was "one arising not between "the parties to the suit [Clause (*c*), Section 244 of Act X of 1877], but bet-" ween the Collector who is a third party and one of the parties to the suit." This decision was expressly approved and followed in *Collector of Kanara* v. *Rambhat*(1), in which it was held that no appeal by Government lies in respect of the question as to the right of Government to recover the Court fees from the plaintiff who has failed in a suit brought by him *in forma pauperis.* The respondent's vakil also relied on *Collector of Vizagapatam* v. *Abdul Kharim Sahib* (2), in which this Court entertained a revision petition under Section 622 in a case in which a District Judge had refused to order the plaintiff, whose suit brought *in forma pauperis* had been dismissed by him without contest, to pay the Court fees. This decision was relied on as showing that no appeal lies in such a case, because, if an appeal lay, the High Court could not have dealt with the case under Section 622. On the other hand, the appellant's counsel relies on the decision in *Secretary of State for India in Council* v. *Bhagwanti Bibi*(3), in which case, a District Judge having, in a suit brought *in forma pauperis*, decreed the plaintiff's claim in part and dismissed it in part but having omitted to order, under Section 412, payment by the plaintiff of the Court fees on the part of the claim which was dismissed, an appeal by the Government for recovery of such Court fees was held to lie. The learned Judges in that case referred to and followed the case of *Janki* v. *The Collector of Allahabad* (4) wherein it had been held that, in an application by the Collector for execution of an order for payment of Court fees passed under Section 411 of the Code, the Collector must be deemed to be a " party to the suit in which the decree was passed " within the meaning of Section 244, sub-Section (*c*), and that an order passed on such application was therefore appealable. It is to be observed, however, that, while in Section 411 it is expressly provided that the Court fees, from payment of which the successful pauper plaintiff was in the first instance exempted, shall (besides being a first charge on the subject-matter of the suit) be recoverable by the Government from the party ordered by the decree to pay them in the same manner **[80]** as costs of suit are recoverable under the Code, Section 412 contains no such provision for recovery by Government of Court fees ordered under that section to be paid by a pauper plaintiff. Arguments, therefore, in favour of the Government being deemed " a party to the suit " based on the special provision in Section 411, which places the Government, in respect of the Court fees decreed to be paid, in the same position as a party to the suit in regard to execution of a decree, cannot, it appears to me, be applied to a case falling under Section 412 without ignoring the fact that the Legislature has enacted no such provision in the latter section. The appellant's counsel

(1) 18 B. 454. (2) 21 M. 113.
(3) 13 A. 326. (4) 9 A. 64.

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also relies on the decisions in *Ram Dial* v. *Ram Das* (1) (a Full Bench case), *Amir Baksha Sahib* v. *Venkatachala Mudali* (2), *Bajnath Sahai* v. *Moheep Narain Singh* (3) and *Shek Suleman* v. *Shivram Bhikaji* (4) as showing, by way of analogy, that an appeal ought to be held to lie in such a case as the present. In the first three of these cases the question was whether a defaulting purchaser at an execution sale was, with reference respectively to Section 293 of the Code of 1882 and Section 254 of the Code of 1859, which was substantially the same as Section 293 of the Code of 1882, a party to the suit within the meaning of Section 244 of the Code of 1882 and Section 11 of Act XXIII of 1861, respectively, so as to render orders passed in such cases appealable, and the question was in all these three cases decided in the affirmative. In the case of *Shek Suleman* v. *Shivram Bhikaji* (4) it was held that a surety for the performance of a decree, against whom an application for execution has been made under Section 253 of the Code, has a right of appeal, as if he were a party to the suit, against an order passed on such application. But the sections to which all these cases related expressly provide that execution proceedings may be taken against, in the one case the defaulting purchaser, in the other case the surety, in the same manner as they may be taken in execution of a decree, thus placing the defaulting purchaser and the surety respectively in virtually the same position as a judgment-debtor, just as Section 411 contains a similar provision placing the Government in the position (for the purpose of recovering the Court fees) of a decree-holder; and the decisions in these cases turned mainly upon the effect of those provisions in the respective [81] sections of the Code above mentioned. Whatever may be the value of those decisions as authorities bearing upon a case falling under Section 411, they are not, I think, authorities bearing upon a case, such as the present, falling under Section 412, which contains no such provision.

For the reasons given, I am of opinion, agreeing with the Bombay decisions in *Collector of Ratnagiri* v. *Janardan Vithal Kamat* (5) and *Collector of Kanara* v. *Rambhat* (6), that the Collector is not "a party to the suit in which the decree was passed" within the meaning of Section 244 (*c*) of the Code and that therefore he had no right of appeal in this case.

With reference to the other preliminary ground of objection taken, *viz.*, that the next friend of the plaintiff is not a party to the suit and therefore the proceedings in question in this case do not involve any question falling within Section 244 (*c*), and no appeal lay, *prima facie* a next friend is not a party to the suit. The appellant's Counsel, however, relied on the provision in Section 440 that the next friend "may be ordered to "pay any costs in the suit as if he were the plaintiff." But that provision relates only to costs, and Court fees, though as between the plaintiff and the defendant they are costs, are not costs as between the plaintiff and the Government, but revenue. Section 440, therefore, does not, in my opinion, apply to a case of an order passed under Section 412. It is true, Section 411 makes the amount of the unpaid Court fees ordered by the decree to be paid by any party to the suit recoverable by the Government in the same manner as costs of suit are recoverable under the Code; but in the first place the present case does not fall under that section, and in the second place, that section does not say that these Court fees are to be deemed to be costs in the suit, but that they shall be recoverable in the

(1) 1 A. 181. (2) 18 M. 439. (3) 16 C. 535.
(4) 12 B. 71. (5) 6 B. 590. (6) 18 B. 454.

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same manner as costs of suit are recoverable. I am, therefore, of opinion that, at all events in such proceedings as those with which we are concerned in the present case, which relate to the enforcement of an order under Section 412 which directed payment of Court fees by a next friend, the next friend cannot be considered to be a party to the suit, and that, consequently on this ground also, it must be held that no appeal lies in the present case.

[82] This appeal should, therefore, in my opinion, be dismissed with costs.

Nor is this a case which we can deal with under Section 622 of the Code, because the order appealed against dismisses the Collector's application upon grounds of law and no question of jurisdiction is involved.

MOORE, J.—I concur.

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23 M. 82.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

PURAMATHAN SOMAYAJIPAD AND OTHERS (*Plaintiffs Nos.* 1 *to* 4), *Appellants* v. SANKARA MENON AND OTHERS (*Defendants Nos.* 1 *to* 41, 44 *to* 49, 51 *to* 63, 65 *to* 72, 74 *to* 112, *and* 64, *and Plaintiff No.* 5), *Respondents.** [11th and 18th July, 1899.]

Parties—Devasom—Property vested in three sabhas—Suit by members representing two—Maintainability of suit.

A temple was managed by three sabhas, and members representing two only of such sabhas brought a suit to recover land belonging to it, without alleging that the members of the third sabha had been consulted with reference to the suit, or that they had repudiated the right of the plaintiff to sue in conjunction with that sabha. Permission to sue as representing the whole of the members of the three sabhas had been refused:

Held, that the suit was not maintainable.

[R., 26 M. 649 (F.B.); 34 M. 406 (414)=7 Ind.Cas. 422=20 M.L.J. 951=8 M.L.T. 208.]

SECOND appeal against the decree of A. Venkataramana Poi, Subordinate Judge of Palghat, in appeal suit No. 472 of 1896, affirming the decree of P. P Raman Menon, District Munsif of Angadipuram, in original suit No. 187 of 1894.

Suit to recover land belonging to the Attuthrikovil devasom, together with arrears of rent. The devasom belonged in common to three sabhayogams, but the suit was brought by members representing only two of them. It was objected, in defence, that plaintiffs were not competent to sue. The plaint alleged that the suit was brought on behalf of the sabhas, but contained no statement that [83] the other members had been consulted with reference to its institution. Plaintiffs contended that such consultation was unnecessary. Leave had been obtained under Section 30 of the Code of Civil Procedure, but only three months after the suit had been filed; it, moreover, only related to two out of the three sabhas to whom the devasom belonged. The members of the other sabha had been

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* Second Appeal No. 41 of 1898.

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impleaded as defendants. The District Munsif dismissed the suit, treating it as one brought by plaintiffs in their own right and as such not maintainable. The Subordinate Judge, on appeal, upheld the finding of the lower Court.

Plaintiffs Nos. 1 to 4 preferred this second appeal.

Govinda Menon, for appellants.—Appellants had the right to sue, though it must be admitted that the object of appointing many trustees is that they shall be consulted. See *Pyari Mohun Bose* v. *Kedarnath Roy*(1) which deals with Section 32 of the Code of Civil Procedure. [O'FARRELL, J.—That is a case of contract. Here the question is as to the management of a religious institution, and whether litigation is to be forced upon it by a minority of its members.] It is submitted that the real question is whether the suit is for the benefit of the trust. See *Mahabala Bhatta* v. *Kunhanna Bhatta*(2) as to the object of Section 32 of the Code of Civil Procedure. It is sufficient if all the managing members of all the three sabhas are parties— plaintiffs or defendants.

Sankaran Nayar and *Appu Nedungadi*, for respondents.—Appellants, under Section 30 of the Code of Civil Procedure, should be made parties before the suit is brought (*Oriental Bank Corporation* v. *Govind Lall Seal* (3) and *Geeree Balla Dabee* v. *Chunder Kant Mookerjee* (4), though it must be admitted that the decisions on the point are conflicting. In *Parameswaran* v. *Shangaran* (5), where one of two co-uralers sued, the other being joined as a defendant and not consulted, it was held that there was non-joinder of parties. The case in *Pyari Mohun Bose* v. *Kedarnath Roy* (1) was between co-contractors. No leave was granted under Section 30 of the Code of Civil Procedure, until after the institution of the suit. Even assuming that to have been in time, it related to two only out of the three sabhas, and plaintiffs cannot be said to represent the members of the third sabha.

[84] *Govinda Menon*, in reply, referred to *Manavikrama* v. *Vythi Pattar* (6).

JUDGMENT.

We think the finding of the Courts below that the plaintiffs alone were not competent to maintain the present suit is correct. The point is really concluded by authority (see *Parmeswaran* v. *Shangaran* (5)). The circumstances are precisely similar. The temple is managed by three sabhas, and the suit is only brought by certain members representing two sabhas, there being no allegation that the other sabha had been consulted or had repudiated the right of the plaintiffs to sue in conjunction with itself. Permission to sue as representing the whole of the members of the three sabhas, if it could have been granted under Section 30, Civil Procedure Code—which is somewhat doubtful—was refused. The subsequent making of all the members defendants will not, in our opinion, cure the defect. To hold that it would do so would be to countenance the very evil struck at by such decisions as the one we have quoted, and allow a small minority of the governing body to dispute the acts of the majority and plunge the institution into litigation whenever they thought fit.

We dismiss this second appeal with costs.

(1) 26 C. 409. (2) 21 M. 373. (3) 9 C. 604.
(4) 11 C. 213. (5) 14 M. 489.
(6) Second Appeals Nos. 978 to 980 of 1895 (unreported).

23 M. 84.

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APPELLATE CIVIL.

Before Mr. Justice Subrmania Ayyar and Mr. Justice Boddam.

REFERENCE UNDER COURT FEES ACT, SECTION 5.*
[10th April, 1899.]

Court Fees Act—Act VII of 1870—*Suit for ejectment—Claim by tenants for improvements of greater value than plaint valuation—Appeal by tenants for improvements—Court fees payable on such appeal.*

In a suit for ejectment, in which the plaint land was valued at Rs. 50 and Court fee paid on that valuation,, the tenants claimed Rs. 500 as compensation for improvements, which claim was disallowed. The tenants appealed on the ground that their claim for improvements should have been allowed, but only paid Court fee on the plaintiff's valuation. On a reference as to whether the value of the improvements ought not to be taken into account for the purpose of levying the Court fee:

[85] *Held*, that, as the claim for improvements was not the subject-matter of the suit, but was merely incidental to the decree for possession, and on grounds of convenience, the fee payable by an appellant in such a case should be that payable in a suit for possession of land.

[F., 23 T.L.R. 123 (128); R., 11 O.C. 45; 19 P.R. 1908=129 P.L.R. 1908=38 P., W.R. 1908.]

CASE stated under Court Fees Act, Section 5, by F. H. Hamnett, District Judge of South Canara, in the matter of original suit No. 195 of 1897, on the file of the District Munsif of Mangalore.

Plaintiff had obtained a permanent lease in 1896 from the fourth defendant, and sued to eject defendants Nos. 1 to 3, the tenants. Defendant No. 2 contended that the land had been held by her ancestors and herself for over seventy years on mulgeni tenure, and claimed Rs. 500, compensation for improvements. The District Munsif held the mulgeni tenure not proved and disallowed the claim for improvements and decreed surrender of the land. Defendant No. 2 appealed. In his plaint, plaintiff had valued the land at Rs. 50, and a Court fee of Rs. 4-2-0 had been paid thereon, including the expenses incurred for giving notice to the defendants. On appeal, second defendant paid a Court fee of Rs. 8-12-0, that being the fee payable on the value of the land as stated in the plaint. The question was whether the value of the improvements should also be taken into account for the purpose of levying the Court fee, the subject-matter of the appeal being the same as that in the suit, the question of improvements being raised incidentally by the defence.

The Acting Government Pleader (*Sankaran Nayar*), in support of reference.

JUDGMENT.

The question raised by this reference is by no means free from difficulty.

In this Presidency suits such as the one out of which this reference arises have been looked upon and treated as suits for possession of land. (See *Brahmayya* v. *Lakshminarasimham* (1).) The claim for improvements to the land is not the subject-matter of the suit, but is merely incidental

* Referred Case No. 4 of 1899.

(1) 16 M. 310.

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to the decree for possession; and having regard to the difficulty and inconvenience of ascertaining the fee payable in each case if a different view were adopted, we think the proper answer to this reference is that on appeal even where the only question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land.

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23 M. 86.

[86] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

VASUDEVA SHENOI (*Plaintiff*), *Appellant*, *v.* DAMODARAN AND OTHERS (*Defendants Nos.* 3, 1 *and* 2), *Respondents*.*
[3rd March, 1899.]

Malabar Law—Tenant's right to compensation—Mortgage by tenant without notice to landlord—Acceptance of surrender by landlord—Rights of landlord and mortgagee.

The right of a tenant in Malabar to compensation is analogous to the right to a chose-in-action; and a transfer of such a right by a tenant to a third party cannot affect the landlord unless the latter has notice of the transfer when he accepts the surrender of the property demised and settles the account with his tenant in reference to arrears of rent and the amount due as compensation.

Whether notice to a landlord of such a transfer would affect his right to set-off arrears of rent due to him against the amount payable as compensation, *Quære*.

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 136 of 1897, modifying the decree of V. Kelu Eradi, District Munsif of Tellicherry, in original suit No. 361 of 1896.

Suit to recover an amount due under a hypothecation bond (executed by first defendant to plaintiff) by sale of the kurikanom right held by first defendant over the plaint property, and the balance, if any, from first defendant personally. Plaintiff alleged that first defendant, with a view to avoid payment, had executed a deed of surrender in favour of the jenmi and obtained a new lease on the same day in the name of second defendant, his niece. He claimed that the rights created under the new lease were liable for the debt. The second defendant denied that the first defendant's debt was binding on her or the lease held by her: and third defendant, the jenmi, denied fraud, and alleged that he had no notice of plaintiff's mortgage when he accepted the first defendant's surrender. First defendant did not appear. The District Munsif found that third defendant had no notice of plaintiff's mortgage at the time of the surrender; and that the new [87] lease created in favour of second defendant was granted for her own benefit and not benami for first defendant. He said:—"The first defendant was a kurikanom lessee under the third and there is no provision in the lease making the arrears of rent a charge on the improvements. The improvements have not been made security for rent by act of parties and no law has been pointed out to show that rent is always a charge on improvements. If the tenant has not mortgaged the improvements to a third party, the jenmi may set-off the value thereof at the time

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* Second Appeal No. 1816 of 1897.

of eviction against the rent due to him. But it is not shown that the jenmi's claim for rent has priority over that of a mortgagee. Defendants' vakil relies on the decision in *Achuta* v. *Kali* (1). In the case of a kanom the jenmi as mortgagor has the right to adjust accounts with the kanomdar at the time of redemption, and rent and value of improvements form items of the accounts. Thus the kanomdar can only pledge the net sum which may become payable to him at adjustment. But I do not think such a right of adjustment exists in the case of a lessor and lessee. Further, the whole value of improvements has not been set-off against rent. The lessee may transfer absolutely or by way of mortgage the whole or any part of his interest in the property and there is no law requiring the mortgagee to give notice of the mortgage to the lessor; in the present case we have on the one side the plaintiff who has *bona fide* lent money on the security of the leasehold right, and on the other we have the third defendant who has taken a *bona fide* surrender of the leasehold right from first defendant and on the question of *bona fides* one cannot be said to stand on a better footing than the other. The fact then that the plaintiff is a mortgagee of the leasehold right is in his favour, and the subsequent surrender by first defendant should not be permitted to prejudice the existing encumbrance (Woodfall on 'Landlord and Tenant,' 15th edition, page 324)." He found that the surrender to third defendant, though *bona fide*, was invalid as against the plaintiff, and decreed, in default of payment by first defendant of the amount due, that the same should be recovered by sale of first defendant's rights as lessee, and the balance, if any, from first defendant personally and as karnavan. On appeal by third defendant, the District Judge held that first defendant's kurikanom lease expired when [88] he surrendered the land to his jenmi, so that the passage from Woodfall (relied on in the Court below) was not in point: that plaintiff should have enforced his hypothecation rights against first defendant's kurikanom while that interest was still in existence, and that he could not do so after the expiration of the kurikanom term, and compensation of the tenant for his improvements by the jenmi. He held that plaintiff could only claim a personal decree against first defendant, and modified the decree accordingly.

The plaintiff preferred this second appeal.

Ryru Nambiar, for appellant.

Sundara Ayyar, for respondent No. 1.

JUDGMENT.

The right of a tenant to compensation in Malabar is, as pointed out in *Achuta* v. *Kali* (1), of a somewhat peculiar character. It is dependent on the state of the account between the tenant and the landlord as to the claims which the latter has against the former at the time the question of compensation comes to be settled, on account of rent or other dues payable under the demise by which the tenancy was created. The right to such compensation cannot properly be compared to a tenant's right to fixtures which formed the subject of consideration in *London and Westminister Loan and Discount Company, Limited* v. *Drake* (2) cited for the appellant.

The right in question, it seems to us, may be treated as possessing more analogy to the right to a chose-in-action, and a transfer of such a right by a tenant to a third party cannot possibly affect the landlord

(1) 7 M. 545. (2) 28 L. J. C. P. 297=6 C. B. N. S. 798.

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23 M. 86.

unless he has notice of the transfer when he accepts the surrender of the property demised and settles the account with the tenant in reference to arrears of rent, etc., on the one hand, and the amount of compensation on the other, and enters into an adjustment of the respective claims. In the present case no attempt was made to show that the landlord had notice. It is therefore unnecessary to consider whether, if he had had notice, that would have affected his right to set-off the arrears of rent due to him against the amount payable as compensation. The decision of the Lower Appellate Court is, in our opinion, right and we dismiss the second appeal with costs.

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23 M. 89.

[89] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

MARAPPA GAUNDAN (*Defendant*), *Appellant v.* RANGASAMI GAUNDAN AND ANOTHER (*Plaintiffs*), *Respondents.**
[27th March, and 10th and 27th April, 1899.]

Hindu Law—Sale of land not joined in by all coparceners—Partial application of consideration towards debt binding on all—Suit for ejectment—Rights of purchaser.

In a sale of land the consideration was expressed to be the discharge, by the purchaser, of a debt owing by the vendor and secured by mortgage on the land, and of sundry other debts which had been incurred by the vendor for family necessity. In a suit for ejectment by the vendor's coparceners, who were minors at the time and had not joined in the sale, it was held that there had been no legal necessity for the sale, which was accordingly declared to be not binding on the plaintiffs. It was, however, found that a portion of the consideration had been applied to the discharge of a mortgage-debt which would have been also binding on the plaintiffs. On its being contended that plaintiffs' interest in the property comprised in the sale should be held liable to the extent of their share of the mortgage-debt.

Held, that, in making the purchase, defendant was, with reference to plaintiffs, a mere volunteer, and could not, as against them, claim by way of equity a charge on their shares even though part of the consideration had been applied towards the discharge of their joint debt; also that if a purchaser wishes to stand by a sale which is only partially valid, he must be content with the vendor's share; and that if he wishes to repudiate the transaction altogether his only remedy is by suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed.

[Diss., 16 Ind. Cas. 835=23 M.L.J. 256=12 M.L.T. 192=(1912) M.W.N. 851.]

SECOND appeal against the decree of W. J. Tate, District Judge of Salem, in appeal suit No. 99 of 1897, modifying the decree of V.K. Desika Chariar, District Munsif of Namakkal, in original suit No. 380 of 1896.

Suit for ejectment and declaration that defendant had no right to certain lands. As to one-third of the lands, the District Munsif found the claim time-barred, and this finding was not contested on appeal in the District Court. As to the two-thirds, defendant (who was the illegitimate brother of plaintiffs' father), claimed to have acquired it by purchase and produced a registered sale-deed, [90] in support of that contention. This deed, filed as Exhibit I, was executed in 1884 by plaintiffs' father in favour of defendant. Plaintiff alleged that there had been no consideration for the assignment and that it should be declared to be void. The deed

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* Second Appeal No. 1345 of 1898.

recited that the alienation had been made (1) for the discharge of a debt of Rs. 120 secured by mortgage on the land and (2) for the discharge of the several sundry debts which had been incurred by the vendor (plaintiffs' father) from the vendee, since 1876, for family necessity and for the purchase of lift bullocks, &c. The District Munsif held that the sale was a real one and supported by proper consideration and that it was binding on the plaintiffs. He dismissed the suit. On appeal, the District Judge regarded the first item of the consideration (Rs. 120) as genuine. He said:—"Seeing that the plaint land was undoubtedly family land, the chief question is whether plaintiffs, then minors, are bound by the alienation. I think they are not. The newly-produced mortgage deed (Exhibit V) contains not a word as to family necessity. Exhibit I terms the petty longstanding debts (item 2 of the consideration), family debts, but there is not a particle of evidence in support of this, even the defendant's deposition being silent on the point. These debts, even if rightly incurred, could and should have been paid off otherwise than by sale. I am clearly of opinion that there is no established necessity justifying the alienation whatever; in other words, that the consideration for Exhibit I is certainly not binding on the plaintiffs. I also think the second item of the consideration neither real nor *bona fide*. No doubt there has been delay almost amounting to twelve years in bringing the suit, but the plaintiffs were minors till recently and the suit in respect of this (two-thirds) item is not said to be barred." He allowed the appeal, and decreed plaintiffs' possession of two-thirds of the land.

Defendant preferred this second appeal.

Sivasami Ayyar, for appellant.

Seshagiri Ayyar, for respondents.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The Lower Appellate Court has found with reference to the sale relied on by the defendant that there was no legal necessity for the sale and therefore it is not binding on the plaintiffs—the vendor's coparceners—who did not join in making the sale. In the argument before us the only [91] point urged was that as the Lower Courts had come to the conclusion that Rs. 120, out of the price paid by the defendant, went to discharge a mortgage debt which the plaintiffs also were bound to pay, their interest in the property comprised in the sale should be held to be liable for their share of the 120 rupees, *viz.*, 80 rupees. But in making the purchase the defendant was, with reference to the plaintiffs, but a volunteer, and he cannot, as against them, claim by way of equity a charge on their shares for the 80 rupees, even though this sum was applied towards the discharge of their joint debt. Compare *Sivaganga Zamindar* v. *Lakshmana* (1). Even if there were any doubt as to whether the defendant was a volunteer one must hesitate to countenance the introduction of a new rule such as that suggested having regard to the practical inconvenience which is likely to arise in giving effect to it. Now a sale of joint property by a coparcener, though made without legal necessity, is in this presidency valid to the extent of the vendor's share. Suppose that that share is really worth the whole of the amount paid by the vendee as the price, why should he get anything more? Next, suppose, that the share is worth less than the price paid. The

(1) 9 M. 188 (197, 200, 201).

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vendee cannot, in such a case, reasonably ask for a charge for more than the difference between the real value of the share which he gets and the price he has actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy or satisfactory settlement. The simpler and the better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. This view will, on the one hand, avoid all necessity for enquiry into matters alluded to before and, on the other, tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto. The contention of the defendant is clearly unsustainable and cannot be accepted. The second appeal fails and is dismissed with costs.

BODDAM, J.—I agree.

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23 M. 92=9 M.L.J. 124.

[92] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

APPAMMA NAYURALU AND OTHERS (*Defendants*), *Appellants v.* RAMANNA (*Plaintiff*), *Respondent.** [3rd March, 1899.]

Evidence—Admissibility of receipt showing payment of money—Exclusion for want of registration—Document proving extinction of mortgage right.

Plaintiff purchased a portion of certain land from two persons who owed him money on mortgage bonds, and took a mortgage over another portion, taking possession of the whole estate as security for the balance of his debt. He then permitted defendants to purchase a portion and to take a mortgage over the remainder of the lands, and gave them possession, on condition that they should pay to him the said balance that was due. Plaintiff, alleging that defendants had failed to pay him the balance, now filed this suit to recover possession of the land. Defendants contended that the balance had been duly paid, and in support of that contention produced a receipt which, however, was held to be inadmissible in evidence for want of registration. Oral evidence of the alleged payment was also excluded :

Held that the receipt had been wrongly excluded. It did not purport to extinguish the mortgage right, and even if it did so it was receivable as evidence of the payment, oral evidence as to which was also admissible.

SECOND appeal against the decree of E. C. Rawson, Acting District Judge of Vizagaptam, in appeal suit No. 347 of 1895, reversing the decree of B. Joga Rao, District Munsif of Rajam, in original suit No. 390 of 1894.

Suit to recover land with mesne profits. Viraraju and Varahalu each possessed a half share in certain lands. They also owed plaintiff money which was secured on mortgage bonds. Plaintiff purchased half of Viraraju's share, and took a mortgage over half of Varahalu's share ; but he took possession of the whole of the lands as security for the balance of his debt. The defendants were then allowed to acquire interests over the same ands and plaintiff gave them possession on condition that they should

* Second Appeal No. 1111 of 1897.

pay plaintiff the said balance owing to him by Viraraju and Varahalu. Plaintiff now alleged that defendants, having thus obtained possession, had failed to pay him the amount due, which payment had been the condition precedent to the acquisition of their interests. [93] Defendants contended that the debt had, in fact, been duly discharged. To prove this they filed a receipt (Exhibit VI), which was rejected by the District Munsif on the ground that, in a previous suit, his Court and that of the District Judge had held the same receipt (and another similar one) to be inadmissible in evidence for want of registration. Defendants' pleader offered to prove the payments evidenced by the said receipt by oral evidence, but that course was not permitted. The District Munsif, however, found that the plaintiff's debt had been discharged. He dismissed the suit. On appeal, the District Judge, finding no evidence in support of the alleged payment, held that the bonds had not been discharged and reversed the decree.

The defendants preferred this second appeal.

Mr. *N. Subramanyam* and Mr. *Joseph Satya Nadar*, for appellants.

Pattabhirama Ayyar, for respondent.

JUDGMENT.

The question is whether the payment evidenced by the receipt (Exhibit VI) is true. The Lower Courts were clearly in error in holding that the receipt was not receivable in evidence of the payment therein recited. The instrument does not, in our opinion, purport to extinguish the mortgage right. Even if it did, the document is receivable as evidence of the payment and oral evidence as to it was, of course, admissible. The Lower Courts, however, refused to receive even oral evidence. The refusal to admit evidence on the point clearly affected the decision of the case in the Lower Appellate Court, which proceeds entirely upon the absence of any evidence in support of the payment pleaded. We must therefore set aside the decrees of both the Courts and remand the suit for disposal according to law. The costs of this appeal and the costs in the Lower Appellate Court will abide and follow the result.

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23 M. 94=9 M.L.J. 330.

[94] APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

APPA RAO (*Plaintiff*), *Petitioner v.* SURYAPRAKASA RAO AND ANOTHER (*Defendants*), *Respondents.**
[24th and 30th August, 1899.]

Contract Act—Act IX of 1872, *Section* 25, *clause* (3)—*Promise to pay a barred debt—Limitation Act—Act XV of* 1877, *Section* 19, *Schedule II*, *Article* 110.

In defence to a suit for rent a tenant pleaded that a portion of the claim was barred by limitation. Plaintiff relied on a letter which had been signed by defendant, after the disputed portion had become barred, and in which the defendant, after referring to the periods in respect of which the arrears of rent were due, said "I shall send by the end of Vysakha month :"

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* Civil Revision Petition No. 12 of 1899, under Provincial Small Cause Courts Act, 1887, Section 25, praying the High Court to revise the decree of T. Ramachandra Rao, Subordinate Judge of Kistna, in Small Cause Suit No. 1121 of 1898.

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Held, that the document contained the ingredients required by Section 25, Clause (3), of the Contract Act, and that the claim was not barred by limitation.

A document sufficiently complies with Section 25 of the Contract Act when it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a "promise." To create a "promise" within the meaning of the section it is not necessary that there should be an accepted proposal reduced to writing, a written proposal, accepted before action, becoming by the definition clause, a promise when accepted.

The words of the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to.

[**R.**, 33 M. 159 = 5 Ind. Cas. 754 = 7 M.L.T. 81; **D.**, 102 P.R. 1908 = 164 P.W.R. 1908.]

SUIT for rent and interest thereon due for faslis 1300 to 1307. The defence was that the claim in respect of faslis 1300 to 1303 inclusive was barred by limitation. Liability for the balance was not disputed. A letter signed by first defendant and filed as Exhibit A, was in the following terms :—

"In your letters dated 24th March 1898 you said that the kattubadi from fasli 1300 to fasli 1307 was in arrears, and that the same should be sent through your peon. There are no collections now. I shall send by the end of the Vysakha month (April to May). Please to consider.

"27-8-98. (Signed) Kesavapalle Suryaprakasa Rao."

[95] The said Exhibit A was signed after the claim in respect of faslis 1300 to 1303 had become barred. The Subordinate Judge said:—"The document does not sufficiently show how much was due and it may even mean that nothing more than is now admitted by defendant is due. It does not certainly show that the sum sued for is payable by defendant to plaintiff." He held that the claim in respect of faslis 1300 to 1303 was barred by limitation and gave judgment for the plaintiff for the balance, liability for which was not denied by defendant.

Plaintiff preferred this petition.

Sivasami Ayyar, for petitioner.—The Judge has held that the claim for kattubadi in respect of the first four faslis is barred. Exhibit A clearly contains a promise to pay the barred debt and the suit has been brought within three years from the date of Exhibit A. The Subordinate Judge considers that in order to be a good promise to pay, the document should mention the exact amount due. It is submitted that this is wrong. The only issue raised in the case having reference to limitation, the claim should have been decreed.

Sundara Ayyar, for respondents.—The document is not an agreement to pay the barred debt but only an acknowledgment of it. The document does not satisfy the requirements of Section 25, Clause (3). Under that section there must be an intention to create a new liability in consideration of the barred debt and then the cause of action for the suit is not the barred debt but the new contractual liability. Here the suit is not brought upon the new document but upon the old debt. This is clearly on the ground that it is an acknowledgment but as an acknowledgment it is invalid as it was executed after the debt was barred. In order to satisfy Section 25 the old debt must be extinguished and a new obligation must come into existence. That is the general principle of the Contract Act. According to that Act every contract must be supported by consideration. And Section 25, Clause (3), declares that the barred debt is a sufficient consideration for the subsequent promise. A suit brought

to recover the money must therefore be based upon the subsequent promise not upon the barred debt. The promise should refer to this barred debt and recite it as consideration for the promise. [MOORE, J.—There is a reference to the barred debt here.] But the document proceeds entirely upon the footing that the debt is still subsisting. There should be an [96] intention to create a fresh obligation, inasmuch as no subsequent suit can be based upon the antecedent debt. Moreover in order that there may be a promise, there must be a proposal, and an acceptance, and both should be in writing. Here there is neither proposal nor acceptance. The whole must be in writing under Section 25, Clause (3). [BODDAM, J.—The section simply says that there should be a promise to pay the barred debt.] Before it becomes a promise the proposal has to be accepted. A written proposal is not a promise in writing. It is submitted that the document is a mere acknowledgment and the plaintiff cannot succeed upon it. He referred to the following cases :—*Tanjore Ramachendra Row* v. *Vellayanadan Ponnusami* (1), *Chatur Jagsi* v. *Tulsi* (2), *Samuel* v. *Ananthanatha* (3), *Ramji* v. *Dharma* (4) *Ranchhoddas Nathubhai* v. *Jeychand Khushalchand* (5) and *Watson* v. *Yates* (6).

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Sivasami Ayyar in reply: The fact that the debt is barred need not be present to the mind of the promisor. Everybody must be presumed to know the law. The view contended for would make the section practically ineffectual in most cases. The words of the section show that the promise is to pay a barred debt and not to pay money in consideration of a barred debt. The suit was rightly brought upon the debt. As for the other question, it is the proposal that becomes a promise. The proposal in writing when accepted becomes a promise. The acceptance is a condition precedent to the proposal becoming a promise, but the section does not require an express acceptance ; it may be presumed.

JUDGMENT.

The question in this case is whether Exhibit A is within Section 25, Clause (3) of the Contract Act and constitutes " a promise . . . . to pay . . . . a debt of which the creditor might have enforced payment but for the law of limitations." The Subordinate Judge held that it did not, apparently because it did not name the amount: for he ends this part of his judgment by saying " it does not certainly show that there was an agreement that the sum sued for is payable by the defendant to the plaintiff."

[97] The plaintiff sued for the unpaid kattubadi due for faslis 1300 to 1307 inclusive and put in Exhibit A as showing a fresh starting point from which the statute began to run. Exhibit A was written by the defendant to the plaintiff and is as follows :—

" In your letters dated 24th March 1898 you said that the kattubadi from fasli 1300 to fasli 1307 was in arrears and that the same should be sent through your peon. There are no collections now. I shall send by the end of Vysakha month (April to May). Please to consider "—and he signed it.

It was argued before us that this was not sufficient to make a fresh contract but was really of not more effect than an acknowledgment under Section 19 of the Limitation Act and did not give any cause of action for any part of the debt which was already barred.

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(1) 18 I.A. 37=14 M. 258 (262). (2) 2 B. 230. (3) 6 M. 351.
(4) 6 B. 683. (5) 8 B. 405. (6) 11 B. 580.

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The contention on behalf of the defendant was that this document did not satisfy the statute, because to come within the section the document must show a clear intention to create a fresh obligation; that the barred debt must be referred to and not only be referred to, but in such a way as to show that it formed the consideration for the promise to pay; and further that it was intended by the statute that this should be done by a formal proposal duly accepted and subsequently put into writing, because by Section 2 the word "promise" used in Section 25, Clause (3), is defined as being "a proposal when accepted," and it does not become a "promise" until it has been accepted; that here the document was a mere "proposal" which had not been accepted when it was written and was not a promise within the section as it was not an accepted proposal put into writing after acceptance.

We are, however, of opinion that the document (Exhibit A) is sufficient to satisfy the statute.

For this purpose we think the document is sufficient when it is in writing and signed by the person to be charged; when it refers to the debt—not necessarily to the fact that the debt is no longer recoverable owing to the law of limitation—but in such a way as to identify the debt; when it contains a promise to pay wholly or in part the debt referred to therein—that is, when it expresses an intention to pay which can be construed to be a "promise" within the meaning of the section. We do not think that to create a "promise" within the meaning of the section it is necessary that there should be an accepted proposal reduced into writing. The [98] definition clause says a proposal when accepted becomes a promise. It does not say a proposal when accepted and reduced to writing becomes a promise and in our judgment all that is requisite is that there should be a written proposal accepted before action, for a written proposal becomes a promise when accepted—as was the case here: the action not having been brought until the time named in the document for payment had elapsed.

The section does not require that the document should contain a promise to pay a sum of money in consideration of a debt which is barred nor that it should show that the promisor knew that it was barred—for the words used in the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to and there is nothing whatever in the section to indicate that the promisor should do more than promise to pay a debt of which the creditor might have enforced payment but for the law of limitation of suits. The words are not "promise to pay a sum of money in consideration of a debt," nor does the section refer to the knowledge of the promisor. Every man is supposed to know the law and in this case the promisor has mentioned the years for which the rent was in arrear and must be supposed to have known the law of limitation so that even if that were a necessity in this case the promisor must be taken to have known that the debt referred to was barred to some extent at all events.

We think that Exhibit A contains all the ingredients required by Section 25, Clause (3), of the Contract Act, and that the decree of the Subordinate Judge is wrong. We allow the petition and vary the decree of the Subordinate Judge and enter judgment for the plaintiff for the full amount of his claim with costs throughout.

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[99] APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

KAMARAJU AND OTHERS (*Defendants Nos.* 1 *to* 3), *Appellants v.* ASANALI SHERIFF AND OTHERS (*Plaintiffs and Defendant No.* 4), *Respondents.** [14th July, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 30—*Worshipper's suit to recover land—Trustee not a plaintiff—Non-maintainability of suit.*

An individual worshipper in a mosque is not entitled to sue for the recovery of possession of land belonging to the mosque. While there is a trustee who has not been removed from his office he is the only person entitled (irrespective of Section 30 of the Code of Civil Procedure) to sue for the recovery of land belonging to the institution.

Zafaryab Ali v. *Bakhtawar Singh* (5 A. 497) considered.

[R., 8 Ind.Cas. 525=9 M.L.T. 106=(1910) M.W.N. 777.]

SUIT by worshippers in a mosque to eject defendants from land alleged to belong to the mosque. The trustee, who had not been removed from his office did not join plaintiffs in the suit and was impleaded by them as fourth defendant. The defendants contended that plaintiffs could not maintain the suit. The District Munsif referring to *Zafaryab Ali* v. *Bakhtawar Singh* (1), *Jawahra* v. *Akbar Husain* (2), and *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (3) held that plaintiffs, as worshippers, were entitled to sue. The Subordinate Judge upheld this decision on appeal.

The defendants preferred this second appeal.

Sundara Ayyar, for appellants, contended that the suit was not maintainable as brought, and cited *Srinivasa Ayyangar* v. *Srinivasa Swami* (4), *Lutifunnissa Bibi* v. *Nazirun Bibi* (5), *Ex-parte Kearsley* (6) and *Subbarayadu* v. *Asanali Sheriff* (7).

Kumarasami Sastri, for respondents, argued that the duty of a trustee of a temple is only to collect rents as they become due, and that worshippers are entitled to sue. If the right of the worshippers is an individual one, could it be said to be lost merely [100] because all who might also enjoy it did not join. The trustee is only the accredited agent of the community of worshippers. He cited *Madho Prakash Singh* v. *Murli Manohar* (8). [O'FARRELL, J.—It does not appear, whether there was a trustee in that case.] He also referred to *Mohiuddin* v. *Sayiduddin* (9) as showing the principle contended for of the joint and several rights of worshippers to recover property, though that suit was for the removal of a trustee.

Sundara Ayyar was not called upon.

JUDGMENT.

We are of opinion that the decisions of the Lower Courts cannot be upheld. The plaintiffs as worshippers in the mosque are certainly not

* Second Appeal No. 74 of 1898 against the decree of K. Krishna Rao, Subordinate Judge of Cocanada, in appeal suit No. 113 of 1897, affirming the decree of V. V. S. Avadhani, Acting District Munsif of Amalapur, in original suit No. 629 of 1896.

(1) 5 A. 497. (2) 7 A. 178. (3) 24 C. 385.
(4) 16 M. 31. (5) 11 C. 33. (6) L. R. 17 Q. B. D. 1.
(7) Second Appeal No. 20 of 1898 (unreported)—*vide* next page.
(8) 5 A. 406. (9) 20 C. 810 (819).

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entitled to sue for the recovery of possession of land belonging to the mosque. The fourth defendant not having been removed from the trusteeship is the only person (irrespective of Section 30, Civil Procedure Code) entitled to sue for the recovery of the plaint property (*vide Subbarayadu* v. *Asanali Sheriff* (1)). The decision in *Zafaryab Ali* v. *Bakhtawar Singh*(2), quoted by the Subordinate Judge, does not, in our opinion, support the view that an individual worshipper in a mosque can sue for the recovery of land belonging to the institution. If it was the intention of the learned Judges to lay down such a rule, we are constrained to disagree with them. The decrees of both the Lower Courts are set aside, and the original suit dismissed with costs throughout.

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23 M. 101 = 9 M.L.J. 350.

[101] APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

SRIDHARAN SOMAYAJIPAD AND ANOTHER (*Plaintiffs Nos.* 3 *and* 4), *Appellants v.* PURAMATHAN SOMAYAJIPAD AND OTHERS (*Plaintiff No.* 1, *Defendant No.* 4, *Plaintiff No.* 2 *and Defendants Nos.* 1 *to* 3, 5 *to* 12 *and* 14 *to* 43), *Respondents.** [7th, 14th and 24th August and 15th September, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 375, 622—*Compromise of suit—Dispute as to factum of compromise—Order dismissing suit in consequence of alleged compromise—Application to High Court by revision petition under Section* 622—*Right of appeal against order dismissing suit—Appeal—Practice—Acceptance of civil revision petition as appeal on Court fee being paid.*

During the pendency of an appeal in a District Court a petition was filed by the pleaders of the plaintiffs and defendants in the suit, praying on behalf of their clients that the case might be struck off the file on the ground that the matter in dispute had been compromised. Two of the plaintiffs then filed a counter-petition denying that a compromise had been arrived at and praying that the appeal might be heard on its merits. The District Judge, after some intermediate orders, struck off the appeal, as prayed in the petition. The two plaintiffs preferred a civil revision petition to the High Court whereupon it was objected that the petition could not be entertained as an appeal lay against the order of the District Judge inasmuch as it was not a decree in pursuance of a compromise under Section 375 of the Code of Civil Procedure, but an order passed on a dispute as to whether a compromise had in fact been arrived at. The petition had been presented within the time allowed for appeal :

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* Second Appeal No. 932 of 1899 (originally filed as Civil Revision Petition No. 397 of 1898) against the order of W.H. Welsh, Acting District Judge of South Malabar, in Civil Miscellaneous Petition No. 59 of 1898, in Appeal Suit No. 571 of 1896, presented against the decree of the District Munsif of Angadipuram, in Original Suit No. 503 of 1894.

23 M. 100 N.

(1) Second Appeal No. 20 of 1898 (unreported). The judgment of their Lordships (DAVIES and BODDAM, JJ.), delivered on 2nd January 1899 (in so far as is material for this reference) was as follows :—" The plaintiffs as worshippers are entitled (irrespective of Sections 30 and 539, Civil Procedure Code), to maintain an action against any person improperly interfering with their rights to worship (*Jawahra* v. *Akbar Husain* 7 A. 178), but they are not entitled to sue for, or to recover possession of, the suit land. They might even sue to set aside the lease complained of had they been content to do so, but they cannot go further and claim possession as they have done. The third defendant not having been removed from the trusteeship is the only person entitled to possession of the plaint property." [R., 23 M. 99 ; 33 C. 789 (802) = 10 C.W.N. 581.]

(2) 5 A. 497.

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Held, that inasmuch as the petition impeached the alleged compromise as not being a "lawful compromise" an appeal lay against the order of the District Judge; but that the petition might be treated as an appeal, on the Court-fee being paid.

Where a party to a suit impugns an alleged agreement or compromise by which he would be bound the Court must satisfy itself by evidence that the agreement or compromise is a lawful one and that its terms have been consented to by the parties to the suit before it can proceed under Section 375 of the Code of Civil Procedure to record it and pass a decree in accordance therewith.

PETITION by two appellants in an appeal pending before a District Court, praying that the appeal might be heard and disposed [102] of on its merits. A petition (No. 59) had been filed on 3rd February 1898 by the pleaders of the plaintiffs and defendants in a suit praying on behalf of their clients that the case might be struck off the file on the ground that the matter in dispute had been compromised. On 10th March 1898, third and fourth plaintiffs presented a counter-petition (No. 96) praying that the appeal might be heard on its merits as the parties had not come to a compromise. On 30th March 1898 the District Judge passed an order on the first petition (No. 59) as follows:—"Notice to the other parties to show cause why the Munsif should not be required to take evidence in spite of the supposed compromise." On the same day he made the following order on petition No. 96:—"*Vide* order on M.P. No. 59 of 1898." On 27th June 1898 after reading the report of the Munsif to the effect that he was satisfied that the parties had compromised, the District Judge made the following further order on petition No. 59:— "The appeal will be struck off in accordance with the Munsif's report and the petition of the pleaders on both sides." He also passed an order dealing fully with the facts—which order is sufficiently set out in the judgment.

Against this order the third and fourth plaintiffs presented this civil revision petition (afterwards treated as second appeal) on the following among other grounds:—(1) That the Lower Appellate Court erred in not receiving evidence or remanding the case for the taking of evidence after the appellants Nos. 3 and 4 had impeached the validity of the alleged compromise on the ground that they were no parties to it and that it was one obtained without their knowledge; (2) that the compromise being signed by appellant No. 1 and defendant No. 4 only shows that it is not a valid compromise under Section 375 of the Code of Civil Procedure and that the District Judge ought not to have accepted it but should have tried the appeal on the merits; (3) that the compromise being fraudulent and invalid the application to strike the appeal off the file ought not to have been allowed and the appeal ought to have been proceeded with; (4) that the compromise being presented by the plaintiff's vakil without express authority empowering him thereto should not have been accepted and the Court acted erroneously in accepting it.

Sundara Ayyar, for respondents took the preliminary objection that no civil revision petition lay there being an appeal:—The jurisdiction to pass a decree under Section 375 of the Code of [103] Civil Procedure depends on there being in fact a compromise, and a decree passed in pursuance of such compromise is final, being the act of the parties themselves against which no appeal is necessary. But a finding as to whether there has been a compromise or not is not final, and is subject to appeal; *Ramachandra Joishi* v. *Hazi Kassim* (1) and *Brojodurlabh Sinha* v. *Ramanath Ghose* (2). Here the revision petition impeaches the alleged

(1) 16 M. 207 (212). (2) 24 C. 908 (913, 935).

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compromise and the fact that a valid compromise has been entered into is disputed. So an appeal lies. See also *Hara Sundari Debi* v. *Kumar Dukhinessur Malia* (1), *Venkatappa Nayanim* v. *Thimma Nayanim* (2), *Ayyanna* v. *Nagabhooshanam* (3), *Dianat-ul-lah Beg* v. *Wajid Ali Shah* (4), *Gulab Rai* v. *Mangli Lal* (5), *Goculdas Bulabdas Manufacturing Company, Limited* v. *James Scott*(6), and *Zamindar of Tuni* v. *Bennayya* (7).

Mr. *C. Krishnan* for appellants :—The provision that a decree passed under Section 375 is final should not be construed so as to mean final only if a real compromise exists. There would be no need for appeal in such a case. The true meaning is that there shall be no appeal at all in respect of any decree passed under the section, in which case a civil revision petition lies. In any case the Court may treat the petition as an appeal, it having been presented in time, and I ask it to do so, following *Mahomed Wahiduddin* v. *Hakiman* (8).

The Court made the following ORDER *:—" . . . . It is objected on behalf of the counter-petitioners in this revision petition that an appeal lay against the order of the District Judge allowing the application for striking the appeal before him off the file. The petition for striking the case off the file on the ground of an alleged compromise (petition No. 59 of 1898) was presented by two pleaders professedly on behalf of the plaintiffs and third and fourth defendants respectively. It was signed by those two pleaders and by first plaintiff and fourth defendant, and by no other person. It has been held by this Court that a compromise cannot be entered into by a pleader on behalf of his client without the

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* The following is the preliminary portion of the order of the High Court which has been omitted in the I.L.R. 23 M. 101—ED.

ORDER :—

In appeal No. 571 of 1896 before the District Court of South Malabar against the decree in O.S.No. 503 of 1894 on the file of the District Munsif of Angadipuram, a petition, No. 59 of 1898 was presented purporting to be on behalf of the plaintiffs and the 3rd and 4th defendants in the suit, by their respective pleaders praying that the case might be struck off the file on the ground that the matter in dispute in the suit had been compromised by the payment by 4th defendant to 1st plaintiff of Rs. 1,923-15-6, on behalf of the Sabha, and both parties had agreed to pay their own costs. A counter-petition, No. 96 of 1898, was presented to the District Court by the 1st plaintiff and the 4th defendant, objecting to the compromise as not being binding on them, and praying that the appeal might be tried on the merits. Upon the former petition the District Judge passed the following order, dated 30th March 1898: "notice to the other parties to show cause why the Munsif should not be required to take evidence, in spite of the supposed compromise." Upon the latter petition his order, bearing the same date, was: "*Vide* order on M.P.No. 59 of 1898." It appears that the District Munsif reported that he was satisfied that the parties had compromised.

The District Judge passed two final orders of the same date 27th June 1898, one an order on the two petitions, Nos. 59 and 96 of 1898, taken together and the other an order on No. 59 alone. The order on petition No. 59 alone is as follows: "The appeal will be struck off in accordance with the Munsif's report and the petition of the pleaders on both sides." The order on the two petitions, Nos. 59 and 96, taken together, allowed (the words are "I decline to dismiss") the former petition, and dismissed the latter petition. There are thus two final orders upon No. 59. No final order appears to have been passed on petition No. 96 separately. Probably the District Judge intended his so-called order on the two petitions taken together to be his joint judgment on both and the separate order on petition No. 59 to be the order, in the proper sense of the term, thereon, in which case, however, there should also have been a separate order (*proprio sensu*) on petition No. 96. The present revision petition before us purports to be a petition against "the decree or order" passed on petition No. 59 separately or the order passed on petitions Nos. 59 and 96 taken together. The petitioner's

(1) 11 C. 250. (2) 18 M. 410. (3) 16 M. 285. (4) 6 A. 438.
(5) 7 A. 42. (6) 16 B. 202 (212). (7) 22 M. 155. (8) 25 C. 757 (778).

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[104] express authority of the latter :—*Jagapati Mudaliar* v. *Ekambara Mudaliar* (1). One of the grounds of their revision petition is that the petitioners, the third and fourth plaintiffs, were not parties to the alleged compromise, and were not bound by it, the plaintiffs' vakil's action without express authority from the petitioners not being binding on them. The revision petition thus impeaches the alleged compromise as not being a "lawful compromise," and therefore in our opinion the petitioners could have appealed :—See *Goculdas Bulabdas Manufacturing Company, Limited* v. *James Scott* (2). We do not agree with the view expressed by the District Judge that the suit being one brought by four plaintiffs, with permission given under Section 30 of the Code, jointly on behalf of the sabha, the third and fourth plaintiffs have not the same right which one of several plaintiffs might ordinarily have to challenge an alleged compromise.

The petitioner's counsel asks that, if an appeal is held to have lain, this petition may be treated as an appeal, as it was presented within the time allowed for an appeal, and he refers to *Mahomed Mahiduddin* v. *Hakiman* (3). We think, under the circumstances, we may properly accede to this request, on the understanding that the proper Court fee for the appeal be put in on or before the 8th September 1899."

[The case coming on again for final hearing after payment of the proper Court-fee the Court delivered the following judgment :—]

JUDGMENT.

Upon the merits, we think that the alleged compromise not having been shown by evidence to have been entered into by the third and fourth plaintiffs or by any one duly empowered to enter into it on their behalf, the District Judge was wrong in treating the alleged compromise as a "lawful compromise." It appears from the District Judge's so-called order on the petitions Nos. 59 and 96 taken together, that both he and the District Munsif declined to allow evidence to be given as to whether third and fourth plaintiffs joined in or consented to the compromise. We agree in the view taken by the learned Judges of the Bombay High Court in *Goculdas Bulabdas Manufacturing Company, Limited* v. *James Scott*(2) that where an alleged agree-[105] ment or compromise is impugned by a party to the suit sought to be bound by it, the Court must satisfy itself by evidence taken that the agreement or compromise is a lawful one, before it can proceed under Section 375 to record it and pass a decree in accordance therewith. In that case the agreement was challenged on the ground that some of its terms had not been consented to by both parties to the suit; but the principle is the same, whether the legality of the compromise be called in question on that ground or, as in the present case, on the ground that some of the parties to the suit have not consented to the compromise. See

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vakil says it was by an oversight that the revision petition was made out as being made against the order on petition No. 96 instead of against the order on petition No. 59. The date of the order petitioned against is given, in the revision petition, as 27th day of June, 1898 which is the date of the order on petition No. 59 and as has been mentioned, no order of that date, and in fact no final order at all, appears to have been passed on petition No. 96. The grounds of revision petition show clearly that it was against the order on petition No 59 that the petitioners meant to petition. Under these circumstances we think we may consider the revision petition to be really a petition against the last mentioned order, an amendment being made in the revision petition by converting the number of the order petitioned against from '96' into '59'.

(1) 21 M. 274. (2) 16 B. 202 (212). (3) 25 C. 757 (778).

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also *Appasami* v. *Manikam*(1). We therefore reverse the order of the District Judge passed on petition No. 59 of 1898 on the file of his Court, and direct that he either take or cause the District Munsif to take evidence on the question whether the alleged compromise was entered into by the third and fourth plaintiffs and that after such evidence has been taken he do proceed according to law. Costs of this petition will abide and be disposed of on the final determination of the proceedings in the appeal No. 571 of 1896 on the file of the District Court.

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23 M. 105.

APPELLATE CIVIL.

Before Mr. Justice Boddam, Mr. Justice O'Farrell and Mr. Justice Michell.

KUNHI AMMA (*Plaintiff No.* 2), *Appellant v.*
AHMED HAJI (*Defendant No.* 1), *Respondent.**
[9th and 18th October, 1899.]

Registration Act—Act III of 1877, *Section* 17, *Clause* (*b*)—*Document compulsorily registrable—Valuation—Least sum payable—Sum repayable before expiry of stated term—Principal sum without interest.*

A charge on certain property to secure Rs. 50 was given by the jenmis in favour of defendant No. 1, who held a kanom on the property granted three years [106] previously, containing the following terms:—"This amount of Rs. 50, "together with the customary interest thereon, will be added to the kanom amount "when after the expiry of the period of demise of the paramba a renewal is effected "or the paramba is caused to be surrendered. The jenmam right over the said "paramba has been mortgaged to you for this Rs. 50 and the interest thereon." The document was not registered. It was contended that the document was one compulsorily registrable under Section 17 of the Registration Act, 1877, inasmuch as payment under it was postponed for at least nine years, *i.e.*, (the balance of the term granted by the kanom) by the end of which period the accumulations of interest would have amounted to Rs. 54 in addition to the principal sum of Rs. 50, making Rs. 104 in all:

Held, that the document did not contain a clear expression of intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words by construing them to mean no more than that, in the event of the amount remaining unpaid when the kanom became redeemable, the Rs. 50 with interest thereon should be treated as if it were part of the kanom amount so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom.—That there was nothing in the document to prevent the interest accruing under it from being paid from time to time, even if the unpaid capital were not repaid until the kanom was redeemable.—And that the least sum payable being the test as to whether a document is compulsorily registrable, the document need not be registered under Section 17 of the Registration Act, 1877.

Per O'FARRELL and MICHELL, JJ., that under Clause (*b*) of Section 17 of the Registration Act, 1877, only the principal amount secured should be taken into consideration.

[D., 4 N.L.R. 90 (92).]

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* Appeal No. 4 of 1899 under Letters Patent, Section 15, against the judgment of Subramania Ayyar, J., passed in second appeal No. 1813 of 1897, presented against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 57 of 1897, modifying the decree of V. Rama Sastri, District Munsif of Badagara, in original suit No. 272 of 1896.

(1) 9 M. 103.

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SUIT to recover with arrears of rent a paramba demised on kanom of Rs. 313-1-8 by the third defendant's karnavan Kanara Kurup and his sister Kumba, deceased, to defendant No. 1 under a registered instrument (Exhibit D), dated 21st March 1868. Defendant No. 1 admitted the demise sued upon but claimed a purangadom charge of Rs. 50 and interest under an unregistered instrument executed in his favour by the demisors —Kanara Kurup and Kumba—on 1st November 1870 (Exhibit I), and contended that defendant No. 3 and plaintiff's brother Rama Kurup were aware of the purangadom charge, and had caused the suit to be brought to defeat it. He also claimed compensation for improvements. The other defendants claimed to hold as sub-tenants of the first defendant. The third issue was :—"Whether the purangadom document, being unregistered, is not rendered ineffectual by plaintiffs' registered assignment deed."

Exhibit I was in the following terms :—"Document executed by Kannoli Kandil Kannan Kanara Kurup, and sister Kumba Amma of Katamari Amsam thara in Kurumbanad taluk, to Ambaliyeri [107] Vaniyambalon Ammad of Kummankot Amsam thara. In addition to the kanom amount due to you in respect of our jenmam property, Manchakandi paramba in Katamari Amsam thara, we received from you to-day Rs. 50 as purangadom. This amount of Rs. 50, together with the customary interest thereon, will be added to the kanom amount, when after the expiry of the period of demise of the said paramba, a renewal is effected or the paramba is caused to be surrendered. The jenmam right over the said paramba has been mortgaged to you for this Rs. 50 and the interest thereon. In witness hereof are Puthiyottil Etayattam Kunhammad Kutti and Othayinte Avitath Aniyapravan Pakran."

The District Munsif passed a decree ordering the defendants to surrender to the plaintiffs the plaint property with the improvements thereon, on plaintiffs' paying to the first defendant kanom Rs. 313-1-8 and Rs. 145-8-2 as compensation for improvements less the arrears of rent, and the future rent and costs of the suit. On appeal, the District Judge modified the decree by ordering the plaintiffs (in addition to the sum already adjudged) to pay to first defendant the purangadom of Rs. 50 with interest at 12 per cent. to date of payment and to pay their own and first to seventh defendant's costs in both Courts.

[On plaintiff No. 2 preferring a second appeal, which came on for hearing on 21st October 1898, their Lordships (SUBRAMANIA AYYAR and MOORE, JJ.) delivered the following dissenting judgments :—

SUBRAMANIA AYYAR, J.—The point on which this case turns is whether, as contended for the appellant, under Exhibit I, the executants thereof were not at liberty to repay the 50 rupees borrowed thereunder, before the expiry of the ten years which had yet to run out of the term of the kanom mentioned in that exhibit. In support of that contention the appellant's pleader relied on the following passage in the document :— "This amount of Rs. 50, together with the customary interest thereon, "will be added to the kanom amount when after the expiry of the "period of demise of the said paramba, a renewal is effected or the "paramba is caused to be surrendered." Now, as between a creditor and a debtor, a term is ordinarily taken to be inserted in favour of the debtor, and the creditor cannot decline to receive the debt, if the debtor is willing to pay even before the term agreed, unless it appears from the circumstances that the term was appointed [108] in favour of

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both (*Bhagwat Das* v. *Parshad Singh* (1)). And it requires a clear expression of intention to deprive a debtor of his right to pay the debt at any time (compare *Marana Ammanna* v. *Pendyala Perubotulu* (2)). Construing the passage relied on by the appellant in the light of the principles stated above I am unable to hold that it contains a clear expression of an intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words of the passage by construing them to mean no more than that, in the event of the amount remaining unpaid when the kanom becomes redeemable, the 50 rupees with interest thereon should be treated as if it were part of the kanom amount, so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom. The circumstance that the sum in question carried interest at 12 per cent. coupled with the fact that so long a period as ten years out of the kanom term had yet to run makes it, to my mind, improbable that the executants of Exhibit I did intend to debar themselves from paying it off, if they could, at an earlier period. If this view is right, the least amount payable under Exhibit I would come to much less than Rs. 100. The document, therefore, did not, in my opinion, require to be registered. I would therefore confirm the Lower Appellate Court's decree and dismiss the appeal with costs.

MOORE, J.—The District Judge, disagreeing with the District Munsif finds that Exhibit I is not a forgery, and this finding we must accept in second appeal. This document executed on the 1st November 1870 provides that a sum of Rs. 50 together with the customary interest on it is to be added to the kanom amount "when after the expiry of the period of "demise of the said paramba a renewal is effected or the paramba is caused to be surrendered." As the kanom document (Exhibit D) is dated the 21st March 1868, the tenure under it cannot, according to the customary law of Malabar, be terminated before the 21st March 1880, and it must therefore be held that under the terms of Exhibit I, the purangadom amount (Rs. 50) cannot be paid off till the same date *i.e.*, for nine years and four months after execution. The District Judge finds that the customary interest agreed to be paid in Exhibit I [109] is 12 per cent. and to this no objection is raised in appeal. It follows therefore that at the earliest date on which the debt due under Exhibit I can be discharged, the amount due as principal and interest will exceed Rs. 100. Such being the case it appears to me that the registration of Exhibit I was compulsory under Section 17, Clause (*b*), of the Registration Act, the view taken by the Madras High Court being that the value of the interest in immoveable property within the meaning of that clause is the least sum by the payment of which the interest would be determined (*Tiyagaraja* v. *Ramanujam* (3) following *Jagappa* v. *Latchappa* (4)). For these reasons I am of opinion that it must be held that Exhibit I cannot affect the property dealt with in this suit, and that the decree of the District Judge must therefore be modified and the decree of the District Munsif restored.]

An appeal was then preferred by plaintiff No. 2 under Letters Patent, Section 15, and the case came on for hearing before a Court constituted as above.

Ryru Nambiar, for appellant:—The document ought to have been registered. The proper test for determining the value of the interest

(1) 10 A. 602 (606). (2) 3 M. 230. (3) 6 M. 422. (4) 5. M. 119.

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created by a mortgage for the purposes of registration is the amount of the least sum recoverable under the instrument; *Jagappa* v. *Latchappa* (1) and *Tiyagaraja* v. *Ramanujam* (2). This is not a money bond. On the true construction of the document the interest on the principal sum of Rs. 50 could not be paid before the expiration of the period limited in the kanom, namely, over nine years. The least amount therefore that could become due under it by accumulations of interest at the expiration of the period of the demise was over Rs. 100; it therefore falls within Clause (*b*) of Section 17 of the Registration Act, 1877. The question is, not what is the principal amount secured, but what is the interest created: and here the interest created exceeds Rs. 100.

Mr. *C. Krishnan*, for respondent:—The document only creates a mortgage over the property which may be repaid at any time. The term of years limited is for the convenience of the mortgagor alone and he is not bound to postpone payment longer than he wishes; *Bhagwat Das* v. *Parshad Singh* (3) and *Marana Ammanna* v. *Pendyala Perbotulu*(4). The amount due on the document need **[110]** not therefore be increased by accumulations of interest and consequently need not exceed Rs. 100. *Sadagopa* v. *Dorasami* (5), which follows a Bombay ruling, *Nana bin Lakshman* v. *Anant Babaji* (6), and approved *Narasayya Chetti* v. *Guruvappa Chetti* (7), shows that the document need not be registered. In *Jagappa* v. *Latchappa* (1), the case of *Narasayya Chetti* v. *Guruvappa Chetti* (7) is not referred to. In *Stri Seshathri Ayyengar* v. *Sankara Ayen* (8) an unregistered bond was received in evidence in a suit to enforce the personal liability of the person executing the bond; so in *Vani* v. *Bani* (9) and *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan* (10), and in *Rajah of Venkatagiri* v. *Narayana Reddi* (11), where an unregistered kabuliat was admitted to prove a contract.

Ryru Nambiar, in reply.

JUDGMENT.

BODDAM, J.—The only question raised in this appeal is whether the document Exhibit I required to be compulsorily registered under Section 17, Clause (*b*) of the Registration Act, to have any legal effect. Exhibit I is a purangadom for 50 rupees with the "customary interest" (which the District Judge finds is twelve per cent.). It contains these words, *viz.*, "This amount of Rs. 50 together with the customary interest thereon will be added to the kanom amount when after the expiry of the period of demise of the paramba a renewal is effected or the paramba is caused to be surrendered. The jenmam right over the said paramba has been mortgaged to you for this Rs. 50 and the interest thereon," &c.

It was contended that as by the document payment could not be made before the expiry of the kanom—which would be more than 9 years after the date of the purangadom—and as interest would by that time amount to Rs. 54, the document came within Section 17, Clause (*b*), of the Registration Act and was compulsorily registrable and not being registered it could not affect the property.

Section 17 of the Registration Act (Act III of 1877) is as follows (so far as is material):—"Documents next hereinafter mentioned shall be registered . . . . if they have been executed on or after the date on which Act No. XVI of 1864 . . . . **[111]** or this Act

(1) 5 M. 119. (2) 6 M. 422. (3) 10 A. 602 (606). (4) 3 M. 230. (5) 5 M. 214. (6) 2 B. 353. (7) 1 M. 378. (8) 7 M.H.C.R. 296. (9) 20 B. 553. (10) 9 C. 520. (11) 17 M. 456.

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came or comes into force (that is to say),—. . . . (*b*) other non-testamentary instruments which purport . . . . to create . . . . any interest . . . . of the value of 100 rupees and upwards to or in immoveable property."

In *Jagappa* v. *Latchappa* (1) it was held that the proper test for determining the value of the interest created by a mortgage for the purpose of registration is the amount of the least sum recoverable.

In *Habib-Ullah* v. *Nakched Rai* (2), it was, however, held by a Full Bench that the principal sum secured by a mortgage of immoveable property is alone to be considered for the purpose of deciding whether the registration of the instrument of mortgage is optional or compulsory under the Registration Act, and in *Tiyagaraja* v. *Ramanujam* (3), this Court held that for the purpose of registration the value of the interest created in immoveable property by a mortgage bond is that sum by the payment of which the interest could be determined.

I agree with Subramania Ayyar, J., that Exhibit I does not "contain a clear expression of intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words by construing them to mean no more than that, in the event of the amount remaining unpaid, when the kanom becomes redeemable, the Rs. 50 with interest thereon should be treated as if it were part of the kanom amount so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom." And moreover there is nothing whatever in the document to prevent the interest being paid from time to time even if the capital were not repaid until the kanom was redeemable. To make this document compulsorily registrable would be to hold in effect that the largest sum recoverable was to be taken as the test and not the least sum, as the amount would not be Rs. 100 unless nothing were paid until the kanom was redeemable.

I would therefore dismiss this appeal with costs.

O'Farrell, J.—I concur. There is nothing, so far as I am aware, in the customary law of Malabar to prevent repayment of **[112]** even the kanom amount before the expiry of the period of twelve years, though, of course, the land cannot be required to be surrendered before the period has expired, and instances of the kind are hardly likely to be of frequent occurrence. It is a common practice, however, for the interest on the kanom amount, as well as on any further advance secured by a purangadom deed, to be deducted from the payments due as purapad to the jenmi.

Independently of all questions as to the amount of interest I should be prepared to follow the other High Courts in holding that the amount which determines the value for registration purposes (as well as for the purposes of the Transfer of Property Act, Section 59) is the principal amount secured by the document irrespective of any interest which may subsequently accrue.

Michell, J.—As in respect of a kanom, so in respect of the further charge made by a purangadom document, the mortgagor cannot redeem till the expiration of the 12 years from the date of the kanom; unless there is an agreement between the parties to the contrary; *Shekhara Paniker* v. *Raru Nayar* (4). But it does not necessarily follow from this that he cannot pay the mortgagee the purangadom amount

(1) 5 M. 119. (2) 5 A. 447. (3) 6 M. 422. (4) 2 M. 193.

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at any time before expiration of the period. If by the Malabar customary law the mortgagor was not at liberty to do this, but was bound to wait till the expiry of the kanom period before he could repay the purangadom amount, then the amount of the interest secured by the purangadom document would be an ascertainable and certain amount, being the amount of interest (at the rate provided for) which would accrue between the date of the document and the expiration of that period. I do not agree with the view that, in that case, it makes any difference if the interest is paid by the mortgagor year by year, or taken by the mortgagee out of the yearly profits of the land or deducted from the rent reserved by the kanom (which apparently can be done by a kanomdar in respect of interest on a purangadom as well as in respect of interest on the kanom sum), instead of being paid at the end of the fixed period when the principal is payable. For in the end the mortgagor would pay just the same amount of interest if he paid or otherwise discharged it year by year as he would if he paid it all in a lump at the end of that period, and if interest is to be regarded as part of what is secured by the [113] instrument, in the valuation for the purpose of Section 17 of the Registration Act, it is just as much so if paid or discharged in the former as it is if paid in the latter manner.

But it has not been shown that any custom exists precluding repayment by the mortgagor of the purangadom principal sum at any time before the expiration of the period of the kanom, nor is there anything in the terms of the purangadom document in this case which has that effect. The mortgagor therefore being entitled to repay that sum at a time when it, with the interest then due superadded, would not exceed Rs. 100, I think that, on principle as well as authority, the document is not liable to compulsory registration ; *Jagappa* v. *Latchappa* (1) ; *Tiyagaraja* v. *Ramanujam* (2).

In *Jagappa* v. *Latchappa* (1) a mortgage bond which would not have been liable to compulsory registration if the principal sum secured alone had been taken into account, that sum being below Rs. 100, was held so liable, it being provided in the instrument that the principal should be repaid by four annual instalments and the whole of the interest on the due date of the last instalment, and the amount of the principal together with the interest being in excess of Rs. 100. On the other hand in *Habib-Ullah* v. *Nakched Rai* (3), the majority of the Court held that the principal sum secured alone is to be taken as the value with reference to Section 17, Clause (*b*), of the Registration Act, even in a case, which that was, in which it is known at the time of the execution of the instrument that a certain amount of interest must necessarily become payable, and if that amount is added to the principal the total sum exceeds Rs. 100. Similar cases similarly decided are those of *Korban Ally Mirdha* v. *Sharoda Proshad Aich* (4), *Ram Doolary Kooer* v. *Thacoor Roy* (5), *Nana bin Lakshman* v. *Anant Babaji*(6). There have no boubt been decisions to the contrary, but the more reasonable and better view appears to me to be that which regards the principal sum secured alone as the value of a mortgage for the purposes of Section 17, Clause (*b*), of the Registration Act, excluding interest accruable ; and that, as well in cases in which, the mortgage being redeemable at any time, it is uncertain whether at the time of redemption principal and interest together[114] will exceed Rs. 100, as in cases in

(1) 5 M. 11 9. (2) 6 M. 422. (3) 5 A. 447.
(4) 10 C. 82. (5) 4 C. 61. (6) 2 B. 353.

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which, the mortgage not being redeemable till expiry of a fixed period, it is certain that at the time of redemption principal together with interest will exceed that amount. It may also be remarked that this was the view taken by the Legislature when by Section 59 of the Transfer of Property Act it made the principal money secured alone, in all cases, the measure of value determining the question whether a mortgage instrument is or is not compulsorily registrable.

For these reasons, I think, Exhibit I in the present case is not liable to compulsory registration under Section 17, Clause (*b*), of Act III of 1877.

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23 M. 114=9 M.L.J. 361.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Michell.

RAMAYYA AND ANOTHER (*Plaintiffs*), *Appellants v.* KRISHNAMMA AND ANOTHER (*Defendants*), *Respondents.**
[28th April, and 11th and 26th September, 1899.]

Mortgage—Construction of documents—Sale-deed with counter-deed undertaking to re-transfer land in event of payments being made.

In a document described as a sale deed, plaintiff's father professed to give " in absolute sale," certain lands to the defendant, inasmuch as he was unable to pay a debt owing by him to the defendant. On the same day defendant executed a counter-deed in which he referred to the said sale-deed and undertook to get the said lands transferred to plaintiff's father in the event of the latter paying the said debt within a certain time, together with interest till date of payment, and in that event to cancel the said sale-deed and deliver the same to plaintiff's father. The counter-deed further provided that plaintiff's father should pay the principal and interest of the said debt by instalments, and that in default of payment of any instalment plaintiff's father should pay the whole amount due: and in default of payment in that manner, defendant should credit the land to himself according to the sale-deed, after getting the counter-deed cancelled :

Held, that on their true construction the documents showed nothing more than an intention to secure repayment of the debt: that though the provisions for payment by instalments and of the whole amount in default of instalments were contained in the counter-deed signed only by the transferee of the land, **[115]** they were equivalent to a covenant by the transferor so to repay, because the two documents being parts of one transaction, both parties were bound by or could take advantage of every stipulation, whether contained in one or other of the deeds, as would have been the case if the transaction had been embodied in a single document :

Held, therefore, that the transferee had a right to recover the debt (with interest) from the transferor personally ; and that the provision entitling the transferee to credit the land to himself in default of payment could not be construed as negativing that right.

Two documents relating to the transfer and re-transfer of land which were so connected as to constitute one transaction having been executed in the year 1882 prior to the passing of the Transfer of Property Act.

Held, that the transaction should be regarded as having been entered into with reference to the law as propounded in the course of Madras decisions commencing

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* Second Appeal No. 1500 of 1898 against the decree of F. Murray, District Judge of Ganjam, in appeal suit No. 136 of 1897, reversing the decree of N. Lakshmana Rao, District Munsif of Chicacole, in original suit No. 673 of 1895.

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in 1858 and referred to in *Thambusami Mudali* v. *Hossain Ravuttan* (L.R. 2 I.A. 241; I.L.R. 1 M. 1), and that the documents must be construed accordingly.

[R., 14 M.L.J. 347.]

SUIT for the recovery of land with profits. The father of first plaintiff had on 26th June 1882 executed what was described as a sale-deed in favour of first defendant, filed as Exhibit I, which contained the following other terms:—

"Sale-deed executed in favour of Ponnana Krishnamma, first defendant . . . . . Being unable to liquidate the debt of Rs. 200 (two hundred rupees) which I hitherto owe you, I have this day given you in absulute sale towards the said debt (unable to pay the same) all the lands belonging to me, of about six acres comprised . . . . . within the boundaries mentioned in the list herewith annexed in Kothuru village . . . . So, you may henceforward permanently and hereditarily enjoy the crops thereof according to your will." This deed was signed by plaintiff's father.

On the same day Ponnana Krishnamma, the first defendant, executed another deed filed as Exhibit II, in favour of plaintiff's father, which contained the following among other terms:—

"Counter-deed executed in favour of plaintiff's father . . . . . As I have obtained, through sale in consideration of the debt of two hundred rupees due by you, the jeroyati wet lands, belonging to you . . , . . . of about 6 acres, comprised within the boundaries mentioned in the list of boundaries annexed herewith in Kothuru village . . . . . and as I have got the sale-deed executed by you, I shall get the patta lands referred to above transferred to your name in the event of your paying the [116] said debt by the 30th Pushya Bahulam of Virodhi, together with interest on the whole amount due, at 1 Rupee per cent. per mensem from the year Chitrabhanu to the date of payment. I shall cancel the sale-deed in my favour and deliver the same to you. On the 30th Pushya Bahulam of each year up to the expiry of the term you should be paying Rs. 33 towards the principal and interest of the amount referred to above. In default of such payment during any year you shall pay the whole amount due without laying any claim to future instalments. In default of payment even in that manner I should credit the land (for myself) according to the sale-deed after getting this counter-deed cancelled." Ponnana Krishnamma, first defendant, affixed his mark to this counter-deed.

Plaintiffs contended that the debt due under Exhibit I had been fully discharged, and that Exhibits I and II, taken together, constituted not an absolute sale but a mortgage, and that plaintiffs were in consequence entitled to recover possession of the said land. On this point the District Munsif said:—

"To arrive at a correct understanding as to the nature of the transaction between first plaintiff's father and the first defendant, Exhibits I and II should be read together and when so read they go to show that the transaction was intended to be a mortgage. Exhibit I standing by itself is a sale-deed in clear terms. But it is a perfectly legitimate inference to draw from the terms of Exhibit II that plaintiff's father himself remained in possession of the plaint lands. The total amount of Exhibit I was Rs. 200. That amount was to be discharged by the 20th January 1890 with interest at 12 annas per cent. per mensem;

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in the interval between June 1882 [dates of Exhibit I and II] and January 1890 [date fixed for re-payment of the debt.] plaintiff's father was to pay the first defendant Rs. 33 about February every year; eight instalments of Rs. 33 each [or in all Rs. 264] were to be paid; if there should be failure in the payment of any one instalment, the whole amount was to fall due and should be paid by plaintiff's father; in default, Exhibit II should stand cancelled and first defendant should enjoy the lands according to Exhibit I. If, as contended by the defendants, the transaction was a sale with a condition for re-purchase, and if, as soon as Exhibits I and II were executed, the lands were put in first defendant's possession, why should there be a stipulation for payment of interest on the Rs. 200? The first **[117]** defendant would enjoy the produce of the lands and that would be his compensation for the capital lent by him for plaintiff's father's use. Nothing more need have been paid. Again, why should it be stipulated that, year after year, for eight years, plaintiff's father should pay the first defendant Rs. 33? If the lands were in first defendant's possession, he would be in the enjoyment of the usufruct of the lands in lieu of interest, and all that need have been re-paid in January 1890 by plaintiff's father to first defendant would be the principal, Rs. 200. . . . . I must therefore assume that plaintiff's father himself retained possession of the suit lands as alleged by plaintiffs. Towards the end, Exhibit II is wrongly worded, but that is only a clerical error." He referred to *Thambusami Mudali* v. *Hossain Ravuttan* (1), *Bapuji Apaji* v. *Senavaraji Marvadi* (2), *Ramasami Sastrigal* v. *Samiyappa Nayakan* (3), *Bhup Kuar* v. *Muhammadi Begam*(4), *Bhagwan Sahai* v. *Bhagwan Din*(5), *Ayyavayyar* v. *Rahimansa*(6), *Venkatasubbayya* v. *Venkayya* (7), and *Kader Moideen* v. *Nepean* (8). He held that the transaction evidenced by Exhibits I and II constituted a mortgage, and decreed for the plaintiff. The District Judge on appeal reversed that decision and dismissed the suit.

Plaintiffs preferred this second appeal.

Sundara Ayyar, for appellants.

Mr. *C. Krishnan*, for respondents.

On the question whether Exhibits I and II constituted a mortgage, the Court delivered the following

JUDGMENTS.

MICHELL, J.—The two documents sued on, Exhibits I and II, which must be taken together as constituting one transaction, were both executed on 26th June 1882, that is, before the Transfer of Property Act came into force. In accordance therefore with what was indicated by observations of their Lordships of the Privy Council in *Thambusami Mudali* v. *Hossain Ravuttan* (1), that transaction should, I think, be regarded as having been entered into by the parties thereto with reference to the law as propounded in the course of Madras decisions commencing in 1858 referred to **[118]** in that case, and the documents must be construed accordingly. Though the documents now under consideration were executed in 1882, that is about seven years after the decision of the Privy Council in *Thambusami Mudali* v. *Hossain Ravuttan* (1), which was passed in

(1) 2 I. A. 241 = 1 M. 1. (2) 2 B. 231. (3) 4 M. 179.
(4) 6 A. 37. (5) L.R. 17 I.A. 98 = 12 A. 387. (6) 14 M. 170.
(7) 15 M. 230. (8) 21 I.A. 96 = 21 C. 882.

1875, they must, I think, be construed similarly as documents executed before 1875 but not before 1858, because the supposed effect of the current of Madras decisions between 1858 and 1875, cannot, I think, be considered to have been removed by the Privy Council judgment in *Thambusami Mudali* v. *Hossain Ravuttan*(1), so as that documents executed subsequently to that judgment and before the Transfer of Property Act came into force should be construable as having been made with reference to the law as it existed before 1858 and as approved by the Privy Council in that judgment. The question therefore is whether, regard being had to their terms, these documents (taken together), construed agreeably to the law enunciated by the series of decisions which began in 1858, constituted a sale which was subject to a condition at first, but which became absolute on default made by the transferor in paying the debt of Rs. 200 by the 30th Pushya Bahula of Virodhi, or a mortgage, the transferor having an equity of redemption after the period expressly fixed had expired without such payment being made.

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It appears to me that the real intention which the terms themselves of these documents show is that of securing the repayment of the debt mentioned therein and nothing more. The consideration is not stated to be the price of the property transferred, but a debt of Rs. 200 which the transferor owed but was unable to pay to the transferee.

In the case of *Ibrahim Bhai* v. *Fletcher*(2) relied on by the respondents' counsel the document in question recited the fact that a sale of certain land by the one party to the other which had been mortgaged by the former to the latter was to have been made but had not been effected because the parties could not come to an agreement as to the price, but that they had then come to an agreement and settled the price. It proceeded to state that Rs. 200 was due in respect of the mortgage, and that the price of the land which had been mortgaged was Rs. 125, and provided that if the transferor paid this sum with interest within five years he was to **[119]** have back that land but if he failed so to pay, that land was to become the absolute property of the transferee, and that for the Rs. 75 balance the transferor was to be personally liable, and if he failed to pay it within one year, he was to give the transferee another piece of land. One of the points to which the judgment in the case shows that the Court attached considerable weight, in deciding that the transaction was a sale and not a mortgage, was the fact that the conveyance of the land purported to be made for a price, fixed by the parties as the value of the land, and not as security, for payment of a debt.

Then, there is a personal obligation imposed on the transferor to repay the debt with interest. "On the 30th Pushya Bahulam of each year up to the expiry of the term you should be paying Rs. 33 towards the principal and interest of the amount referred to above. In default of such payment during any year, "I" (here, clearly, "I" should be "you") "shall pay the whole amount due without laying any claim to future instalments"(sic).

Though these provisions are contained in the document which was signed by the transferee, they are equivalent to a covenant by the transferor to repay, because, the two documents being parts of one transaction, both the parties were bound by or could take advantage of every stipulation whether contained in the one or the other of the two documents, just as they could have done if the transaction had been embodied in a single document. The provisions of Exhibit II just now quoted are followed

(1) 2 I.A. 241 = 1 M. 1.

(2) 21 B. 827.

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immediately by the following provision:—"In default of payment even in that manner I should credit the land (to myself) according to the sale-deed after getting this counter-deed cancelled." This latter provision cannot, I think, be properly construed as meaning that the right against the property given to the transferee thereby shall be his only right on occurrence of the default on the part of the transferor to pay, thus negativing the right to recover the debt from the transferor personally which would otherwise have been created by the immediately preceding provisions. There is no more reason, I think, for regarding this construction as the right one, than there would be in the case of a simple mortgage for construing the provision entitling the mortgagee to bring the property to sale on default made by the mortgagor in payment as nullifying the mortgagee's right under the mortgagor's preceding covenant to pay to proceed against him personally. The [120] transferee thus has, in my opinion, under the documents, a right to recover the debt (with interest) from the transferor personally, whereas in *Bapuji Apaji* v. *Senavaraji Marvadi* (1), which was also relied on by the respondents' counsel, there was nothing in the documents there in question giving such a right to the transferee and the absence of any such provision was one of the grounds on which the Court held the transaction in that case not to be a mortgage.

Then, by the effect of the two documents taken together, possession of the lands was, I think, to remain with the transferor. Under Exhibit I, indeed, it is provided "so you" (the transferee) "may henceforward permanently and hereditarily enjoy the crops thereof according to your will." But Exhibit I forms only part of the entire transaction. It is controlled by Exhibit II, from which, I think, it appears that the transferor was to retain possession. For he is to pay interest on the debt, year by year, for eight years, and, as observed by the District Munsif, it could hardly be that first defendant was to have both the usufruct of the lands and also interest on the debt, and there is no provision in Exhibit II for first defendant accounting to the transferor for the profits upon the lands becoming the absolute property of the former in default of payment by the transferor in the manner provided. Moreover, defendants admit in their written statement that plaintiffs' father was in possession for one year, Chitrabhanu, corresponding with 1882—83, while plaintiffs' case is that first plaintiff's father and first plaintiff were in possession up to the end of Sarvajit (1887—88) when first defendant usurped the lands. Evidence of the conduct of the parties in connection with and at or immediately after the time of the transaction comprised in the documents is admissbile for the purpose of construing the terms of the documents. I am therefore of opinion that Exhibits I and II together constituted a mortgage. . . . . *

This appeal should, therefore, in my opinion, be allowed and the decree of the District Judge should be reversed and that of the District Munsif restored, and the defendants should pay the plaintiffs' costs in the Lower Court and in this Court.

BODDAM, J.—I concur.

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* The following is that portion of the judgment which has been omitted in the I.L R. 23 M. 114. The same is given for facility of reference.—ED.

[On the question, the subject of the first issue, whether Exhibit II was cancelled and returned as stated by defendants, the District Judge has recorded no decisive finding. He says "It was cancelled and returned by defendants (sic) most probably and

(1) 2 B. 231 (246).

23 M. 121.

1899 AUG. 7. — APPELLATE CIVIL. — 23 M. 121.

[121] APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

SANKARA MENON AND OTHERS (*Defendants and Counter-petitioners Nos.* 1 to 3, 9 *and* 10), *Appellants v.* GOPALA PATTAR (*Plaintiff* and *Petitioner*), *Respondent.** [7th August, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 246, 247—*Execution of decree—Cross-decree—Parties entitled under same decree to recover from each other.*

A plaintiff obtained a decree for the surrender to him of certain mortgaged property on his paying the defendants the mortgage amount within three months together with the value of improvements, and for the payment by defendants to him of the costs of suit. He applied to recover the said costs by the arrest of the defendants:

Held, that the defendants were entitled under Section 247 of the Code of Civil Procedure to set off the amount payable by them to plaintiff by way of costs against the mortgage amount and value of improvements payable by plaintiff to them.

Bhagwan Singh v. *Ratan* (I.L.R. 16 All. 395) approved.

[D., 16 C.P.L.R. 73; D. and Doubted., 11 C.W.N. LXIV (N).]

IN second appeal No. 42 of 1897 the High Court decreed that on plaintiff paying into Court or to the first to eighth defendant's tarwad within three months............the mortgage amount (Rs. 800) and the

then gives his reasons. It is, however, immaterial what the finding on this issue might be, because the next, the second issue, *viz.*, whether such cancellation was valid —a question of law must be decided in the negative. Exhibit II, being a registered document it is clear that it could not be cancelled except by a registered document (Evidence Act, Section 92, Proviso 4 ii *Umedmal Mortiram* v. *Davubin Dhonipa* (2 B. 547) and admittedly there was no such document. The District Judge thinks that Exhibit II "cancelled itself" because of the stipulation therein that in default of payment in the manner provided the transferee should credit the land to himself and the fact that such payment was not made, and therefore decides the third issue in the affirmative; but in the view which I take that Exhibits I and II together constituted a mortgage, the District Judge's opinion that Exhibit II thus "cancelled itself" is untenable. Besides the second issue is as to the validity of the alleged cancellation which forms the subject-matter of the first issue and does not include, the question whether Exhibit II "cancelled itself."

On the 4th issue the District Judge finds that plaintiff's father did borrow from 1st defendant, in addition to the original debt in respect of which Exhibits I and II were executed, a further sum of Rs. 200, and that the lands dealt with by those exhibits were made liable for that sum also. So far as that is a finding of fact we cannot interfere with it. but so far as it involves a decision that the lands were, as the legal effect of the transaction made liable for this further sum, it cannot in our opinion be upheld. For if, as appears to have been the case, it was meant to make the land liable for this further advance similarly as it had been made liable under Exhibits I and II for the original debt, it would not have been a case of a mere charge falling under Section 100 of the Transfer of Property Act, but a further mortgage of the land and a registered instrument would have been necessary to make the transaction valid, it having apparently taken place after that Act came into force.

On the 5th issue the District Judge finds that all the money due to 1st defendant has been discharged. On the 6th issue the District Judge finds, as did the District Munsif that no improvements were made. These are findings on questions of fact and cannot be disturbed on second appeal.

The 3rd issue is "To what relief is plaintiff entitled?]

* Civil Miscellaneous Second Appeal No. 68 of 1898 against the order of N. Sarvothama Rao, Acting Subordinate Judge of South Malabar, in appeal suit No. 233 of 1898 reversing the order of P. Raman, District Munsif of Chowghat, in miscellaneous petition No. 187 of 1898.

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value of improvements (Rs. 100) in all Rs. 900 and on his further paying into Court or to the defendants Nos. 9 and 10 Rs. 642-11-0 the defendants should...........surrender to plaintiff.........the mortgaged property, that if such payment were not made by plaintiff within the said three months, the said property should be sold and the proceeds applied in a certain specified manner, and that the defendants should pay to plaintiff Rs. 363-10-6 being the total amount of the costs incurred by him in all the three Courts.

Plaintiff applied to the District Munsif for the recovery of the said costs by the arrest of the first and second defendants; and for Rs. 61-11-0 from defendants Nos. 9 and 10, which they had recovered from plaintiff, under the decree of the original Court, [122] (which had been reversed by the High Court in the decree herein-before referred to), together with the interest which had accrued due thereon. Defendants Nos. 1 and 2 objected to the execution of the decree, contending that under Section 247 of the Code of Civil Procedure the sum due by them for costs ought to be set off against the mortgage amount and value of improvements decreed to them; and that if such set off were made nothing would be due by them to the plaintiff. The District Munsif allowed the objection and declined to issue the warrant of arrest prayed for. He further ordered the Rs. 61-11-0 which had been paid into Court by plaintiff under the said original decree to the credit of defendants Nos. 9 and 10, but which had never been drawn out by them, to be paid out to plaintiff, but allowed no interest. On appeal, the Acting Subordinate Judge reversed the Munsif's order, holding that the words "recover from each other" in Section 247, contemplated personal liability on the part of both parties to pay each other the sums decreed against each and that they must hold the same character and possess identical rights of enforcing execution, as laid down in *Kalka Prasad* v. *Ram Din* (1). He considered that identical rights did not exist since defendants Nos. 1 to 8 were personally liable for plaintiff's costs whereas their right to the mortgage amount and value of improvements awarded to them in the decree, could only be enforced by sale of the lands specified therein, after failure on plaintiff's part to pay within the period allowed. The reciprocal rights would not therefore be enforceable if plaintiff should choose to apply for execution as against the defendants before the period had expired which was allowed him by the decree for payment of the mortgage amount. He also held that the Munsif had rightly disallowed interest on the Rs. 61-11-0. He directed the Munsif to restore the application to his file and to pass the necessary orders for the execution of the decree against defendants Nos. 1, 2, 9 and 10.

The said defendants appealed. The plaintiff filed a memorandum of objections claiming interest on the Rs. 61-11-0.

Govinda Menon, for appellants.

V. Krishnasami Ayyar and *Appu Nedungadi*, for respondent.

JUDGMENT.

The decision in *Kalka Prasad* v. *Ram Din* (1) relied upon by the Subordinate Judge is inconsistent with the [123] view taken by a later Bench in *Ishri* v. *Gopal Saran* (2), to both of which decisions Straight, C.J., was a party. The former decision has lately been dissented from by

(1) 5 A. 272

(2) 6 A. 351.

another Bench of the same Court (see *Bhagwan Singh* v. *Ratan* (1)). We think that the latest decision is in accord with equity and common sense and prefer to follow it rather than the decision relied upon by the Subordinate Judge. We must therefore allow the appeal, and, reversing the order of the Subordinate Judge, restore that of the District Munsif with costs.

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As regards the memorandum of objections filed by the respondent we think that it must prevail. The plaintiff was compelled to deposit a certain amount in Court which was afterwards ordered to be restored to him, and is entitled to interest during the period for which it was out of his control. No objection is taken to the amount claimed. We allow the memorandum of objections with costs.

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23 M. 123.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar (Officiating Chief Justice) and Mr. Justice O'Farrell.

VENKATAGIRI AND ANOTHER (*Plaintiffs*), *Appellants v.* CHANDRU AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents*.*
[24th February, 24th July and 3rd August, 1899.]

Hindu law—Sapindas tracing relationship to common ancestor through two females.

The widow of a Hindu having acquired property from her husband, and having died issueless, without disposing of it, the plaintiffs claimed, as the heirs of the husband, to recover it from the defendants, who were the brother and sister of the widow. The plaintiffs were found to be the sons of the daughter's daughter of the husband's paternal grandfather:

Held, that inasmuch as plaintiffs were sapindas of the deceased husband, it was immaterial that their relationship to the common ancestor should have to be traced through two females. They must therefore be held to be his bandhus and as such entitled to succeed to the property left by the widow.

[F., 14 C.P.L.R. 185.]

[124] KRISHNA Naik died in 1882 leaving him surviving his widow Durgi, to whom he left certain property by will. The property thus devised was considered by the District Munsif to be Durgi's stridhanam, following *Musammat Thakro* v. *Ganga Pershad* (2); and she died issueless in 1895 and without having disposed of the said property. Shortly after Durgi's death, plaintiffs instituted this suit praying for a declaration that the property left undisposed of by Durgi belonged to them as sapinda heirs of the late Krishna Naik. Plaintiffs were found to be the sons of the daughter's daughter of Krishna Naik's paternal grandfather. The District Munsif granted the declaration as prayed. On appeal the District Judge reversed the decision holding that no reason had been shown why the property devised by will to Durgi did not belong to her absolutely, in which case it would descend to her heirs, who were the defendants.

The plaintiffs preferred this second appeal.

Sivasami Ayyar, for appellants.

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* Second Appeal, No. 1299 of 1898, against the decree of H. G. Joseph, District Judge of South Canara, in appeal suit No. 181 of 1897, reversing the decree of S. Raghunathayya, District Munsif of Mangalore, in original suit No. 47 of 1896.

(1) 16 A. 395. (2) 15 I.A. 29=10 A. 197.

1899 AUG. 3. — APPELLATE CIVIL. — 23 M. 123.

Madhava Rao, for respondents.

The Court, as constituted above, called for findings (1) as to whether the plaintiffs' alleged pedigree had been proved, and (2) whether Krishna Naik had been validly married to Durgi. Both questions were answered in the affirmative.

JUDGMENT.

We accept the finding that Durgi, who had acquired the property in dispute under the will of the late Krishna, was lawfully married to him and that the appellants are the sons of the daughter's daughter of Krishna's paternal grandfather.

As Durgi died issueless her property descends, according to the Mitakshara, to the heirs of Krishna, her marriage with him not having been shown to have been in one of the disapproved forms.

The question for determination is whether the appellants are Krishna's heirs.

It cannot be denied that the appellants are Krishna's sapindas in the sense of the Mitakshara as being connected with him by particles of the body. The fact that they have to trace their relationship to the common ancestor through two females is immaterial and cannot make them any the less sapindas (see *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (1) and *Umaid Bahadur* v. *Udoi Chand* (2)), and it is not disputed that they belong to a gotra different from that of Krishna.

[125] The respondents contend that only such bhinnagotra sapindas as belong to any one of the lines expressly referred to in Mitakshara, Chapter II, Section VI, paragraph 1, possess heritable rights. This, of course, is clearly untenable, it being now well established that the enumeration therein is not exhaustive.

It must therefore be held that the appellants are Krishna's bandhus, and hence entitled to succeed to Durgi's property.

In coming to the above conclusion we have not overlooked the contention of Mr. Ramachandra Rao Saheb questioning the correctness of the proposition enunciated in *Umaid Bahadur* v. *Udoi Chand*(2) and reiterated in *Babu Lal* v. *Nanku Ram*(3), that to enable a person to claim as a bandhu he and the propositus must have been mutually related in the manner explained therein. We do not enter into that matter since the appellants must be held to be bandhus of Krishna whether that proposition is sound or not.

The decree of the Lower Appellate Court is reversed and that of the District Munsif restored with costs in this and in the Lower Appellate Court.

(1) 19 B. 631. (2) 6 C. 119. (3) 22 C. 339.

23 M. 125=9 M.L.J. 313.

1899
SEP. 12.

APPEL-
LATE
CIVIL.

23 M. 125=
9 M.L.J. 313.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar (Officiating Chief Justice) and Mr. Justice Michell.

MUSALA REDDI AND ANOTHER (*Plaintiffs*), *Appellants v.* RAMAYYA AND OTHERS (*Defendant No. 1, Representatives of Defendant No. 2, Fourth and Fifth (supplemental) Respondents in the Lower Appellate Court, Representatives of the Fourth supplemental Respondent, and supplemental Respondents in this Court*), *Respondents.**
[4th and 12th September, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 365, 366—*Abatement of appeal—Decease of appellant—Application by representatives to be brought on record—"Legal representative"—More than one legal representative—Effect of application being made by some only of several legal representatives.*

During the pendency of an appeal two persons applied under Section 368 of the Code of Civil Procedure to be brought on the record as legal representatives [126] of the appellant, who had died. In their petition they stated that there were two other persons having interests equal to their own in the representation who did not join in the application and were not made parties by the applicants for reasons that were given. The applicants were duly placed on the record as representatives of the deceased appellant within the time limited by Article 175-A of Schedule II of the Limitation Act. After the period of limitation had elapsed the respondents applied under Sections 366 and 582 of the Code of Civil Procedure, for an order that the appeal had abated on the ground that the former petitioners had not added all the persons who had interests equal to their own in the representation. The Subordinate Judge held that the representation of the two applicants was sufficient to prevent the abatement of the appeal, but he made the other two representatives respondents on the record. He subsequently heard and allowed the appeal. On its being contended, on second appeal, that the appeal to the Subordinate Court had abated and should have been dismissed by reason of the non-joinder of the other two representatives:

Held, that though, in Article 175-A of Schedule II of the Limitation Act, the application is expressed to be an application under Section 365 of the Code of Civil Procedure and Section 366 is not mentioned, yet for the purpose of considering the question of abatement the two sections must be read together. When there are more than one legal representative of a deceased appellant, all those representatives must, so far as it is possible for this to be done, join in an application under Section 365 and the words "legal representative" in Section 365 of the Code of Civil Procedure, (and similarly the words "any person" and "the legal representative" in Section 366) strictly construed must, in such a case, be read in the plural and as including all the legal representatives. But where all the representatives cannot be joined as applicants, Sections 365 and 366 should not be construed so as to have the effect of rendering the application no application by "the legal representative" within the meaning of the sections so that the appeal must be held to have abated.

Bhikaji Ramchandra v. *Purshotam*, (I.L.R., 10 B. 220), and *Ghamandi Lal* v. *Amir Begam*, (I.L.R., 16 A. 211) considered.

[R., 8 C.W.N. 843 (857); 5 Ind. Cas. 514=7 M.L.T. 43; D., 26 M. 230 (235)=12 M.L.J., 368 (374).]

SUIT for money due on a registered mortgage bond. The District Munsif decreed for plaintiffs for the amount claimed and in default for sale of the mortgaged property. The second defendant, Seshamma, on 9th July 1896, preferred an appeal to the Court of the Subordinate Judge but died in the same month, during the pendency of the appeal. On 14th

* Second Appeal, No. 1275 of 1898, against the decree of T. Ramachandra Rao, Subordinate Judge of Kistna, in appeal suit No. 472 of 1896, reversing the decree of I. L. Narayana Rao Naidu, District Munsif of Bapatla, in original suit No. 74 of 1895.

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September 1896 a petition was presented under Section 368 of the Code of Civil Procedure by two out of four sapindas of equal degree to the last male holder of the mortgaged property, praying that they might be brought on the record as representatives of the deceased Seshamma, to save the property from being sold under the decree then under appeal. The remaining two sapindas did not join in the application and the petitioners alleged misconduct as their excuse for not including them. On 3rd December 1897, the respondents applied, under [127] Sections 366 and 582 of the Code of Civil Procedure, that the appeal might be dismissed, contending that it had abated in consequence of the former petitioners not having added all the persons who were entitled as reversioners to the mortgaged property. On 4th December 1897, the former petitioners again applied under Sections 366 and 368 of the Code of Civil Procedure and Section 5 of the Limitation Act of 1877. They referred to the previous petition in which it had been mentioned that there were two other persons who also had rights to the mortgaged property and had been excluded for the reasons there given. They relied upon *Bhikaji Ramchandra* v. *Purshotam* (1), as showing that any one of several representatives may represent a deceased party, and though they did not consider it necessary to ask the Court to make the other sapindas parties, they added that if the Court should follow *Ghamandi Lal* v. *Amir Begam* (2), they prayed that the said two sapindas might be so added. They stated that the omission to make that request in the prior petition did not arise from any negligence, inaction or carelessness but from a *bona fide* belief that the representation by the petitioners was sufficient, and relied upon Section 5 of the Limitation Act, the delay being excusable inasmuch as the decisions referred to, as governing the proper practice, were conflicting. The Subordinate Judge, following *Bhikaji Ramchandra* v. *Purshotam* (1), was of opinion that an application by the petitioners as two out of four representatives of the deceased appellant was sufficient to prevent an order of abatement being made under Section 366 of the Code of Civil Procedure, but deeming it necessary to bring all the representatives on the record he directed, under Section 32 of the Code of Civil Procedure, that the two remaining sapindas should be added as respondents Nos. 4 and 5, and that notice should be sent them. Upon the appeal coming on for hearing the said respondents did not appear; and the Subordinate Judge reversed the decision of the Court below and dismissed the suit.

The plaintiffs preferred this second appeal on the ground, among others, that the first appeal should have been dismissed on the ground of non-joinder of all proper and necessary parties, inasmuch as the two representatives of the deceased Seshamma had not included the two other sapindas in their first petition, above [128] referred to, and as the said remaining sapindas had not been brought on the record within the time allowed by law.

Rama Rao, for appellants.

Narayana Rao, for respondents Nos. 2, 3 and 8.

JUDGMENT.

The first contention raised on behalf of the appellants before us (plaintiffs) is that, as the appellant in the appeal to the Lower Appellate

(1) 10 B. 220. (2) 16 A. 211.

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Court, Seshamma, (second defendant) died during the pendency of that appeal and the two persons who applied within the time limited by Article 175A, Schedule II, Act XV of 1877, for applications under Sections 365 and 582 of the Civil Procedure Code, to be made appellants in her place as her legal representatives, admitted in their application that there were two other sapindas of her deceased daughter's son (the last male holder) of equal degree with themselves, but did not within the time so limited apply to have those two other sapindas made co-respondents (the latter not having joined with the appellants in their application to be made appellants), the appeal to that Court therefore abated, and that Court ought to have accordingly dismissed it. The facts are these. The appeal to the Lower Appellate Court was presented by Seshamma on 9th July 1896. On some day in July 1896 not specified she died. On 14th September 1896 the persons who are second and third respondents in this second appeal applied to be entered on the record in place of the deceased appellant and their application was granted. In this application they stated that there were two other sapindas of equal degree with themselves to the late Sivaramayya, the deceased husband of Lakshmidevi, the deceased daughter of Seshamma, but that these two other sapindas had not joined them in making the application, "having all along "colluded with persons who set up a forged will and false adoption against "the title of the late Seshamma and having been ordered to be prosecuted "for offences committed by them in the litigation against Seshamma." Nothing further appears to have been done till 3rd December 1897, when the plaintiffs, as respondents before the Lower Appellate Court, presented a petition praying that the appeal might be dismissed as having abated by reason that the substituted appellants (in that Court), though admitting that there were two other legal representatives of Seshamma besides themselves, had not joined them as parties to the appeal. On 4th December 1897 the substituted appellants presented another application to the Lower Appellate Court, in which, after referring to [129] their former application, they stated that on the authority of *Bhikaji Ramchandra* v. *Purshotam* (1), they did not consider it necessary to apply to have the said other two sapindas made parties to the appeal, but that if the decision in *Ghamandi Lal* v. *Amir Begam* (2) was considered to be a correct exposition of the law, they prayed that the two other persons mentioned in their former petition might be made parties; that their omission to make this request did not arise from any negligence on their part, but from a *bona fide* belief that the representation by them was sufficient; and that as the point did not appear to have been authoritatively settled by any decision besides the two mentioned the delay was excusable under Section 5 of the Limitation Act. The Subordinate Judge was of opinion that, with reference to the terms of Section 366 of the Civil Procedure Code an application by one or some of several representatives of a deceased plaintiff or appellant if made within the prescribed period was sufficient to prevent an order of abatement being made under that section, and that he ought to follow the Bombay decision rather than the Allahabad decision. He therefore refused to pass an order of abatement; but being of opinion that all the representatives must be brought on the record, he directed under Section 32, Civil Procedure Code, that the two legal representatives of the deceased who had not been brought on the record should be made co-respondents.

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(1) 10 B. 220. (2) 16 A. 211.

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Though in Article 175 A, Schedule II of the Limitation Act, the application is expressed to be an application under Section 365 of the Code, and Section 366 is not mentioned, yet for the purpose of considering the question of abatement the two Sections 365 and 366, must, we think, be read together. In the Allahabad decision, above referred to, no reference is made to Section 366. It is Section 366 which contains the provision as to abatement, and that section provides that "if within the "time limited by law no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the "Court may pass an order that the suit shall abate."

The Bombay High Court in the case above referred to construed the words "any person claiming to be the legal representative" in Section 366 as meaning any person claiming to be the, or (where [130] there is more than one) a legal representative of the deceased. The Bombay case is not referred to in the judgment in the Allahabad case above cited. In the Allahabad case the learned Judges held that when an appellant dies during the pendency of the appeal, leaving more than one legal representative, all the representatives or all those who are willing to join in the application must apply to be made appellants in place of the deceased appellant within the limitation period, otherwise the application is barred and the appeal abates. They were of opinion that the application being to carry on the appeal, the appeal could only be carried on by those who represented the deceased appellant's interest in its entirety, and that an application for bringing on the record a person or persons who represented only a share or shares in, but not the entirety of, such interest was therefore not an application within the meaning of Section 365 of the Civil Procedure Code. If an application is made to bring on the record only one or some of two or more heirs of the deceased appellant then though he or they might be capable of representing their respective shares in the estate of the deceased, they would not, it was considered, represent the interest of the deceased, in whose place they sought to be substituted in the appeal. "In Section 365," the Court said in their judgment "the words 'the legal representative' "must, where there are more than one legal representative, be read in the "plural."

It does not appear that in that case the two co-heirs of the deceased appellant who did not join with the heir who made the application under Section 365 were unwilling to join with him in that application, and therefore that case differed, in that respect, from the present case. It is true, however, that the Court went on to say in their judgment:—"It "might be that one only of the legal representatives of a deceased appel-"lant was willing to carry on the appeal. In that case that legal represen-"tative should make the other legal representatives parties to the appeal "as respondents, if they refused to join as appellants, so that the Court "might have before it all the persons whose interests might be affected "by the decree in appeal. The legal representatives of the deceased "appellant not having been brought upon the record in the Court below "within time, or at all, the appeal below abated, and an order to that "effect should have been made." These observations were therefore obiter, and we cannot take this as amounting to a decision that in such a case as the supposed case there referred to, which is [131] such a case as the present, if the recusant legal representatives are not brought on the record as respondents within the period limited for an application under Section 365, or at all, the application is no application with the meaning of the section or is barred and the appeal abates.

We so far agree with the learned Judges in the Allahabad case that we think, when there are more than one legal representative of a deceased appellant, all those representatives must, so far as it is possible for this to be done, join in the application under Section 365 and that the words "legal representative" in Section 365 (and similarly the words "any person" and "the legal representative" in Section 366), strictly construed, must, in such a case, be read in the plural and as including all the legal representatives. But if their observations above quoted can be taken to mean that, in the opinion of the learned Judges, if, in such a case, one or some of the representatives refuse to join in the application, then unless the recusant representative or representatives be joined by the Court, or application to join them be made, within the time limited for an application under Section 365 of the application which has been made is no sufficient application within the meaning of Sections 365 and 366 or is barred and the appeal abates, we are unable to concur in that view. It is clear that there may be cases in which where there are more than one representative Sections 365 and 366 cannot, assuming that the words "legal representative" must then be read in the plural and so as to include all the representatives, be strictly complied with, that is to say all the representatives cannot be joined as applicants in the application. One of such cases would be that in which the representative or representatives applying within time is or are not aware of the existence of one or more other representatives who in fact exists or exist. Another is that in which one or some of the representatives apply within time, but one or more other representatives have refused to join in the application or to make a separate application themselves. In neither of these cases is it possible for the applicants to comply with the terms of those sections, if they are construed, strictly, as meaning that all those who represent the entire estate of the deceased appellant must "apply to the Court." We cannot think that in such cases, those sections should be construed to have the effect of rendering the application no application by "the legal representative" and [132] therefore no application within the meaning of the sections, so that the appeal must be held to have abated. The learned Judges of the Allahabad Court appear to admit that, in the case of one or some only of the legal representatives applying, another or others refusing to join, if such other or others be joined as a respondent or respondents or at all events if such joinder be made within the limitation period, the sections are complied with. Yet that is an admission that the terms of the sections need not always be strictly or to the letter complied with, for in that case all the legal representatives (the words "the legal representative" being required, by the hypothesis, to be read in the plural and so as to include all those representing the entire estate of the deceased appellant) have not applied to the Court. It is departing from a literal construction of the sections, but putting upon them a construction which, regard being had to the subject-matter, is, the learned Judges apparently admit, a legitimate construction and one in accordance with the principles governing the construction of statutes.

Again an applicant or applicants under Section 365 might believe that he or they were the only legal representatives and *bona fide* deny a right set up by some other claimant or claimants and therefore not attempt to join them in the application, yet it might be found subsequently by the Court (see Section 367) that such claimant or claimants were also legal representatives, and should therefore also have been joined in the applica-

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tion or sought by the applicants to be made respondents. We do not think it could have been intended to put the question of the representation of a deceased plaintiff or appellant for the purpose of carrying on a suit or appeal upon the extremely hazardous footing which would result from the strict literal construction of Sections 365 and 366 contended for by the appellants' counsel in this second appeal.

We are therefore of opinion that, in the present case, in which two out of the four legal representatives of the deceased appellant have applied under Section 365 within time and the other two have not joined in the application owing to their unwillingness to do so and to the other reasons stated above, and the applicants have subsequently, but, in consequence of a *bona fide* belief, as we see no reason to doubt, entertained by them, that it was unnecessary for them to do so, not within the time limited by law for an application under Section 365, applied to have the other two brought on the record as respondents, we are not unduly straining, [133] or rather perhaps we should say relaxing, the terms of Sections 365 and 366, but placing on them a construction which, having regard to the subject-matter, is one in accordance with the principles governing the construction of statutes, if we hold as we do, that the application to the Lower Appellate Court of the 14th September 1896 was an application fulfilling the requirements of those sections, and that the appeal before that Court therefore did not abate.

It was not disputed that the applicants, the second and third respondents in this second appeal, as reversionary heirs to the last male holder, are legal representatives of the deceased appellant before the Lower Appellate Court, Seshamma, within the meaning of Sections 365 and 366, nor was there any room for questioning this. (*Katama Natchiar* v. *Raja of Shivagunga* (1), *Premmoyi Choudhrani* v. *Preonath Dhar* (2), *Tribhuwan Sundar Kuar* v. *Sri Narainsingh* (3)).

[Their Lordships then, dealing with the merits of the case, dismissed the second appeal with costs.]

* [The next and only other contention urged in this second appeal relates to the merits of the case. The suit was brought against the minor 1st defendant (the alleged adopted son of Lakshmidevi but whose alleged adoption the Subordinate Judge says there was no attempt on the part of either party to rely on as valid, and who has allowed the suit to proceed *ex parte* as against him) and the other defendant, Seshamma, to enforce a mortgage executed by Seshamma's daughter, the late Lakshmidevi, in favour of 1st plaintiff's late brother and manager of their family, and 2nd plaintiff, dated 2nd March 1886. The plaintiffs were bound to show that the mortgage was executed under circumstances rendering it binding on the reversioners. So far as the question whether it was so executed was a question of fact, the decision of the Lower Appellate Court thereon cannot be called in question in second appeal. But it is contended that the Lower Appellate Court was wrong in considering that the plaintiffs were bound to ascertain the nature of the original debt contracted by Lakshmidevi, in connection with which the mortgage sued on was executed, and also that due legal effect was not given to certain of the documents filed or they were not properly construed. Exhibit A, the

*[Here commences the latter portion of the judgment in the case reported in 23 M. 125. Though *omitted* in the I.L.R., yet it is given here for facility of reference.—ED.]

(1) 9 M.I.A. 539. (2) 23 C. 636. (3) 20 A. 341.

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mortgage sued on, purports to have been executed by Lakshmidevi, for the purpose of paying off, with the sum advanced Rs. 1,000, the debt due by her under a decree obtained by one Chowdari against her in suit No. 5 of 1886 and in execution of which decree a sale proclamation for the sale of the same property which was mortgaged by Exhibit A had been issued (Exhibit H). Chowdari's suit was brought on a mortgage of the same property for Rs. 800 executed by Lakshmidevi in his favour on 21st March 1885 (Exhibit K). Exhibit K was executed in connection with, and on the same date as, that of a razi decree passed in suit No. 71 of 1884 (Exhibit C). That was a suit brought by Lakshmidevi against Chowdari for recovery of certain land said to have been sold by the latter to her late husband Sivaramaiya. That land was part of certain lands purporting to have been sold by Lakshmidevi to one Perinidu by the document Exhibit II, dated 10th February 1883. By this document she purports to sell the lands to him for Rs. 4,500, made up thus : Rs. 3,000 due on settlement of accounts between them in respect of dealings between him and her late husband ; Rs. 500 already received by her from him for expenses of her late husband's obsequies, for discharge of urgent debts which she had to repay, and for other purposes ; Rs. 500 received then for assessment, discharge of debts and other purposes ; and Rs. 500, amount of document then executed by him to her agreeing to pay her Rs. 25 per month as maintenance for 20 years. It was found by both the Lower Courts that this sale-deed, Exhibit II, represented a nominal transaction. In suit No. 71 of 1884 Perinidu intervened and claimed under Exhibit II the land for recovery of which that suit was brought. In the razi decree, Exhibit C, one of the stipulations was that Chowdari agreed to pay Rs. 625 to Perinidu at Lakshmidevi's request out of the amount of the mortgage bond (K) for Rs. 800 then executed by her to Chowdari. It has been found by the Subordinate Judge, on a consideration of Exhibits II and C and the other evidence bearing on the question, that there was no debt due to Perinidu by Sivaramaiya, and that Lakshmidevi did not agree to pay Perinidu Rs. 625 in discharge of such debt. The sum, Rs, 800, for which (K) purports to have been executed is stated therein to have been advanced, or rather given credit for, to Lakshmidevi, partly for the discharge of this alleged debt to Perinidu of Rs. 625, and partly, that is, as to the remaining Rs. 175, towards payment by him to her pleader of a sum of Rs. 200 for costs of the suit, a pro-note being executed by her in Chowdari's favour for the remaining Rs. 25. The Subordinate Judge observes with reference to this that the value of the suit being only about Rs. 90 and the regulation fee for the pleader only about Rs. 5, such a high remuneration to the pleader as a payment of Rs. 200 must have involved, even if he had to pay thereout costs, if any, incurred by his client, would not be binding upon the estate so far as the interests of reversioners are concerned, and we agree with him in regard to this. The razi decree provided that each party should bear his own costs of the suit. The Subordinate Judge has correctly summarized in his judgment the contents of the razi decree, and we agree with him in thinking that a perusal of it ought to have set plaintiffs on their guard, as being suspicious as disclosing the fact that while the whole of the land which Lakshmidevi purported to sell to Perinidu for Rs. 4,500, by Exhibit II was to be made over to her as being entitled to it, the consideration money, Rs. 4,500 was reduced to Rs. 625, as being all that Perinidu was entitled to, and we agree with the Subordinate Judge

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that these provisions in Exhibit C were such as to make it incumbent on plaintiffs to enquire into the previous transactions with reference to which that razinamah purported to have been made and more especially the alleged sale represented by Exhibit II; and if they had made such inquiry they would have discovered that Exhibit II was obtained by Perinidu from Lakshmidevi whithout any consideration either paid by him or proved to have been due by Sivaramaiya to him. The plaintiffs have not proved any debt to have been due by Sivaramaiya to Perinidu. Even as to the Rs. 625 which by the razi decree it was arranged that Perinidu was to get from Lakshmidevi, Perinidu did not substantiate any legal right to it. Plaintiffs' 3rd witness Chowdari said "Sivaramaiya did not borrow any money during his lifetime. He was a rich man. That was a rumour. * * * * As Sivaramaiya deceived Perinidu to a large extent, the latter took hold of the nominal sale-deed and did not give it up until Rs. 625 were paid." The only witness who gave any evidence as to any enquiry having been made before the plaintiffs took their mortgage was first plaintiff, who is not one of the mortgagees, and he admits that he made no enquiry beyond seeing the razinama decree; that he did not see the documents upon which Lakshmidevi was alleged to be indebted to Perinidu nor ascertain the details of Perinidu's and Chowdari's alleged debts. In short, he in no way tested the *bona fides* of the transactions set forth in Exhibit C, though on their face dubious and suspicious. It has not been shown to us that any of the exhibits have been misconstrued or given a wrong legal effect to by the Subordinate Judge.

In our judgment the Subordinate Judge has come to the right conclusion in law upon the facts found and on the documents exhibited in holding that the plaintiffs were bound to make enquiry into the transactions to which the razi decree referred, and if they had done so, they would, as has been found by him, have ascertained that the alleged debt to Perinidu the payment of which by Chowdari formed the greater part of the consideration for the mortgage by Lakshmidevi on which Chowdari obtained his decree as well as the alleged payment of Rs. 200 to her pleader, which formed the rest of that consideration, were not binding on the reversioners.

This second appeal is therefore dismissed with costs.]*

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23 M. 133.

ORIGINAL CIVIL.

Before Mr. Justice Boddam.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF BUKTHAWAR MULL SOWCAR (DECEASED).† [22nd August, 1899.]

Probate and Administration Act—Act V of 1881, *Sections* 2, 4—*Document in form of will passing no property and only appointing guardians.*

A document in the form of a will, which was presented for probate, dealt with no property, the petition stating that the family of which the testator had been managing member was undivided, and that the testator's property had devolved

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* [Here ends the omitted portion of the judgment.—ED.]

† Testamentary Petition No. 92 of 1899.

by survivorship on his sons and nephews. The document, however, appointed persons to manage the family business during the minority of the said minors: 1899 AUG. 22.

Held, that it was not a document of which probate could be granted.

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PETITION for probate. After setting out that the testator had died leaving two minor sons and nephews him surviving, that he was managing member of an undivided family which was carrying on business as bankers and money-lenders, and that considerable [134] property had been left belonging to the said undivided family, the petition proceeded as follows:—"That on the death of the said testator the said properties devolved on his said minor sons and nephews, and they, by right of survivorship, are entitled to the same. That the said testator with the object of continuing the said family business and for the benefit of the said minors left his last will and testament appointing your petitioners executrixes and executors thereof so as to enable your petitioners to manage the said family business during the minority of the said minors."

JUDGMENT.

I do not think, having regard to the definition of a will in the Probate and Administration Act, Section 2, that probate should be granted of a document in the form of a will which admittedly deals with no property of the testator and where, under Section 4 of that Act, nothing would pass to the executor. The mere fact that guardians are appointed by such a document is not sufficient of itself to bring the document within the statute or to render probate necessary. The fact of the appointment of a guardian by a so called will can be proved otherwise. I therefore refuse probate and dismiss this petition.

Messrs. *Ranganadham Naidu* and *Tirumalai Pillai*, attorneys for petitioners.

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23 M. 134.

ORIGINAL CIVIL.

Before Mr. Justice Boddam.

RAMASAMI CHETTI (*Plaintiff*) v. SUBBU CHETTI AND OTHERS (*Defendants*).* [5th September, 1899.]

Attorney—Rules of Madras High Court, Rule No. 320—Leave of Court for proposed change of attorney—Grounds upon which leave will be given or withheld—Payment of costs due to attorney.

Leave will not be given by the Court for a change of attorney under rule No. 320 of the Rules of the Madras High Court (which provides that leave must be obtained before such a change of attorney can be made) until the costs of the attorney are first paid or provided for.

[135] PETITION by fourth defendant in a suit praying for an order that one of the attorneys of the High Court might be at liberty to conduct the further proceedings on petitioner's behalf in the place and stead of another attorney who had hitherto acted for him. The suit was one for partition, in which family disputes had arisen and petitioner's reason for desiring the change of attorney was, in effect, that the latter had acted for many years for his father with whom petitioner was now on inimical

* Civil Suit No. 213 of 1898.

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terms, in consequence of which he wished to become a plaintiff instead of a party defendant. The attorney referred to had consented to the change on the understanding that a razinamah decree would be consented to by which the costs of the said attorney in respect of the petitioner would be secured to him, but petitioner having opposed the said razinamah decree, the attorney objected to the change taking place and had withdrawn the consent and now opposed the order prayed for.

Mr. *Allan Dalay*, for petitioner.

The attorney, as counter-petitioner, in person.

JUDGMENT.

There is no real difficulty in enunciating the law or in applying it in this case. Before a change of attorneys can be made in this country, it is necessary to obtain the leave of the Court, rule No. 320; and it is in consequence of this leave being necessary that the question is now before me.

There is no such necessity in England. There, under the old chancery practice a client was entitled to change his attorney at his option and the only right the attorney had was to retain any papers of the client until his costs were paid. At common law the client could not change his attorney without paying his costs. In *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (1), it was held by the Court of Appeal that where no rule of practice is laid down and there is a variance between the old practice of the Chancery and Common Law Courts, that practice is to prevail which is considered by the Court most convenient.

In these circumstances and in this country it would not be right, in my judgment, to adopt the old chancery practice in preference to the common law practice for reasons that must be obvious to all practitioners and in addition to this in each case the leave of the [136] Court has to be obtained, which rule is, I imagine, intended as much for the protection of the attorney as of the client.

Here it is contended that a client has a right at any time to change his attorney at his own option, and that this Court will not refuse to sanction that change if the former attorney has once given his consent. In this case it appears that the petitioner was a client up to July of the former attorney, who, in that month, consented to his changing attorneys and wrote a consent on the new attorney's vakalat.

It is said on behalf of the petitioner that this was done upon the former attorney being given an undertaking. The former attorney, however, says he consented upon an understanding that the petitioner consented to a razinamah decree which provided for the payment of his costs. The petitioner however changed his mind and now opposes that razinamah, so that there is little or no chance of the former attorney getting his costs and naturally he now declines to consent to the change, as he is entitled to say "I object unless my costs are paid or satisfactorily provided for." The so-called undertaking does not satisfactorily or at all provide for the former attorney's costs unless the razinamah decree is passed.

In my opinion, a litigant in this country may, at his option, change his attorney, but he must first pay or satisfactorily provide for the payment of his costs, and I for my part should decline to sanction a change of attorneys until that is done.

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(1) L.R. 13 Ch. D. 310.

It is not done here and I therefore refuse to give leave, and dismiss this petition unless the former attorney is satisfied with respect to the payment of his costs, within the next half hour.

[The petition having been again called on, his Lordship made the following]

FURTHER ORDER.

Mr. Branson is satisfied and I accordingly sanction the change of attorneys.

Mr. *Subbayya Chetti*, attorney for petitioner.

Messrs. *Branson & Branson*, attorneys for counter-petitioner.

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23 M. 137=9 M.L.J. 368.

[137] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar (Officiating Chief Justice), Mr. Justice Moore and Mr. Justice O'Farrell.

SUBRAMANIA AYYAN (*Defendant No.* 2), *Appellant v.* KRISHNA AYYAN AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents.** [14th February and 1st and 16th August, 1899.]

Construction of document—Alteration in material part—Effect of alteration as vitiating document—Vesting of interest by execution of mortgage instrument.

By an agreement entered into between plaintiff and defendants' predecessors in title plaintiff undertook to sell and convey certain lands to the purchasers and to allow half the purchase money to remain at interest for three years on security of the lands sold. Plaintiff's mother was alive, as also his son, who was then a minor. In order to protect the purchasers from any claims by the said mother or son as against the lands so agreed to be sold plaintiff further agreed to give the purchasers a bond indemnifying them from any such or other claims. Plaintiff in pursuance of the said agreement duly executed a conveyance of the lands; he also gave the purchasers an indemnity in respect of claims by his mother as against the lands. The purchasers executed a mortgage over the lands in plaintiffs' favour, in which the indemnity to be furnished by plaintiff was at first referred to in general terms, but the document concluded with the words, ' a security should be furnished for this sum on account of the minor only." The balance of purchase-money so secured not having been paid plaintiff brought a suit for the sale of the mortgaged land and before doing so tendered an indemnity protecting the defendants against any claims that might be made as against the lands by the plaintiff's said minor son. It was found that the words "for the minor only" had been added to the mortgage instrument after its execution and without the mortgagors' consent. On its being contended that the alteration was a material one and vitiated the document, and that the suit, being based on the altered document, must fail; and that the tender of a general guarantee as originally agreed upon was a condition precedent to the plaintiff's right to sue:

Held, (O'FARRELL, J., dissenting), that on the execution of the mortgage instrument an interest in the property comprised therein at once became vested in the plaintiff; that such interest was not and could not have been divested from him by the subsequent addition of the words referred to, and that in asking for the sale of the land plaintiff was seeking to enforce, not a right resting on the contract or covenant, but one arising by operation of law with reference to the vested interest created by the instrument having been executed;

[138] that though reference was made in the plaint to the provisions relating to the mortgage instrument in its altered state, such reference was not an essential part of plaintiff's cause of action, and that the suit was not necessarily based on the altered instrument;

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* Second Appeal No. 613 of 1898 against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Appeal Suit No. 493 of 1897, reversing the decree of Virasami Ayya, District Munsif of Mannargudi, in Original Suit No. 53 of 1895.

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that the execution of a security bond in terms of the mortgage instrument before it was altered was not a condition precedent and the suit was sustainable though no such security had been given before the institution of the suit; and that (the question of damages not arising) plaintiff was entitled to a decree on the mortgage instrument, which would also provide that he must furnish a proper security bond before an order absolute would be passed.

Per COLLINS, C.J., and BENSON, J.—(in the order calling for a finding),—that the mortgage instrument having provided for security to be given by plaintiff in general terms, the addition of the words for "the minor only" restricted the liability of the property to be given by plaintiff as security to claims made by the said minor son. It diminished the guarantee to be given by plaintiff against claims by the mother or others. It was thus an alteration in a material part of the document and would vitiate it as a basis for the plaintiff's suit unless the plaintiff could show that the alteration had been made with the consent of the mortgagors, who executed the document.

Per O'FARRELL, J.--That inasmuch as the suit was based not on the transferred right but on the altered document and as no obligation had as yet attached under the unaltered document, the suit should be dismissed; that the defendants' liability was contingent upon the prior execution by plaintiff of a general guarantee and not of the limited one which he, relying on the fraudulent alteration, had tendered; that where an agreement has, as to one of the parties, been wholly executed, the altered contract may be given in evidence of the correlative obligation incurred by the other party; but that here the agreement so far as it related to repayment of the purchase money was executory and contingent upon the fulfilment by the plaintiff of the prior obligation to execute a proper guarantee; and that a conditional decree upon a proper security bond being executed could not be given.

[F., 25 A. 580 (601) (F.B.); D., 33 C. 812=3 C.L.J. 363=10 C.W.N. 788.]

BY an agreement (Exhibit II), dated 20th July 1891, the plaintiff agreed to sell certain lands to first defendant's late husband Vydinada Ayyar and his mother Sitha Ammal for the sum of Rs. 4,000. Of this sum, Rs. 300 was received by the plaintiff on the date of the said agreement and the balance of Rs. 3,700 was agreed to be paid as follows:—Rs. 1,700 on the day upon which a sale deed should be executed; and the balance Rs. 2,000 within three years with interest at a half per cent. per mensem. Plaintiff agreed to receive the principal sum of Rs. 2,000 on giving proper security; he further agreed to execute a bond indemnifying the vendees in respect of any claims to maintenance which might at any time be put forward by plaintiff's mother Mangalathammal against the land. Plaintiff had a minor son, who did not join with him in the sale. On 4th September 1891 a conveyance of the lands was executed by plaintiff in pursuance of the said agreement and on the same **[139]** day a deed (Exhibit A) was executed by the vendees hypothecating the same lands to the plaintiff as security for the payment of Rs. 2,000, the balance of purchase money. Among other terms were the following:—"As we owe you the sum of rupees two thousand as per particulars mentioned in the said sale deed, we shall pay you interest for the above said sum for three years from this day at Re. ½ per cent. per mensem, paying the interest of each year on the 3rd September of each year. We shall pay you the said sum of Rs. 2,000 either on the 3rd September of 1894 which is the said third year, or before that time or on any other day, on which a security deed is executed either by you or by any other person on property worth Rs. 2,000 and free from all incumbrances whatever. If within the said fixed date the security be not furnished and the amount received, you shall receive the principal sum without interest for the period subsequent to that on the day on which the security is furnished. If the interest due for every year within the said three years be not paid at the time so fixed, we shall add interest to the said interest at the rate of 10 annas per cent.

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per mensem. The sum for which the security has to be furnished as said above is Rs. 2,000. A security should be furnished for this sum of rupees two thousand on account of the minor only."

On the same day plaintiff executed an indemnity bond (Exhibit C) in respect of any claims against the lands as follows :—" If in any year there should be default in paying the said income, if any suit were brought for it by the said Mangalathammal, and if it should happen that the amount be made recoverable from the income of the lands which have been sold to you, or if any other claim or incumbrance be found out and if such be made recoverable from the property that have been sold to you, for the said purposes and for all the expenses that might be incurred, and for loss of interest sustained, the following properties which belong to me ancestrally and are in my enjoyment are given to you as security."

The lands in question were sold to second defendant who now alone contested the suit. The Rs. 2,000 not having been paid, plaintiff, in October 1894, tendered a bond of indemnity, Exhibit B, in respect only of any claims that might be made against the land by plaintiff's minor son. This was refused by second defendant, who asked for an indemnity in general terms. Plaintiff thereupon obtained the signature of another bondsman, sent the bond to **[140]** second defendant by registered post and ultimately brought this suit to recover the Rs. 2,000 due on the mortgage bond (Exhibit A). Defendant No. 2, among other defences, contended that the bond of indemnity should not be restricted to claims by the plaintiff's minor son alone, and, after seeing the deed of hypothecation, Exhibit A, he set up the further contention that the concluding words therein restricting the indemnity to claims by "the minor only" had been interpolated since the execution of the bond, and that the bond was vitiated thereby and the suit should fail. The District Munsif found that plaintiff had tampered with the document, and that the alteration related to a material part of it since it altered the nature of the covenant upon the performance of which plaintiff's right to enforce repayment of the money depended. He relied on *Govindasami* v. *Kuppusami* (1) and said :—" The money being made expressly payable on the furnishing of security according to the agreement between the parties, the plaintiff cannot recover it except by acting in conformity to the terms of the document, which he rendered himself incapable of complying with by the unauthorised addition he made to it, which vitiates it as a whole. The claim, as also observed in the case quoted, is neither based on any antecedent transaction for which the instrument is given as security, nor does the execution of the instrument vest in the plaintiff any estate or right of the existence of which the deed would be evidence. I hold under the first issue therefore that the bond sued on is not genuine, having been fraudulently altered in a material part." He dismissed the suit.

On appeal, the Subordinate Judge concurred in the finding that the words " for the minor only " in Exhibit A had been interpolated, but considered that the alteration was not in a material part of the document, since the claims of plaintiff's mother had been provided against by Exhibit C, and the only indemnity to be given was in respect of his minor son, in accordance with the alteration. He did not find as to whether the words had been added with the consent of the executants of Exhibit A. Following *Tikamdas Javahirdas* v. *Ganga kom Mathuradas* (2) he held that the

(1) 12 M. 239. (2) 11 B.H.C.R. 203.

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bond was not vitiated, and, allowing the appeal, decreed that second defendant should accept the indemnity (Exhibit B) and pay the Rs. 2,000 to plaintiff within three months with interest from [141] the date of plaint to that of the judgment and that in default of payment the mortgaged property should be sold and the sale-proceeds applied in discharge of the debt.

Defendant No. 2 preferred this second appeal which came on for hearing, in the first instance, before COLLINS, C. J., and BENSON, J., who passed the following

ORDER.

We are unable to accept the view of the Subordinate Judge that the alteration of Exhibit A by the addition of the words "for the minor only" is not a material alteration. It may be that by the execution of Exhibit C the plaintiff gave the security therein mentioned as a guarantee against claims by Mangalathammal and other incumbrances, but that is no reason why he should not have been also required by the mortgagors under Exhibit A to give further security in general terms as a guarantee not only against the son's possible claims but also against the claims of Mangalathammal and other incumbrances already guaranteed by Exhibit C to the extent of the property therein mentioned. The property in Exhibit C might prove an insufficient security, and the mortgagors might reasonably have thought fit to obtain a further security. Such further security was given in general terms by Exhibit A before the words "for the minor only" were added. The addition of those words restricted the liability of the property in that document to claims made by the son of the plaintiff. It diminished the guarantee given by the plaintiff against claims by Mangalathammal and other incumbrances. It was thus an alteration in a most material part of the document (*Govindasami* v. *Kuppusami* (1)) and would vitiate it as a basis for the plaintiff's suit, unless the plaintiff could show that the alteration was made with the consent of the mortgagors who executed the document.

On this question the finding of the Subordinate Judge is by no means distinct. We must ask him to return a finding on this point within six weeks from the date of receipt of this order.

We observe that two of the witnesses who attested the document have not been examined, nor does it appear their evidence is not procurable. In a case like the present it is highly desirable that all available evidence as to the circumstances under which the alteration was made should be exhausted. The Subordinate [142] Judge should therefore examine these witnesses if their evidence is available.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[The finding of the Subordinate Judge was duly returned and was to the effect that the words "for the minor only" were not added with the consent of the mortgagors who executed the document.]

The case came on again for hearing, after the return of the above finding, before the Court constituted as above.

Ramachandra Ayyar, for appellant, contended that the alteration of Exhibit A being a material one vitiated it as a basis for plaintiff's suit,

(1) 12 M. 239.

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since the finding was that it was made without the consent of the mortgagors, who executed the document. He referred to the order of the Court; also to *Govindasami* v. *Kuppusami*(1), *Ramasamy Kon* v. *Bhavani Ayyar*(2) and *Christacharlu* v. *Karibasayya*(3). If no such obligation to pay arose before tender of security, the decree could only be given after something else had been done;—the tendering of the security by plaintiff in terms originally agreed upon was a condition precedent to the plaintiff's right to sue. If it were conceded that a conditional decree should be passed, that showed that the condition was a condition precedent and its non-performance fatal to institution of the suit.

V. Krishnasami Ayyar, for respondent No. 1.—On the language of the instrument (Exhibit A) plaintiff may sue and can be made to execute such a document as the Court directs. The only alternative is to hold that no cause of action arose until after tender of the document, plaintiff being at liberty to bring another suit after tender has been made ; *Sahib Zadah* v. *Parmeshar Das* (4). Here, there were two covenants, one to be performed by each of the parties; and it is submitted that in such circumstances the Court will pass a conditional decree. The passing of a conditional decree will only give effect to the accepted principles of equity that he who seeks equity shall do equity ; and does not show that the covenant to give an indemnity was a condition precedent or that the suit should be dismissed for its non-performance ; *Ramaiya* v. *Narayanasamy* (5). By the terms of the security bond, **[143]** interest is lost and that is the only penalty that plaintiff should suffer. On the authority of the Full Bench decision in *Christacharlu* v. *Karibasayya* (3), it not being a mere agreement that is sought to be enforced but a right *in rem*, plaintiff is entitled to fall back on the instrument as it stood prior to the alteration.

JUDGMENT.

SUBRAMANIA AYYAR, OFFG. C. J.—The first point for decision is whether the addition of the words "for the minor only" in the sentence 'a security should be furnished for this sum of rupees two thousand,' which occurs at the end of the mortgage instrument (Exhibit A), bearing date the 4th September 1891,—an addition now found to have been made wrongfully after the instrument was duly executed and registered—precludes the mortgagee, the first respondent (plaintiff), from seeking as against the appellant (second defendant), claiming through the mortgagor, a sale of the mortgaged property for the mortgage money, assuming for the present that the money had become due on the 3rd September 1894, notwithstanding the failure on the part of the first respondent to execute a security bond as provided in the mortgage instrument.

Now it is unquestionable that on the execution of Exhibit A an interest in the property comprised therein became at once vested in the first respondent, that such interest was not and could not have been devested from him by the subsequent addition of the words referred to and that one of the incidents annexed by law to the interest so vested is a right to have the property sold through the Court should the mortgagor or other person bound to pay the mortgage money fail to pay it. Therefore, in asking for the sale of the land it is obvious that the first respondent is seeking to enforce, not a right resting on contract or covenant, but one arising by operation of law with reference to a vested interest created by

(1) 12 M. 239. (2) 3 M. H. C. R. 247. (3) 9 M. 399.
(4) 1 A. 524. (5) 3 M.H.C.R. 209.

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the instrument having been executed. It is true that reference is made in the plaint to the provisions relating to the security bond in Exhibit A as altered. But such reference is not an essential part of the first respondent's cause of action, in the view I take of the effect of the provisions relating to the security, on the respondent's right. I am therefore unable to say that the suit is to be taken as necessarily based on the altered instrument. The case is, under the circumstances, in principle, similar to *Agricultural Cattle Insurance Company* v. *Fitzgerald* (1), where it was held [144] that though the deed of settlement of the Company had, since its execution, been altered by the erasure of the name of a shareholder subscribed before that of the defendant, still the deed was available as evidence in an action for calls against the defendant. Lord Campbell, C.J., said:—"This is not an action on the deed, but upon the Act of Parliament which "renders the defendant liable to be sued in this form (debt) if he was a "shareholder when the calls were made. His execution of the deed shows "that he was then a shareholder; and the erasing of the name of another "shareholder, rightfully or wrongfully, could not devest from the defendant "the shares which he before held. The deed therefore was evidence that "he was a shareholder when the calls were made." Similarly, in the present case the addition of the words 'for the son only' could not and did not devest from the first respondent the mortgage interest already vested in him and the instrument in question is evidence of such interest entitling him to enforce the incidental right of selling through the Court annexed to the interest by the law. Be this as it may, *Ramasamy Kon* v. *Bhavani Ayyar* (2) in so far as it is unaffected by the Full Bench decision in *Christacharlu* v. *Karibasayya* (3), and the very clear observations to be found in the latter case itself bearing on the present question, are distinct and direct authorities in favour of the view that the first respondent is not precluded from enforcing his mortgage right against the appellant to the extent sought by him.

The other point for determination is whether the execution of the security bond, referred to in Exhibit A as it stood before it was altered, is a condition precedent to the accrual of the right to payment of the mortgage money. This is of course a question of construction, the intention of the parties being collected from the whole instrument. Now the most important passage bearing on the point runs thus:—"we shall pay you the said "sum of rupees two thousand on the 3rd September 1894, which is the "third year, or before that, on the day on which a security deed is executed "by you or any other person on good immoveable property which is worth "rupees two thousand and which is not subject to any claim or dispute." The obvious meaning of the parties is that the sum of rupees two thousand was to become payable at all events on the 3rd September 1894, though payment thereof might be claimed [145] even before that date should the first respondent execute or cause to be executed a security bond of the description mentioned in the instrument. That the two thousand rupees were to be paid unconditionally on the 3rd September 1894 would seem to be pointed to even by the terms of the instrument as to interest on that amount. They are as follows:—"As we owe you this sum of "rupees two thousand, as per particulars mentioned in the sale-deed, we "shall pay you interest for the abovesaid sum for three years from this "day at ½ rupee per cent. per mensem, paying the interest of each year on

(1) 16 Q. B. 432 at p. 441=16 A. & E. 432. (2) 3 M.H.C.R. 247.
(3) 9 M. 399.

"the 3rd September of each year . . . . If perhaps within the said fixed "date (3rd September 1894) the security be not furnished and the amount "received, you shall after that date, on the date on which security is "furnished, receive from us the principal alone."

The intent of the parties would seem to be that failure on the first respondent's part to furnish security will entail on him only the loss of interest subsequent to the 3rd September 1894, but will not affect in any way his right to interest prior to that day or to the payment of the principal which, as already stated, was taken as accruing due unconditionally on the 3rd September. If it were otherwise the parties would surely have stated in express terms that apart from the loss of interest the principal amount too could not be demanded until the security is furnished.

As to the statements in the plaint bearing on the question of the security bond, they are averments of the plaintiff's readiness to perform his covenant in the matter—a covenant the breach of which would entitle the mortgagor to claim a set-off for the damages caused thereby. I am unable to hold that the statements in question imply any admission on the part of the plaintiff that the giving of the security was a condition. Lastly, the agreement (Exhibit II), executed in July 1893, on which reliance is placed on behalf of the appellant, is not in my opinion inconsistent with the view that there is no condition. Assuming that it is open to refer to that document in construing Exhibit A which was executed in September, the language of the former Exhibit II with reference to the point under consideration is substantially the same as that of the latter Exhibit A.

Though with reference to a question of construction of the terms of a document decisions upon the construction of other documents may not be of binding authority, still I think reference may **[146]** be made to *Campbell* v. *Jones* (1) the facts of which present some analogy to the facts of this case. There, by an indenture made between A (a patentee) and B, which recited an agreement that in consideration of £ 500 to be paid by B to A in manner thereinafter mentioned A would instruct B in his method and should also permit B to use his patent, A in consideration of £250 paid by B and of the further sum of £250 to be paid, &c., covenanted that he would with all possible expedition instruct B in his method; and B covenanted that he would on or before the 25th February 1794 or sooner if A should before that time have instructed him, &c., pay the further sum of £250. The Court of King's Bench held that A might sue B for the £250 without averring that he had taught B the method, &c. Lord Kenyon, C.J., observed with reference to the first ground on which the conclusion of the Court was rested "the intent of the parties appears "to be that the payment might be accelerated, but should not in any "event be delayed." The other ground taken by the Court for their view was that "the teaching of the defendant was not the whole considera-"tion of the covenant to pay." So, here the covenant to give security was of course not the whole consideration for the covenant to pay the two thousand rupees, if it formed any part of the consideration at all; for, that sum was the unpaid moiety of the price of the lands sold and delivered to the mortgagor and mortgaged by him for that moiety under the instrument in question. In conclusion it may not be superfluous to add that in cases like this where the parties have not chosen to declare in the instrument that the performance of any particular covenant

(1) 6 T.R. 570 = 3 R.R. 263.

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therein is a condition precedent, as it was open to them to declare, those who construe the instrument should, in the language of Bramwell, B. " be chary in doing for them that which they might, but have not done "for themselves."—*Tarrabochia* v. *Hickie* (1). For all these reasons, I am of opinion that the execution of a security bond as provided in Exhibit A was not a condition precedent and the suit is sustainable though no such security was given before it was instituted.

However, upon the finding now come to as to the terms of the security bond undertaken to be given by the first respondent, the declaration made in the Lower Appellate Court's decree that the appellant do accept the security bond, Exhibit B, must be expunged [147] since the bond is not in accordance with the provisions of Exhibit A as unaltered. Nor is the first respondent entitled to interest after the 3rd September 1894 he having failed to furnish by that date such a bond, as he was bound to furnish. Therefore in so far as the appellant is concerned that decree must be modified with reference to the two points mentioned. As to the failure on the first respondent's part to furnish a proper security bond, it is not necessary to determine what damages the appellant is entitled to, since the respondent is willing now to execute it or cause it to be executed and the appellant is willing to take it. The decree will therefore provide that he shall do so before an order absolute is passed. The appeal is otherwise disallowed, but the first respondent must pay the appellant's costs throughout. The memorandum of objections is dismissed with costs.

MOORE, J.—On the 20th July 1891, an agreement (Exhibit II) was entered into between the plaintiff and Vydinada Ayyar, the husband (since deceased) of the first defendant and his mother Sitha Ammal under which the plaintiff undertook to sell certain lands to Vydinada Ayyar and his mother for Rs. 4,000. Of this sum it was agreed that Rs. 2,000 should be paid to the plaintiff with interest within three years from the date of Exhibit II and it was further stipulated that before the plaintiff received this sum he should furnish security to the extent of Rs. 2,000 and that in case he failed to do so and to receive the money within the term of three years fixed he should whenever he subsequently furnished the security receive the Rs. 2,000 but without interest. It is shown that on the 4th September 1891 the sale deed agreed upon in Exhibit II was executed and that on the same day a deed of mortgage (Exhibit A) was drawn up under which the vendees, Vydinada Ayyar and his mother, mortgaged to the vendor, the plaintiff, the property comprised in the deed of sale. In this latter document stipulations almost identical to those to be found in Exhibit II were inserted and it was agreed that the mortgagors should pay to the mortgagee Rs. 2,000 either on the 3rd September 1894 or before that date or on any other day on which a security deed should be executed either by the mortgagee (plaintiff) himself or by some other person on his behalf and it was further agreed, as in Exhibit II, that if within the date fixed the security was not furnished and the sum of Rs. 2,000 paid the plaintiff was to receive the principal on whatever date the security might [148] eventually be furnished but without any interest for the period subsequent to the 3rd September 1894. Later on, after the death of Vydinada Ayyar, his widow (first defendant) and his mother sold the property to the second defendant. The plaintiff has brought the present suit on Exhibit A alleging in the plaint that he had offered to get a security deed executed as agreed on but that the second

(1) 1 H. & N. 183 at p. 188.

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defendant had ignored his offer. He therefore sued for the recovery of Rs. 2,000 together with interest from the defendants and by sale of the mortgaged property. The first defendant did not contest the suit and the second defendant pleaded that no deed of security drawn up as agreed upon had been tendered to him and that he was ready to pay the amount due by him provided a "proper deed" of indemnity was tendered. He subsequently added a plea that Exhibit A had been altered subsequent to execution and contended that on that ground the suit should be dismissed. The further inquiry that has now been made by the Subordinate Judge under the order of this Court shows clearly that Exhibit A was altered by the plaintiff after the document had been registered. It is therefore clear that that portion of the decree which directs the second defendant to accept Exhibit B, a security bond drawn up according to the terms of Exhibit A as altered by the plaintiff, cannot stand. I however agree with the learned Officiating Chief Justice that it is open to us to pass a decree directing that on the plaintiff tendering to the second defendant a security bond drawn up in accordance with Exhibit A as it stood before alteration, time should be allowed to the second defendant to pay Rs. 2,000 with interest up to the 3rd September 1894 and that on his failure to do so the mortgaged property should be sold. It will be seen that in his first written statement the second defendant expressed his consent to such a decree being passed and that his only objection to the plaintiff's suit was that Exhibit B had not been drawn up in accordance with the terms of Exhibit A. The decree proposed by the Officiating Chief Justice is also in my opinion in accordance with the terms of the agreement entered into, as set forth in Exhibit II taken with Exhibit A, which, as I read them, were that whenever the plaintiff should tender a properly drawn up security bond the mortgagors should be bound to accept it and pay the sum of Rs. 2,000 due subject to the condition that if the security bond was not tendered on or before the 3rd of September 1894 the plaintiff was to lose all **[149]** interest subsequent to that date. This condition was not in my opinion a condition precedent to the plaintiff's right of action. It will be satisfied if even after the final decree in this suit is passed the plaintiff offer to the second defendant a security bond drawn up as agreed upon.

I would therefore modify the decree of the Lower Appellate Court as proposed by the Officiating Chief Justice.

O'FARRELL, J.—The finding now submitted is to the effect that the alteration was made without the consent of the defendants who executed the mortgage-deed, and the learned vakil for the respondents does not venture to contest the correctness of this finding. Following, therefore, the opinion of the Judges who ordered the remand, the plaintiff's suit should be dismissed. It is for the first time, however, contended in argument by the vakil for the respondents, that the suit should not be entirely dismissed, but decreed conditionally on the plaintiff now executing a proper guarantee according to the terms of the unaltered agreement. He relies upon *Ramasamy Kon* v. *Bhavani Ayyar* (1) and the Full Bench decision in *Christacharlu* v. *Karibasayya* (2). The effect of those decisions, so far as concerns the present case, would seem to be, that where a vested interest has been created by the execution of a document, such right will not be affected by any subsequent alteration, and the document may be given in proof of the creation and extent of the right. The remarks of Lord Abinger in *Davidson* v. *Cooper* (3) were referred to. But

(1) 3 M.H.C.R. 247. (2) 9 M. 399. (3) 11 M. & W. 778.

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the rider was added that even in such a case the suit must be framed on the transferred right and not on the altered document.

It appears to me plain from the recital of the pleadings contained in the District Munsif's judgment that the suit was based not on the transferred right but upon the altered document. In that view the cases cited are against the respondent's contention. I think, moreover, that these cases are inapplicable for another reason, *viz.*, that no obligation has as yet attached under the unaltered document. The defendants' liability to pay the balance of the purchase money is contingent upon the prior execution by the plaintiff of a general guarantee and he, relying on the fraudulent alteration, has tendered only a limited one which the defendants have naturally refused to accept. I quite concede [150] that where an agreement has, as to one of the parties, been wholly executed, it is deducible from the Madras cases that the altered contract may be given in evidence of the correlative obligations incurred by the other party. But here the agreement so far as relates to the payment of the balance of the purchase money is executory, and contingent upon the fulfilment by the plaintiff of the prior obligation to execute a proper guarantee. I think this is plain from the language of the document sued upon—though that is somewhat involved.—"If "within the fixed date the security be not furnished, you shall receive the "principal sum without interest for the period subsequent to that on the "day on which the security is furnished." I think it appears, however, still more clearly from the stipulation in the agreement for sale (Exhibit II). A term of three years is there fixed and the principal is made payable on or before the expiry of that term with interest at the rate of six per cent. per annum. The document then goes on to say "Before I receive the "principal sum, security shall be given of immoveable property . . . "". . If within the said three years I fail to do so, I shall, at the time "when I furnish security subsequent to the said stipulated time, receive "the said sum of Rs. 2,000 without charging interest up to that time." It seems to me that nothing could be clearer than this, and it was evidently understood as creating a condition precedent by the plaintiff himself when he framed his plaint and stated that "to entitle the plaintiff to take "payment of the amount . . . . the vendees should beforehand be "furnished with an indemnity bond;" and he accordingly had such a bond drawn up and presented along with the plaint. I may further point out that the District Munsif certainly understood the condition as to the furnishing of security as a condition precedent, for he distinctly says so in paragraph 7 and again in paragraph 11 of his judgment, and the plaintiff never contested that view in his grounds of appeal or even in special appeal. He has not taken the ground he now seeks to press upon us even in the memorandum of objections to the finding of the Subordinate Judge. It was put forward for the first time in argument when he was unable to sustain the objections to the finding of fact and even then I understood him to ask not for an unconditional decree, but for a decree conditional upon his executing a proper security bond in accordance with the unaltered instrument. I am unable to see how he can get any such decree [151] in the present suit, except, perhaps, by consent. It is urged that if the plaintiff's suit is wholly dismissed he will be driven to fresh litigation. I do not think this necessarily follows, as the defendants—quite honestly so far as I can judge—have always professed themselves ready and willing to pay the money if a proper guarantee be executed. But even if this consequence did follow, I do not

think it ought to affect our judgment. We are not specially concerned to make the paths of forgery easy or relieve the plaintiff from the consequences of his criminal folly. I would, therefore, as originally contemplated by the late learned Chief Justice and Mr. Justice Benson, allow this second appeal and dismiss the plaintiff's suit with costs throughout.

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* [I think also that the documents sued upon should be impounded and forwarded, with other material papers, to the District Magistrate of Tanjore in order that he may consider the propriety of directing criminal proceedings.] *

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23 M. 151=2 Weir 335 & 747.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

QUEEN-EMPRESS *v.* CHINNA PAVUCHI AND OTHERS.**
[29th and 30th November, 1899.]

Evidence Act—Act I of 1872, *Section* 30—*Confession by one of several persons jointly tried for the same offence—Plea of guilty by person so confessing—Criminal Procedure Code—Act V of* 1898, *Section* 271—*Discretion to continue trial after plea of guilty.*

The trial of an accused person does not necessarily end if he pleads guilty. Under Section 271 of the Code of Criminal Procedure, where an accused pleads guilty, "the plea shall be recorded," and the accused "may be convicted" thereon; but evidence may be taken in sessions cases as if the plea had been one of "not guilty," and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration under Section 30 of the Indian Evidence Act, 1872, as against any other person who is being jointly tried with him for the same offence. A trial does not strictly end until the accused has been either convicted or acquitted or discharged.

[F., 12 Cr.L.J. 605=12 Ind. Cas. 981=15 P.R. 1911; **Appl.**, 23 A. 53 (54)=(1900) A.W.N. 192; R., 25 M. 61 (69)=3 Bom. L.R. 540=5 C.W.N. 866=28 I.A. 257=11 M.L.J. 233=8 Sar. P.C.J. 160; 10 M.L.J. 147 (160) (F.B.).]

[152] THREE persons being tried on a charge of murder, the (second and third accused gave information to the Magistrate which led to the discovery of jewels which had belonged to the deceased and had been worn by her immediately before the murder. The third accused then attempted to commit suicide and while in hospital made a full confession to the Taluk Magistrate, stating how the murder had been committed by himself and the first and second accused. On the following day, the second accused made a similar confession to the Taluk Magistrate. These confessions were repeated before another Magistrate who held the preliminary enquiry. Before the Sessions Court, the second accused adhered to his confessions and pleaded guilty, but the third accused retracted his, alleging that he

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* The paragraph within rectangular brackets form a part of the judgment, though omitted in the I.L.R.—ED.

** Referred Trial No. 55 of 1899 for confirmation of the sentences of death passed by G. F. T. Power, Sessions Judge of Tanjore, upon the prisoners in calendar case No. 75 of 1899, on the file of the Stationary Second-class Magistrate of Tanjore; and criminal appeals Nos. 702 to 704 of 1899 by the said prisoners.

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had been induced to make them by police torture. The trial of the second accused before the Sessions Court continued notwithstanding his plea of guilty. The first accused did not at any time confess, nor was any of the murdered woman's property traced to his possession. The Sessions Judge and the assessors, accepting the evidence of four prosecution witnesses and the two confessions, convicted all the three accused of murder and they were sentenced to death.

The accused appealed.

Subrahmania Sastri, for accused No. 1.—The confession of the second accused was wrongly relied on. Under Section 30 of the Evidence Act the Court may take into consideration the confession of one or more persons who are being tried jointly for the same offence, but here the second accused was no longer on his trial, he having pleaded guilty. See *Queen Empress* v. *Lakshmayya Pandaram*(1).

Kuppusami Ayyar, for accused Nos. 2 and 3.

Mr. *N. Subrahmanyam*, for the Crown.—Though an accused pleads guilty, his plea need not necessarily be accepted. If accepted, and he is convicted on his plea, possibly his trial ends and his evidence might not be receivable under Section 30 of the Evidence Act. But under Section 271 of the Code of Criminal Procedure it is in the discretion of the Court to convict on the plea or not, though it is imperative that the plea should be recorded. Here, the Sessions Judge recorded the plea, but the trial proceeded and the second accused actually cross-examined witnesses [153] and was still on his trial throughout. He was still therefore being jointly tried with the first accused and his confession was properly received in evidence as against first accused. If *Queen-Empress* v. *Lakshmayya Pandaram*(1) lays down that a trial necessarily comes to an end with a plea of guilty, it goes too far: and that is hown by the unreported case referred to in *Queen-Empress* v. *Pahuji* (2)s which latter case was relied on in *Queen-Empress* v. *Lakshmayya Pandaram* (1). But this question was not before the Court in *Queen-Empress* v. *Lakshmayya Pandaram*(1) as there the plea of the accused seems to have been in fact accepted and his trial ended.

JUDGMENT.

(After stating the facts* their Lordships continued).—It has been urged by the vakil for the first accused that the confessions of the second accused before the Magistrate and the Sessions Court, ought not to be considered as against the first accused, on the ground that when the second accused pleaded guilty before the Sessions Judge his trial must be taken to have terminated, and he was therefore no longer a person who was being "jointly tried" with the first accused, so as to fall within the rule laid down in Section 30 of the Indian Evidence Act. The rule is that "when more "persons than one are being tried jointly for the same offence and a con- "fession made by one of such persons affecting himself and some other of "such persons, is proved, the Court may take into consideration such

* As hereunder. ED. The following is the first portion of the judgment omitted in the I. L. R. It is given *in extenso* here, for facility of reference :—ED.

The appellants have been convicted of having murdered one Mariammal, on the 25th August 1899, and have been sentenced to death by the Sessions Judge, subject to confirmation by this Court.

(1) 22 M. 491. (2) 19 B.195.

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"confession as against such other person, as well as against the person "who makes such confession." The vakil for the first accused contends that the trial ends with the plea of guilty, and in support of this view he has referred us to the observation of Boddam, J., to that effect in *Queen-Empress* v. *Lakshmayya Pandaram* (1). The actual procedure adopted by the Magistrate in that case does not appear from the report, and the learned Judge upon the evidence found that the then appellant was not guilty. The observation relied on by the present appellant's vakil follows as an additional reason for acquitting the accused. If the learned Judge intended to lay down as a proposition of law that the trial of an accused person necessarily ends as soon as he pleads guilty, we could not agree with the proposition; for under the Criminal Procedure Code the Court is not bound to convict an accused person on his plea [154] of guilty. The Code (Section 271) only says that "the plea shall

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(1) 22 M. 491.

It is clearly proved that Mariammal went between 2 and 3 O'clock on the afternoon of the 25th August last to the palmyra tope of the 1st accused, Chinna Pavuchi. in order to bring thence some palmyra stems which he had promissed to supply to her husband. She did not return, but her dead body was found on the next day in the channel adjoining the tope. The marks of violence on the body and the medical evidence leave no doubt but that she was murdered. When she left her house she was wearing a considerable number of jewels but when her corpse was found these had all, with some trifling exceptions, been removed, and the lobes of the ears were lacerated. The 2nd accused Peraman is the owner of a palmyra tope adjoining that of the 1st accused. These accused and the 3rd accused Subramanian were arrested on suspicion a few days after the offence, and the 2nd and 3rd accused then desired to make confessions to the Taluq Magistrate, but he remanded them to custody in order to satisfy himself that the confessions were being made voluntarily. They then independently gave information to the Magistrate which led to the discovery of the bulk of the jewels which belonged to the deceased and which were worn by her immediately before her murder. Some of these jewels had been deposited by the 2nd and 3rd accused with two of the witnesses; and some were taken by the 3rd accused from the place where he had concealed them. These latter were found to be wrapped up in a piece torn from his own cloth. After giving up these jewels the 3rd accused attempted to commit suicide by throwing himself into a well, but he was rescued and immediately afterwards while in hospital made a full confession to the Taluk Magistrate stating how the murder had been committed by himself and the 1st and 2nd accused. On the following day the 2nd accused made a similar confession to the Taluk Magistrate. These confessions were repeated before another Magistrate, who held the preliminary enquiry. Before the Sessions Court the 2nd accused adhered to this confessions, but the 3rd accused retracted his confessions, stating that he was induced to make them by police torture. This statement of the 3rd accused is not supported by any evidence, and all the circumstances negative its truth. We have no doubt but that the confessions were voluntarily made and they appear to contain a substantially true account of how the murder was committed. There is also independent evidence, which will be noticed afterwards, that the 2nd and 3rd accused were at the scene of offence at about the time when it was committed. So far as these two accused are concerned, the case is a clear one, and there can be no reasonable doubt as to their guilt. The 1st accused has not at any time confessed, nor has any of the murdered woman's property been traced to his possession. Nevertheless we agree with the Sessions Judge and assessors that he also must be found guilty.

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The case, therefore, against the 1st accused stands thus:—The deceased went to the tope in connection with a matter pre-arranged by him, and which required his presence. The deceased is seen near his hut looking for him, and he is seen in the immediate neighbourhood going towards the hut in company with a man who is shown by his own confession, and otherwise, to have been one of those who murdered the woman in the tope. Within an hour or so afterwards the accused informs her relatives that the woman had not come to the tope at all, and no attempt has been made to explain this conduct on his part. On these facts alone we should consider the conviction justifiable, but the confessions of the other two accused, which we have already stated we regard as true render the guilt of the 1st accused free from all doubt.

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"be recorded, and he may be convicted thereon." As a matter of practice in Sessions trials—especially in murder cases—many Judges, as we think very properly, prefer not to act on the plea of guilty, but proceed to take the evidence just as if the plea had been one of not guilty, and decide the case upon the whole evidence, including the accused's plea. When this procedure is adopted it is obvious that the trial does not terminate with the plea of guilty, and this view is in accordance with the decision of the Bombay High Court in the case referred to and distinguished in *Queen-Empress* v. *Pahuji*(1), to which the learned Judge refers in *Queen-Empress* v. *Lakshmayya Pandaram*(2). Strictly speaking a trial does not come to an end until the accused has been either convicted or acquitted or discharged. The proper course therefore to be adopted when an accused person pleads guilty is either to convict him on his plea and remove him from the dock, in which case his trial would be manifestly at an end so as to warrant his being called as a witness for or against any persons who had been accused along with him; or else to allow the trial togo on as if the plea had been one of not guilty. When this is done it is clear that the trial does not end with the plea of guilty, and therefore any confession made by the person so pleading could be taken into consideration under Section 30 of the Indian Evidence Act as against any other person who was being jointly tried with him for the same offence.

The only case in which there may be a doubt is where neither of these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on the plea of guilty. In such a case we should be inclined to hold that it would not be fair to allow his confession to be considered as against his co-accused for that would be, in effect, to comply with the forms of justice while violating it in substance; compare *Reg* v. *Gardner* (3). It is not, however, necessary to pursue this subject further, for in the present case it is clear that the trial of the second accused continued, notwithstanding his plea of guilty. His vakil cross-examined the witnesses, the accused himself was examined in the [156] usual course at the end of the evidence for the prosecution, and the opinion of the assessors was taken as to his guilt. In these circumstances we have no doubt but that his confessions may be considered as against the first accused.

The result is that we agree with the Sessions Judge and the assessors in finding all the accused guilty of murder. We dismiss their appeals and confirm the sentences of death passed upon them by the Sessions Judge.

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(1) 19 B. 195. (2) 22 M. 491. (3) 9 Cox. Cr. C. 332.

23 M. 155=1 Weir 907.

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APPEL- LATE CRIMINAL.

23 M. 155= 1 Weir 907.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar (Officiating Chief Justice) and Mr. Justice O'Farrell.

QUEEN-EMPRESS *v.* SOMASUNDARAM CHETTI.*
[24th August and 14th and 19th September, 1899.]

Stamp Act—Act I of 1879, *Sections* 61, 67—*Defrauding Government of stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under Section* 61 *of Stamp Act* 1879—*Penal Code —Act XLV of* 1860, *Section* 40.

Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under Section 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the document became letters of guarantee and as such liable to stamp duty :

Held, that the execution of a document which on its face required to be and was not stamped, could not be said to be an act "contrivance or device not specially provided for by this Act or any other law for the time being in force"; and that punishment for the act of the executant of such a document, if it were punishable at all, was provided for under Section 61 of the Stamp Act, 1879, and it could not therefore be dealt with under Section 67. Also that the act of a person receiving [156] an unstamped document might amount to abetment of an offence, having regard to Section 61 of the Stamp Act, 1879, and to the definition of an "offence" in Section 40 of the Indian Penal Code, and if so, would be an act provided for by "any other law for the time being in force," and so not within the terms of Section 67 of the Stamp Act, 1879.

PETITIONER had been second accused in a charge, under Section 67 of the Stamp Act I of 1879, of defrauding Government of stamp revenue by illegal devices. The first accused in the case had written to the second accused two letters in which he recommended second accused to lend Rs. 400 and Rs. 500 to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made and second accused kept the letters, which were not stamped. At a subsequent enquiry, held in connection with the assessment of income-tax, the letters were produced and a prosecution ordered under Section 67 of the Stamp Act, I of 1879, for defrauding Government of its stamp duty by an illegal device. The accused were convicted and sentenced to pay fines of Rs 100 and 200, respectively, with terms of imprisonment in default of payment.

Against these convictions both accused appealed. The Sessions Judge allowed the appeal of the first accused, holding that his letters to second accused to give loans to certain persons and binding himself to make good the loans in a stated contingency could have no force against him, unless and until the loans were made. He referred to *Narayanasami Mudaliar* v. *Lokamabalammal* (1) as laying [157] down that "acceptance of the offer made in the letter was necessary before any

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* Criminal Revision Case No. 244 of 1899, under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the judgment of W. F. Graham, Sessions Judge of South Arcot, in Criminal Appeal No. 56 of 1898, confirming the finding and sentence of the Deputy Magistrate of Cuddalore in Calendar Case No. 19 of 1898.

23 M 156 N.=7 M.L.J. 220.

(1) Civil Revision Petition No. 247 of 1896 (unreported). Petition under Section 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate

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obligation could be said to arise." He found no proof that first accused knew that the loans had been made or that he was aware that an obligation had arisen in connection with the letters. With regard to second accused, the Sessions Judge held that inasmuch as he knew that the loans had been made it was his duty to call upon first accused to stamp the letters, which had become letters of guarantee. From his omission to do so and from the other circumstances which led to his prosecution the Sessions Judge held that second accused had wilfully acted fraudulently with interest to cause loss to Government. He dismissed the appeal by second accused and affirmed his conviction and sentence.

Against this order the second accused preferred this criminal revision petition.

Balamukunda Ayyar, for accused No. 2.—The letters written to the petitioner are mere proposals and not completed agreements and do not require to be stamped. *Dhondbhat Narharbhat* v. *Atmaram Moreshvar* (1) and *Narayanasami Mudalair* v. *Lokambalammal* (2). The terms of the document alone must be looked to and no external circumstances can be considered in determining whether it requires to be stamped. Nor can the letters be fairly described as devices or contrivances within the meaning of Section 67 of the Stamp Act merely because they are unstamped. Intent to defraud cannot be inferred from the failure to stamp a document. Section 61 expressly provides for the punishment of persons executing or signing a document chargeable with duty without the same being duly stamped, but the petitioner here did none of the acts referred to in that section. *Channamma* v. *Ayyanna*(3) was also referred to.

[158] Mr. *N. Subrahmanyam* for the Crown.—The documents contain promises to pay money, as the writer says that he will be responsible for

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Judge of Kumbakonam in small cause suit No. 78 of 1896. The suit was for the recovery of Rs. 225 borrowed from plaintiff by defendant's deceased husband on the following letter, which was conveyed to plaintiff by one Souriraja Mudaliar, referred to therein:—"(To plaintiff):—As I have to purchase the sembalai paddy which . . . . . has settled for me with . . . . in . . . , you will send Rs. 200 through Souriraja Mudaliar. I will send these two hundred rupees with interest according to mera rate at Rs. 2-1-4 per cent. per mensem, and have it credited in this letter on cadjan; and get it back. Should there be a delay in your sending, the bandy will return in vain. You will have to send without delay." This letter was signed by defendant's deceased husband. The Subordinate Judge dismissed the suit, which was not defended, on the ground that the letter was an unstamped promissory note containing terms similar to the document in *Channamma* v. *Ayyanna*, (16 M. 283), and inadmissible in evidence. The Court, (COLLINS C.J., and SHEPHARD, J.), on 29th January 1897, delivered the following JUDGMENT:—"There can be no doubt that in the letter the defendant's husband merely asked "for a loan of money. The letter does not amount to a promise, and no obliga-"tion would have arisen unless the addressee had consented to comply with the "request and to lend the money. Acceptance on the plaintiff's part of the offer "made in the letter was necessary before any obligation could be said to arise. "Whereas if the letter were equivalent to a promissory note, it would follow that on "mere proof of the writing and signature, the plaintiff would have been entitled to "recover. We cannot understand how such a letter can be construed as a promissory "note or how the request of the writer to send the letter back can make any difference. "The terms of the letter in *Channamma* v. *Ayyanna*, (I.L.R., 16 M. 283) are not "quite the same as they are in the present case. The case more closely resembles that "of *Dhondbhat Narharbhat* v. *Atmaram Moreshvar*, (I.L.R., 13 B. 669). We must "reverse the decree. There must be a decree for plaintiff for amount claimed with "interest and costs throughout." [F., 27 M. 1 = 14 M.L.J. 65; R., 23 M. 155.]

(1) 13 B. 669.
(2) Civil Revision Petition No. 247 of 1896 (unreported)—*vide ante* p. 156.
(3) 16 M. 283.

the repayment of the loan, when it is given. If the letters had been written in pursuance of a request by petitioner he would have been concerned in a contrivance or device coming within Section 67. The habitual practice by the petitioner of this contrivance which the Judge refers to would establish guilty intention under Section 67.

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JUDGMENT.

The petitioner is the recipient of a letter which requests that a loan may be granted to a certain person, and that when this is done the writer will be responsible for the amount of the loan, if the borrower does not repay it. Both the petitioner and the writer of the letter were prosecuted under Section 67 of the Stamp Act and convicted. On appeal the writer of the letter was acquitted by the Sessions Judge on the ground that no obligation had attached under the letter at the time it was written. The conviction of the petitioner was, however, upheld on the view that when the loan was granted the document became a letter of guarantee and therefore liable to stamp duty as an indemnity bond. In the view we take of the case, Section 67 of the Stamp Act has no application.

The execution of a document which on its face requires to be, and is not, stamped cannot be said to be an "act, contrivance or device not specially provided for by this Act or any other law for the time being in force."

There can be no device or contrivance if the document is what on its face it purports to be, and the act of the executant, if punishable at all, is provided for under Section 61 of the Stamp Act and cannot therefore fall under Section 67.

The act of the person receiving the unstamped document may amount to abetment of an offence, under Section 61 (see definition of 'offence,' Section 40, Indian Penal Code), and would then be "an act provided for by any other law for the time being in force"—*viz*, the Penal Code—and equally not within the terms of Section 67 of the Stamp Act.

We must therefore reverse the conviction and sentence and the order of the Sessions Court in appeal and direct that the fine if levied be refunded.

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23 M. 159 = 1 Weir 381.

[159] APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS *v.* PAPA SANI.* [31st August, 1899.]

Penal Code—Act XLV of 1860, *Section* 373—*Obtaining a girl under the age of* 16 *for purposes of prostitution—Evidence of intent.*

In a charge against a dancing girl under Section 373 of the Indian Penal Code, for having purchased a young girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other

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* Criminal Revision Case No. 298 of 1899, under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the judgment of T.M. Horsfall, Acting Sessions Judge of Bellary, in Criminal Appeal No. 39 of 1899, affirming the conviction of, and the sentence passed on, the petitioner in Calendar Case No. 11 of 1899 on the file of the Deputy Magistrate of Adoni.

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dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under Section 373 of the Indian Penal Code:

Held, that there was evidence before the Court to support the conviction.

[R., 23 A. 124 (126) = (1901) A.W.N. 16; 14 Cr.L.J. 33 (34) = 18 Ind.Cas. 257 = 24 M.L.J. 211 = 13 M.L.T. 131 = (1913) M.W.N. 207 (213).]

FIRST accused, a dancing girl, was charged before a Deputy Magistrate, under Section 373, for buying a girl of five years of age from her mother with the intention of using her or knowing it to be likely that she would be used for the purpose of prostitution. Second accused was charged with having abetted the said offence. The mother subsequently complained that she had given the child to first accused to be reared up for a family life but, finding that she was being reared for the purpose of prostitution, had demanded the return of the child, which was refused. The evidence showed that first accused paid Rs. 60 to the complainant and obtained the child from her in the house of the second accused, who was also present and settled the bargain and handed the money to the complainant. The further evidence was set out by the Deputy Magistrate as follows:—" From the evidence above alluded to and from the admission of the first accused, it is clear that she bought the girl from her mother for a consideration. The next and the most important [160] question for decision is with what intention was the purchase made. Although it may be notorious that the daughters of dancing girls or girls brought up by them when they have no children generally become dancing girls or prostitutes, still the law presumes their intention to be innocent till the contrary is proved, and requires evidence in each case that the intention or knowledge of the likelihood or probability of the girl obtained becoming a prostitute was present at the time of the transaction. This is not capable of direct proof and can only be inferred from the surrounding circumstances. Such evidence is available in this case. Prosecution fifth witness Venkaji Rao, a landholder and merchant of Adoni town, states that he knew the first accused from her infancy. One Hulugasani a dancing girl, had no children. She brought up four girls obtained from others and the first accused is the eldest of them. All the four girls became dancing girls or prostitutes. These facts are admitted by the first accused herself. The witness further states that there are forty dancing girls' houses in Adoni and that their chief source of income is prostitution. He adds that the dancing girls of this town who have no daughters of their own get girls from others and bring them up and eventually make them dancing girls or prostitutes and he gives several instances in this town of girls obtained and brought up having become prostitutes. He swears that there is no instance of girls brought up by dancing girls having been regularly married, and that the dancing girls derive good incomes by bringing up girls in preference to boys. He states also that the dancing girls commmit prostitution with those who pay them. Prosecution sixth witness Subbayya more or less corroborates the above witness. He adds that dancing girls when they get old obtain girls and bring them up to follow their profession and that good-looking girls are generally bought. He gives instances and says that the girls so brought up are never married. The first accused admits that she and three other girls were brought up as prostitutes by another prostitute and that she has no children nor has any of her foster-sisters

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any children. She is now forty years old and she says she carried on prostitution for about twenty-years. She wishes us to believe thet being disgusted she gave up her profession and took to money-lending by which she lives. She admits she bought, or, as her pleader would put it, obtained a girl for a consideration. She says she intended to obtain a boy in adoption and to get the [161] girl married to him, so that both of them might inherit her property. This is very laudable if true or probable." The defence was that the child had been obtained with the object that it should be brought up as a daughter. The Magistrate dealt with this as follows:—" She called seven witnesses for her defence. First defence witness, a woman from Bellary, says that first accused came and asked her to give to her, her sister's grandson, but that his father refused to give. Second defence witness is called to support her. Fourth defence witness says he was asked by the first accused to give to her his concubine's son but he did not. Fifth defence witness was asked to give up his nephew, but he did not. These are people of no position and can be got for nothing. Second and third defence witnesses say that some girls brought up a boy and got him married. Seventh defence witness is the first accused's foster-sister and is called to prove that she has confined herself to one man. Even if we take all the defence to be true, it does not prove much. . . . Although first accused was defended by three pleaders they were not able to prove or point out one single instance of a girl brought up by a dancing girl having been regularly married. On the contrary fifth and sixth prosecution witnesses say that there were no such instances but there have been many instances of girls so brought up having become prostitutes. From a careful consideration of the foregoing facts the Court has no hesitation in finding that first accused bought the girl with intent that she shall be used for the purpose of prostitution or knowing it to be likely that she would be so used." He also found the second accused guilty of abetment, and sentenced both accused to be kept in simple imprisonment till the rising of the Court, and imposed a fine of Rs. 200 on first accused, and of Rs. 50 on second accused, with three months' rigorous imprisonment in default in each case.

Against these convictions both accused appealed on the ground that the accused should not have been convicted on the evidence of the habits prevailing amongst other dancing girls, and that the intent necessary to constitute an offence under Section 373 of the Indian Penal Code had not been proved. On this point the Sessions Judge said:—" The sole question for determination in appeal is whether appellant intended at the time of purchase to use the girl eventually, but during minority, as a prostitute, or knowing it to be likely that she would be so used; or whether she bought her intending to adopt her and get her respectably married. . .

[162] I was referred to a dictum of Muttusami Ayyar, J., in *Queen-Empress* v. *Ramanna* (1) to show that dancing girls do occasionally adopt *bona fide*. The argument is unsound. It is both common sense and law that in such cases the rare exception in the matter of intention must be affirmatively proved by those who assert it (see Evidence Act, Section 106). And, in a similar and recent case, the Calcutta High Court has laid it down that once the prosecution has proved a probability of future prostitution during minority, it is for the defendant to show that defendant's intention was exceptional and different; *Deputy Legal Remembrancer* v. *Karuna Baistobi* (2). In the present case the *prima facie* likelihood of

(1) 12 M. 273.

(2) 22 C. 164.

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prostitution (and more is not required for conviction under Section 373 of the Indian Penal Code) was very great indeed; and that likelihood must have been present in the minds of all parties to the bargain. The child is smart and pretty; it was sold for a sum which to its disreputable beggar mother must have seemed very large; it was sold to a prostitute who herself had been brought up from her childhood to be a prostitute; there is nothing to show that appellant has any special means or property so as to make it worth her while to adopt a girl to inherit that property. . . . And no case is proved that in Adoni or Bellary a girl so purchased was ever brought up respectably. This is a very strong *prima facie* case for the prosecution, and the evidence put forward to rebut it is worthless. I have no doubt that the girl was bought in order to be trained up to follow appellant's profession." He dismissed the appeals and characterised the sentences as extraordinarily lenient.

Notices were served on both accused to show cause why their sentences should not be enhanced; and first accused presented this criminal revision petition against the conviction.

Mr. *R. F. Grant*, for first accused, contended the evidence of intent was insufficient to support the conviction. Under Section 373, the intention of the accused must be proved, and the evidence of the customs of other dancing girls was no evidence of such intention. He referred to *Queen-Empress* v. *Ramanna* (1) in which Mr. Justice Muttusami Ayyar pointed out that it would be no offence if the intention were that the girl should be brought up as a daughter, and that when she attained her age she should be allowed **[163]** to select either to marry or follow the profession of her prostitute mother. He also cited *Venku* v. *Mahalinga* (2), as showing that intention is a question of fact and law and must be made out properly, and referred to *Deputy Legal Remembrancer* v. *Karuna Baistobi* (3).

Mr. *D. Chamier*, for second accused.

Mr. *N. Subrahmaniam*, in support of the conviction and of the application for enhancement.

JUDGMENT.

We are of opinion that there was legal evidence before the Courts sufficient to justify the conviction. It is proved by the purohit of the first accused, who has known her since infancy, that the first accused was herself in her infancy acquired by a dancing girl, was brought up to become and became a dancing girl, that it is the practice among dancing girls to acquire children for the purpose of bringing them up as dancing girls, and that there is no case known to him of a girl so acquired being married. The first accused lived the life of a dancing girl for twenty years and she gave a large sum of money, *viz.*, Rs. 60 for this girl at the age of five years, who is said to be good-looking. There is no suggestion that the first accused acquired the girl for the purpose of adopting her. In these circumstances it seems difficult to arrive at any conclusion other than that arrived at by the Courts below. We must therefore dismiss the criminal revision petition.

The Courts below, however, whilst convicting the accused, the first accused of purchasing and the second of abetting her in purchasing this child for immoral purposes, inflicted only a nominal sentence of imprisonment of one day upon each, but fined the first accused Rs. 200 and the

(1) 12 M. 273. (2) 11 M. 393. (3) 22 C. 164.

second accused Rs. 50. We think these sentences are wholly inadequate and should be enhanced.

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The crime is a very bad one and should be dealt with as such. In this case, however, for the reasons given by the Lower Courts, that hitherto among dancing girls it has not been considered wrong, much less a crime, we do not think it necessary to do more than increase the term of imprisonment given by the Lower Court from one day in the case of the first accused to six months' rigorous imprisonment, and in the case of the second accused to three months' rigorous imprisonment and we vary the sentences accordingly. The fines remain.

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23 M. 164.

[164] APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice), Mr. Justice Moore and Mr. Justice O'Farrell.

PERUMAL (*Accused*), *Petitioner v.* MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS (*Complainants*), *Counter-petitioners.**
[24th and 30th August and 4th and 12th September 1899.]

City of Madras Municipal Act (Madras)—Act I of 1884, *Section* 307—*Prohibition against depositing stable refuse in a street—Deposit of stable refuse in a dust bin—Liability of person so depositing.*

By the first clause of Section 307 of the City of Madras Municipal Act, 1884, the president of the municipality "shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust, dirt, ashes, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which shall be removed by the owner thereof." By the second clause of the same section "whoever, after such provision has been made, deposits any of the said matters or any building, stable or garden refuse in any street, pavement or verandah of any building" . . . . . is rendered liable to fine. Petitioner having deposited stable refuse in one of the dust-bins provided in accordance with the Act was charged before a Magistrate and fined under the latter clause of the said section :

Held, that the dust-bin was not a part of the street and that the throwing of stable-refuse into the dust-bin was not a deposit of such refuse in the street so as to constitute an offence under the said section.

PETITIONER was charged, at the Presidency Magistrate's Court, Black Town, Madras, with having deposited stable refuse in a dust-bin in a street in the municipality, contrary to Section 307 of the City of Madras Municipal Act I of 1884 (Madras). He admitted having thrown the stable refuse into the dust-bin, but contended that it was not an offence within the meaning of the section. The Magistrate held that as stable refuse was not inoffensive matter a person throwing it into a dust-bin would be liable. He convicted the petitioner and imposed a nominal fine.

The accused preferred this petition.

Virabhadra Mudaliar, for the petitioner.

Mr. *Allan Daly*, for the complainants.

[The arguments appear from the judgments.]

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* Criminal Revision Case No. 176 of 1899, under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the order of Sultan Mohidin Sahib, Presidency Magistrate, Black Town, Madras, in calendar case No. 7159 of 1899.

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JUDGMENT.

[165] Subrahmania Ayyar, Offg. C.J.—In this case the petitioner was convicted by the Magistrate under Section 307 of the City of Madras Municipal Act (I of 1884) for having deposited stable refuse in a Municipal dust-bin in a street. The section runs as follows:—

"The President shall provide in the streets of the city suitable and "sufficient dust-bins for the temporary deposit of dust, dirt, ashes, kitchen "refuse and other inoffensive matter excepting building, stable and garden "refuse, which shall be removed by the owner thereof."

"Whoever, after such provision has been made, deposits any of the "said matters or any building, stable or garden refuse in any street, pave-"ment or verandah of any building, on any ground between the building "and the street or on any public quay, jetty or landing-place or on any "part of a river bank, whether above or below high-water mark, or on any "part of any private premises or land without the consent of the owner "or occupier thereof shall be liable to a fine not exceeding rupees ten for "each offence."

On behalf of the petitioner it was contended that the act complained of is not punishable under the section and the argument in support of that contention was this:—To bring the present case within the language of the second paragraph quoted above, the word 'street' there should be understood to be inclusive of the parts thereof which are occupied by dust-bins. If that construction be adopted, a deposit in a dust-bin of even dust, dirt, ashes or kitchen refuse must be treated as an offence. But that must be absurd since the deposit of such matter in a dust-bin is distinctly authorised by the first paragraph. Therefore the term 'street' in the second paragraph should be taken to be exclusive of the sites of dust-bins and it follows that somehow the Legislature failed to impose a penalty on persons who deposit stable refuse in dust-bins.

Now, according to the first paragraph of the section, building, garden or stable refuse is, by clear implication, prohibited from being deposited in dust-bins. And the clause "the President shall provide in the streets of the city suitable and sufficient dust-bins," makes it clear that, so far as that paragraph goes, 'street' does include even those parts in which dust-bins may be erected. How can the same term, in the next paragraph, be, in the absence of indubitable indications to the contrary, taken in a different sense? Nor does the view that 'street' means the same thing in both the [166] paragraphs necessarily involve the absurdity sought to be imputed to the Legislature. For, if the paragraphs are read together, as they undoubtedly must be, the meaning, so far as we are here concerned, is exactly what it would be, had the Legislature, out of abundant caution, inserted after the words 'said matters' in paragraph 2, the clause 'save as aforesaid' or words to that effect. And the meaning is any person, who deposits dust, dirt, ashes, kitchen refuse or other inoffensive matter, not being building, stable or garden refuse, in a street except in a dust-bin and a person who deposits building, stable, or garden refuse in any part of a street inclusive of the sites of dust-bins shall be liable to the prescribed penalty.

This seems to be the proper view to take having regard to the principle laid down by the Judicial Committee in "*The Gauntlet* (1)" where their Lordships observe.—

(1) L. R. 4 P. C. 184 at p. 191.

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"No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

I would, therefore, dismiss the petition."

O'FARRELL, J.—The petitioner has been convicted under Section 307 of the Act (I of 1884) and Mr. Daly, who appears for the municipality, admits that if that section does not apply, there is no other that does. Mr. Daly also admits, what appears to have been doubted by the Magistrate, that stable refuse is, within the terms of the section, inoffensive matter. We have then to see whether [167] the deposit of 'building, stable or garden refuse' in a dust-bin, primarily intended for 'dust, dirt, ashes kitchen refuse and other inoffensive matter' is an offence within the terms of the second clause of the section. Now it appears to me that no one reading the second clause by itself would be likely to contend that it was, and that the view which is put forward by the municipality is based upon the prohibition supposed to be implied in the concluding words of the first clause. It is then sought to make out that to deposit stable refuse in a dust-bin standing in a street, or on any ground between a building and a street, is the same thing as to deposit it in the street or on the ground. This appears to me to be an entirely non-natural use of language which in itself is simple and plain. It is open also to the fatal objection, in my opinion, that the section makes no distinction between the deposit of the different kinds of matters, and that if it is an offence to deposit stable refuse in a dust-bin, it is equally an offence to deposit therein 'dust, dirt, ashes or kitchen refuse'—the very things for which the dust-bin is provided. It appears to me impossible to avoid this absurd conclusion except on the supposition that 'ground' or 'street' means one thing when used in connection with 'dust, dirt, ashes, &c.,' and another thing when applied to 'garden or stable refuse.' This method of interpretation appears to me to be extremely forced, and I think the only other conclusion possible is that the deposit of stable manure, &c., in a dust-bin is not intended to be made an offence by this section of the Act. The conclusion is strengthened by a comparison of the wording of Section 312, where the deposit, in a receptacle for night-soil, of other matter is made an offence in language which is plain and unambiguous. There is no reason why similar language should not have been used in Section 307 if it was intended to make the act now under consideration an offence. It appears to me that what the former part of the section (307) primarily had in view was not to create offences, but to define the duties of the President, and that the concluding words 'excepting building, stable and garden refuse, which shall be removed by the owner thereof' were inserted to make it clear that it was no part of the duty of the President to provide receptacles for the temporary deposit

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of such refuse. I may also, I think, point out that the deposit of stable or garden refuse in a street or other public place, where it may be carried about by the wind or washed by rain into drains or sewers (compare Section 317) is a more serious matter **[168]** than depositing it in a receptacle not properly intended for it. The latter act can do no great harm. It may have been some such considerations as those which induced the Legislature not to make the act an offence. However this may be, I am of opinion that the case, whether by accident or intention, has not been provided for, and I would allow the petition, set aside the conviction and direct that the fine levied be refunded.

[Under Section 439, paragraph i, Criminal Procedure Code, the case was laid before Mr. Justice Moore, and his Lordship heard it and, after taking time for consideration, delivered the following judgment] :—

JUDGMENT (FINAL.)

The question for decision is as to whether a person who deposits stable refuse in a municipal dust-bin erected in a street can be convicted of an offence under the latter clause of Section 307 of Madras Act I of 1884. The former clause of this section provides that the president of the municipality shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust, dirt, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which, it is directed, shall be removed by the owner thereof. The present petitioner has been convicted by a Magistrate under the latter clause of this section because he deposited stable refuse in a municipal dust-bin. That clause, however, does not relate to the deposit in a dust-bin of matter not allowed to be thrown there, but merely renders it penal to deposit any of the matters for the receipt of which the President is bound to erect dust-bins as well as building, stable and garden refuse in any street, pavement or verandah of any building or in certain other places there mentioned among which dust-bins are not specified. It is, however, now urged in support of the conviction that it should be held that a dust-bin is a part of the street and that such being the case any one who throws stable refuse into a dust-bin should be considered to have deposited such refuse in the street. To read the section in this manner would, in my opinion, be to strain its language in a somewhat violent manner. It is further perfectly clear that the Legislature cannot have intended that such an interpretation should be put on this clause for, if this were done, it would be illegal to deposit in a street dust-bin not only stable refuse, &c., but also dust, ashes, &c.' *i.e.*, the very articles for the reception of which the bins are ordered to be provided. Section 308, Clause 2, of the Act makes it an **[169]** offence to deposit any offensive matter in a dust-bin, but has no similar provision with regard to inoffensive matter of any description and the first clause of Section 307 lays down that, in so far at all events as these sections of the Act are concerned, stable refuse is inoffensive matter. For these reasons, I agree with O'Farrell, J., in the decision arrived at by him and would accordingly direct that the conviction of the petitioner be set aside and that the fine imposed on him, if it has been collected, be refunded.

[Under Sections 439 and 429, Criminal Procedure Code, the Judgment of Mr. Justice Moore prevailed and operated as the decision of the Court.]

Messrs. *Barclay, Orr & David*—Attorneys for the complainants.

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APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice Benson.

VENKATARAMA AYYAR (*Petitioner and Plaintiff*), *Appellant v.* MADALAI AMMAL (*Counter-petitioner and Defendant*), *Respondent.**
[16th February, 1900.]

Letters Patent, Section 15—Appeal from order of refusal to send for records—Dismissal on ground that no appeal lies.

An order refusing to send for the record on a petition filed under Section 25 of the Provincial Small Cause Courts Act, 1887, is not a judgment, and no appeal lies therefrom.

[F., 26 M. 437; R., 30 M. 311=17 M.L.J. 123=2 M.L.T. 84.]

PETITION presented under Section 25 of the Provincial Small Cause Courts Act IX of 1887, praying the High Court to revise the judgment of the District Munsif of Valangiman dismissing small cause suit No. 42 of 1899, in which petitioner had claimed Rs. 22-8-0 in respect of cist paid by him for lands in defendant's [170] enjoyment on usufructuary mortgage together with interest. The petition coming on for orders as to admission, Mr. Justice Moore on 26th July 1899, passed the following.

ORDER :—"There are no grounds for interference. The petition is rejected."

From the above order, the petitioner preferred this appeal under Section 15 of the Letters Patent.

Sivasami Ayyar, for appellant.

Sundara Ayyar, for respondent.

JUDGMENT.

This is an appeal from an order of a Judge refusing to send for the record on a petition put in under Section 25 of Act IX of 1887. A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies.

It has been held by this Court that in such a case there is no right of appeal, on the ground that the order appealed against is not a judgment within the meaning of Section 15 of the Letters Patent (see *Gurappa* v. *Venkatanarasimha Bhupala Bhallerow* (1)).

We agree with this decision and with the grounds on which it is based. The appeal is dismissed with costs.

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* Appeal No. 17 of 1899 under Letters Patent, Section 15, presented against the order of Mr. Justice Moore in civil revision petition No. 162 of 1899 (in small cause suit No. 42 of 1899 on the file of the District Munsif of Valangiman).

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(1) Letters Patent Appeal No. 23 of 1898, decided on 9th February 1899 :—Suit to recover balance of cist. The answer put in by defendants alleged that the terms of the cowle said to have been tendered by plaintiff were not acceptable The clauses related to the cultivation of new lands, to payment of wet-rates of assessment if dry lands should be cultivated with tank water, and to payment of interest. The District Munsif held all the three clauses to be proper. On a civil revision petition being presented against this decision under Section 25 of Act IX of 1887, the Court (SHEPHARD, OFFG. C.J.) passed the following ORDER :—"I do not think that any of the three

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[171] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

SUBBARAYA PILLAI (*Plaintiff*), *Appellant v.*
RAMASAMI PILLAI AND ANOTHER (*Defendants*), *Respondents.**
[3rd November and 19th December, 1899.]

Hindu Law—Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit—Caste Disabilities Removal Act—Act XXI of 1850, *Section* 1.

The step-son of a deceased Hindu widow sued as her heir for possession of certain property. The defence was that the widow had deserted her husband in his lifetime and lived a life of unchastity and that the plaintiff's right of inheritance was in consequence destroyed.

Held, that assuming the widow to have been guilty of unchastity and to have been actually degraded for it, plaintiff's right to inherit her property in the absence of nearer heirs could not be affected by such degradation.

Held also, that though Act XXI of 1850 gives relief against the forfeiture of rights of persons deprived of caste on other grounds besides that of renouncing or being excluded from the Hindu religion, it does not restore to an outcaste all the rights which he, as a casteman, could have civilly enforced ; nor does it contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste ; nor does it interfere with the forfeiture of such a right, as *e g.*, to participate with other members of a caste, in the benefits of a religious institution appropriated to the members of the caste or to participate jointly with fellow castemen in the benefit of a caste institution ; nor can it apply where the question is not as to the rights of a degraded person, but as to who is entitled to the property of a degraded person. *Kery Kolitany* v. *Moneeram Kolita* (13 B.L.R., 1) referred to.

Held, further, that though under the Hindu Law, a loss of caste by expulsion for specified reasons causes forfeiture of rights, it has never broken the relationship of the person expelled to those who remain within the caste, degradation having merely the effect of rendering the tie of kindred but dormant ; and *e.g.*, the degradation of either spouse does not dissolve the tie of marriage. It is impossible to construct out of the smritis and commentaries a consistent doctrine of "civil death" or "fiction of death."

Prostitution does not sever the legal relation, and therefore the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. Nor does a wife's adultery, unattended by degradation, dissolve the marriage ; *In re Kamineymoney Bewah*, (21 C. 697), referred to.

Held, therefore, that the step son was entitled to inherit the property, as sapinda of the widow's late husband in the absence of nearer heirs.

[Diss., 10 C.W.N. 1085 ; 4 N.L.R. 37 : N.F., 38 C. 493 (499) = 15 C.W.N. 807 = 9 Ind. Cas. 657 ; F., 29 A. 4 = 3 A.L.J. 537 = A.W.N. (1906) 243 ; R., 26 M. 509 ; 31 M. 100 = 18 M.L.J. 70 = 2 M.L.T. 533 ; 17 C.L.J. 438 (456) = 17 C.W.N. 679 (693); 24 M.L.J. 223 (227) = 13 M.L.T. 88.]

"clauses mentioned are objectionable. There is nothing vague in them. The higher "rate of rent is ascertainable. There is nothing unreasonable in requiring that crops "shall not be removed. The petition is rejected." Against this order defendants presented an appeal under Section 15 of the Letters Patent, which came on for hearing before COLLINS, C.J., and BENSON, J., who, on the date referred to, delivered the following JUDGMENT:—"The order of the learned Judge refusing to send for the re- "cord on a petition put in under Section 25 of Act IX of 1887, is not a 'judgment' "within the meaning of the Letters Patent. There is therefore no appeal against the "order of the learned Judge. We dismiss this appeal with costs."

* Second Appeal No. 1531 of 1898 against the decree of Ll. E. Buckley, Acting District Judge of Tanjore, in appeal suit No. 22 of 1898, reversing the decree of K. Krishnama Chariar, District Munsif of Kumbakonam, in original suit No. 453 of 1895.

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[172] SUIT to recover possession with mesne profits of certain property alleged to have belonged to plaintiff's deceased step-mother, Virayi, one of whose heirs plaintiff claimed to be. The other heir was impleaded as second defendant. The first defendant contended, *inter alia*, that Virayi had deserted her husband, Sami, within two years of her marriage and had lived an unchaste life and that in consequence plaintiff's right of inheritance was destroyed. The District Munsif found that the property in dispute was that of Virayi. He also found that plaintiff and second defendant were legitimate sons of Sami, and the heirs of Virayi. He said:—"In the beginning, I felt some doubt in the matter, having regard to the fact that Virayi abandoned her husband, went beyond the seas, and purchased the plaint properties subsequently with money she acquired there. But on a reference to the law on the subject, I am of opinion that the abandonment by Virayi of her husband, and even her subsequent unchastity, granting for the sake of argument that she was unchaste as alleged by the first defendant in his examination as plaintiff's fourth witness, cannot affect the plaintiff's and second defendant's right of inheritance to her. There is no allegation of any divorce between Virayi and her husband at any time, nor even an allegation of a custom of divorce in the caste to which Virayi belonged. Consequently, the relationship created between Virayi and her husband and his relations, by means of Virayi's marriage to her husband, Sami Pillai, never ceased, and first plaintiff and second defendant are none the less her step-sons, because of her abandonment of her husband." He decreed in plaintiff's favour for possession and for mesne profits as prayed.

On appeal, the District Judge said:—"This appeal is based on . . . . the ground that the plaintiff has no right to succeed to the property of his step-mother, acquired after she had left her husband to live an unchaste life. Reliance is placed on *Sivasangu v. Minal* (1) *and In the goods of Kamineymoney Bewah* (2). The first case is not decisive with regard to the present case. Here the plaintiff is the step-son of the deceased, and the only claimant to her property. In the Madras case quoted there was competition between the degraded and undegraded descendants of a degraded woman, and in that case it was held that the degraded descendants [173] had superior claims to the undegraded. The Calcutta decision declared the severance of the tie of kindred between the degraded and undegraded members of a Hindu family. It was also held that if this principle is held to apply as between a degraded woman and the members of her own natural family, it would seem to apply with even greater force as between her and the members of her husband's family. In that case a man was held to have no right to succeed to his degraded aunt. Following the Calcutta ruling, which corresponds more nearly to the present case, I hold that the plaintiff is not entitled to succeed to his step-mother's property." He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal.

Rama Rao for appellant.

Panchapagesa Sastri, for respondent No. 1.

JUDGMENT.

The plaintiff sued for the property in dispute alleging that it belonged to one Virayi, a wife of Sami, and that he and the second defendant as the sons of Sami, are entitled to it. The first defendant contended that

(1) 12 M. 277. (2) 21 C. 697.

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the property was his own and that even if the property were Virayi's and the plaintiff and the second defendant, the sons of Sami, the suit must fail as Virayi deserted her husband and lived in adultery.

The District Munsif having found that the property belonged to Virayi and that the plaintiff and the second defendant are Sami's sons, directed the first defendant to surrender it to the plaintiff and the second defendant. He however, expressed no opinion upon the question whether Virayiled an unchaste life as he considered that such a life on her part could not, by itself, put an end, under the Hindu Law, to the relation of husband and wife between Sami and Virayi. The District Judge apparently accepted the Munsif's finding that the property belonged to Virayi and that the plaintiff and the second defendant are Sami's sons. Novertheless he reversed the Munsif's decree and dismissed the suit on the authority of *In the goods of Kamineymoney Bewah* (1) where Sale, J., held that when a woman becomes degraded and an outcaste the tie of kindred ceases between her and her natural family and *a fortiori* between her and the members of her husband's family. Even if this view of the law be correct it is clear the District Judge should not have applied the rule in the present [174] case without arriving at a finding as to whether Virayi was guilty of adultery and on that ground was degraded. But the Judge records no finding on either point. It is, however, unnecessary to call for findings in regard to these questions of fact, since assuming that Virayi was actually degraded for adultery, the plaintiff's right to inherit her property in the absence of nearer heirs, could not, in the view we take of the law, be held to be affected by such degradation.

On appeal before us, it has been argued on behalf of the appellant that whether Virayi deserted Sami and led an unchaste life or her unchastity was followed by her being put out of caste, the tie of kindred existing between him and his step-mother did not cease under the Hindu Law and even if it did cease, Act XXI of 1850 cured the defect and the appellant is entitled to the property. It was, however, urged on behalf of the respondent, relying on *Sivasangu* v. *Minal* (2), *Narasanna* v. *Gangu* (3) and *In the goods of Kamineymoney Bewah* (1), that unchastity caused degradation and put an end to the tie of kindred and that Act XXI of 1850 could not help the appellant as that Act is applicable only to cases of out-castes who are so on account of change of religion.

Before we proceed further it would be convenient to determine to what cases Act XXI of 1850 applies and to what extent that Act has affected Hindu Law. Now, there is no reason to suppose that, in the face of the clear and unmistakable language of the Act, it was intended to prevent the forfeiture of rights of only those who are put out of caste on account of their renouncing, or being excluded from, the Hindu religion. Though in favour of this view there is the solitary opinion of Mitter, J., in *Kero Kolitany* v. *Moneeram Kolita* (4) yet the preponderance of authority is in favour of the conclusion that the Act relieves the forfeiture of rights of those who are deprived of caste on other grounds as well. In *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (5), Sir Barnes Peacock, C.J., with whom Macpherson, J., concurred, went very fully into the question of the construction of the Act and following the decision of Sir Lawrence Peel in *Doe d Saummoney Dossee* v. *Nemy Churn Doss* (6) but dissenting from

(1) 21 C. 697. (2) 12 M. 277. (3) 13 M. 133.
(4) 13 B.L.R. 1. (5) 5 B.L.R. 466 (493.) (6) 2 T.&. B, 200.

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Rajkoonwaree Dassee [175] v. *Golabee Dassee* (1) arrived at the conclusion that the Act "was an enactment that in suits between Hindus loss of property by deprivation of caste should not be enforced." In the North-West Provinces the above case was followed in *Bhujjun Lal* v. *Gya Pershad* (2) and in another case also *Taij Singh* v. *Musst. Kousilla* (3) the same construction was put. In the Bombay case, *Parvati* v. *Bhiku*(4), Westropp, J., in consultation with the other Judges of the Court decided that by Act XXI of 1850 deprivation of caste was no longer capable of working a forfeiture of any right or property or affecting any right of inheritance whatever may be the cause. The same view was reiterated in *Honamma* v. *Timannabhat* (5). Turning to our own Presidency, a view as to the meaning of the Act similar to that taken elsewhere has been more or less explicitly adopted. As pointed out by Sir Barnes Peacock in the case already cited, the observation of Sir C. Scotland in *Pandaiya Telaver* v. *Puli Telaver* (6) implies that he was inclined to construe Act XXI of 1850 as Sir Barnes Peacock did. In *Karuthedatta* v. *Mele Pullakkat Vasudavan Nambudri* (7) Holloway and Collett, JJ., held that a Nambudri who had been put out of caste for adultery did not, in consequence of the Act XXI of 1850, lose his right to deal with, hold or inherit property. Nor is there good foundation for the suggestion that the Legislature could not have intended by Act XXI of 1850 to provide for other than degradation on the ground of change of religion if we remember what the kinds of acts were at the time of the passing of the Act for which a person might be put out of caste and which, if strictly enforced, might be made the ground of forfeiture of right though such a result might have been avoided by a counter-balancing and elaborate system of expiation provided by the law. Now the acts which under the Hindu Law would have rendered a person 'pathitha,' 'fallen' or 'degraded,' were by no means few. And even such among these as would exclude the 'pathitha' from inheritance consisted not of heinous offences and sins only, but also of such as would hardly be considered in the present state of society as deserving forfeiture of rights. To take an illustration. Among the 'mahapathakas' on account of which an out-caste may be [176] excluded is 'surapana' or drinking liquor. Can it be held, will it even be tolerated that, because a person drinks liquor, his property is forfeited to him? Indeed, such a system must be, as a writer observes, "altogether impracticable in any conceivable state of society." No wonder, therefore, that even before the advent of the British rule, Hindu society was silently freeing itself from the trammels of this peculiar branch of the law as will be seen from Sri Krishna Tarkalankara's observation on the term 'fallen' quoted in page 426 of the Tagore Lectures of 1884-85. These observations clearly suggest, as pointed out by the learned author of the lectures, that the loss of proprietary rights had become almost obsolete even in the days of that commentator on the Dayabhaga.

Having thus determined to what persons the Act is applicable, we have to consider how and to what extent the Act has affected the Hindu Law applicable to those persons. Now, under the Hindu Law a person who lost caste by being expelled therefrom for specified reasons, forfeited whatever rights he might have had if he had remained in caste. That loss of caste created in him a disability to enjoy the rights incident to his relationship

(1) (1858) S D A. 1891 (1895).
(2) 2 N.W.P.H.C.R. 446.
(3) 1 Agra H.C.R. 90.
(4) 4 B.H.C.R.A.C. 25.
(5) 1 B. 559.
(6) 1 M.H.C.R. 478 (482).
(7) 1 Ind. Jur. N.S. 236.

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with those who remain within the caste. But it never broke that relationship. Whether the relationship be one of husband and wife or any other, it was too sacred to be dissolved, be the disabilities imposed on the outcaste few or many as may be inferred from *Bisheshur* v. *Mata Gholam* (1), *Queen-Empress* v. *Marimuttu* (2) and *Administrator-General of Madras* v. *Anandachari* (3) which show that the degradation of either spouse does not dissolve the marriage. And the circumstance that in general it is open to an outcaste, on his undergoing expiation, to resume his former position strongly points to the view that degradation had the effect of rendering the tie of kindred but dormant. It is almost impossible to construct out of the smritis and commentaries a consistent doctrine of 'civil death' or as it has been called fiction of death. Now, turning to the language of the Act itself, it clearly indicates that all that the Legislature intended to do was only to remove some of the disabilities which pre-existed under Hindu Law. Here we must not be understood as laying down that the Act places the outcaste in every respect in the position which he would occupy if he had not been put out of caste or restores to him all the rights which he **[177]** as a casteman could have civilly enforced. It does not contemplate the restoration of privileges, the granting of which would amount to an interference with the autonomy of caste. Nor does it interfere with the forfeiture of rights such as were in question in *Venkatachalapati* v. *Subbarayadu* (4) and in *Krishnasami* v. *Virasami* (5). As was pointed out by Muttusami Ayyar, J., in the former case "a right consisting in the participation along with other members of a caste in the benefits of a religious institution appropriated to the members of the caste is not within their (Acts XXI of 1850 and XV of 1856) purview."

Such being the construction of the Act it is obvious that the Act is inapplicable to cases like the present where, instead of a degraded person's right being in question, we have to ascertain who is entitled to the property of a degraded person. As to the Hindu Law itself that does not, so far as we are aware, prescribe any special rule of succession to the property of an outcaste; nor does it expressly assert or deny the right of an undegraded person to succeed to the property of a degraded person to whom the former might have been unquestionably the heir but for the degradation of the latter. In these circumstances, where there is no usage regulating the devolution of the property of a degraded person who is within the pale of Hinduism as in the case of dancing girls, the only rules of inheritance that the Courts can with propriety fall back upon are those of the Hindu Law. And in applying so much thereof as without incongruity could be applied either with reference to those connected with the degraded person after his degradation or in their absence to those remaining undegraded, the Courts would at all events be administering those rules as rules of equity and good conscience which are the guide in cases not otherwise provided for.

Let us now turn to the case on hand where we have supposed a married woman to have been degraded on the particular ground of adultery. Under the Hindu Law, adultery unexpiated by penance formed a valid ground for expelling the married woman from caste. But the loss of caste, as may be seen from the cases already referred to, did not dissolve the

(1) 2 N.W.P. H.C.R. 300. (2) 4 M. 243. (3) 9 M. 466.
(4) 13 M. 293 (299). (5) 10 M. 133.

matrimonial tie. No doubt in *Sivasangu* v. *Minal* (1), *Narasanna* v. *Gangu* (2) and *In* **[178]** *the goods of Kamineymoney Bewah*(3) which is more to the point, it was said that prostitution severed the legal relation. But we are unable to agree in this statement, though we think that the decision itself, that when there is a competition between a degraded person and an undegraded person to the property of a degraded person, the degraded person has the preferential right, may be supported on equitable principles referred to above.

Therefore the broad proposition that degradation of a woman in consequence of her unchastity entails in the eye of the law cessation of the tie of kindred between her and the members of her natural family and also between her and the members of her husband's family does not appear to be sustainable. Equally unsustainable is the contention that a wife's adultery unattended by degradation does, by itself, dissolve the marriage, for that contention is not only unsupported by any authority but also opposed to the well-recognized principle of Hindu Law that so long as both parties remain Hindus there is no dissolution of the marriage tie except where divorce as distinguished from desertion or abandonment is permitted by usage which is not alleged to be the case here.

It is scarcely necessary to add that the argument, if such be raised, that because an adulterous wife is also put out of caste her right of inheritance is preserved to her by Act XXI of 1850, is manifestly unsustainable. For adultery, though it may form also a ground for expulsion from caste is, under the Hindu law, sufficient by itself to prevent the right of inheritance vesting in her and if loss of caste also supervenes, then the Act cannot help her, though it may, if the cause of expulsion be different.

It follows, therefore, that the appellant together with the second respondent became, on Virayi's death, entitled to inherit her property as the sapindas of her husband in the absence of nearer heirs. He can, however, recover his share only. In reversal of the District Judge's decree and in modification of that of the District Munsif, there will be a decree for the appellant for a moiety of the property sued for with profits for three years before the date of the plaint and with profits from the date of the plaint till date of delivery of possession or three years from this date, whichever event occurs first, the amount of the profits being determinable in execution. The first respondent must pay the appellant's costs in this and in the Lower Appellate Court.

(1) 12 M. 277. (2) 13 M. 133. (3) 21 C. 697.

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[179] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice O'Farrell.

Mustapha Saheb and others (*Plaintiffs*), *Appellants v.* Santha Pillai and others (*Defendants*), *Respondents.**
[12th and 26th September, 1899.]

Specific Relief Act—Act I of 1877, Section 9—Suit for possession by person evicted brought more than six months from date of dispossession against one having better title than himself.

Certain land belonging to two brothers was mortgaged by one of them and leased to plaintiffs by the mortgagee. The heirs of the other brother, declining to accept the mortgage or the lease which had been granted under it as binding on them, evicted plaintiffs from the land. Plaintiffs now brought this suit against the defendants to recover the possession of which the defendants had deprived them by such eviction. The defendant's title was found to be good :

Held, that plaintiffs could not succeed.

Per Subramania Ayyar, J.—That it is an undoubted rule of law that a person who has been ousted by another who has no better right, is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title. *Asher* v. *Whitlock* (L.R. 1 Q.B. 1), *Mussamat Sunder* v. *Mussammat Parbati* (L.R. 16 I.A. 186; I.L.R. 12 All. 51), *Ismail Ariff* v. *Mahomed Ghouse* (L.R. 20 I.A. 99; I.L.R. 20 Calc. 834), referred to; *Nisa Chand Gaita* v. *Kanchiram Bagani* (I.L.R. 26 Calc. 579), distinguished. Also, that Section 9 of the Specific Relief Act cannot be held to take away any remedy available with reference to the well-recognised doctrine that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. But that the above propositions were inapplicable to the facts of the present case, where the defendants were found to have good title.

Per O'Farrell, J.—The rule is that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of Section 9 of the Specific Relief Act, and not otherwise. Here the defendants held under a lease granted by a person who was found to have title, and a suit to recover possession would only lie under the provisions of Section 9 of the Specific Relief Act, and this was clearly not such a suit.

[R., 26 M. 514; 5 Bom. L.R. 265; 4 Ind. Cas. 359 (362) = 3 S.L.R. 149; 137 P.L.R. 1902; U. B.R. (1905), 4th Qr., Evidence, 110.]

Suit for possession of lands with profits. Plaintiffs' case was that the land in question had belonged to one Varisai Ravuthan, and that his daughter Peer Ammal, as mother and guardian of his [180] grandsons, with the sanction of the District Court, had usufructuarily mortgaged it, with other land, to one Pampaya Ravuthan, and satisfied a decree debt due in original suit No. 3 of 1884, by the said grandsons, with the money so raised. Plaintiffs Nos. 1 to 6 were the representatives of the mortgagee, and plaintiffs Nos. 7 and 8 were lessees of the land under the mortgagee and plaintiffs Nos. 1 to 6. It was complained that while the said plaintiffs Nos. 7 and 8 were in enjoyment of the lands as lessees, they were evicted by defendants Nos. 1 and 2, who asserted a lease to them of the said land by third defendant, and obtained an order under Section 145 of the Code of Criminal Procedure in favour of their possession, though they

* Second Appeal No. 1155 of 1898 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 62 of 1895 reversing the decree of K. Ramachandra Ayyar, District Munsif of Trichinopoly, in original suit No. 159 of 1893.

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had never had any enjoyment or right. Defendants contended that the land had belonged jointly to Varisai Ravuthan and his undivided cousin, Khadir Saheb, whose sons were defendants Nos. 3 and 4, and that they had been enjoying the land on lease from defendant No. 3, the manager of the family for over twelve years, and that the mortgage was not a valid one, nor binding on them. Defendants Nos. 1 and 2 were in possession when the suit was filed, which was more than six months after the intervention of the Magistrate under Section 145 of the Code of Criminal Procedure. The District Munsif found that the mortgaged land had belonged jointly to Peer Ammal and her children and to defendants Nos. 3 to 6; that the mortgage by Peer Ammal to Pampaya Ravuthan, the ancestor of plaintiffs Nos. 1 to 6 was for a valid debt binding on defendants Nos. 3 to 6; that the leases to plaintiffs Nos. 7 and 8 were correct and that the said plaintiffs Nos. 7 and 8 had been cultivating the land and their eviction was unauthorised and unsustainable. He ordered plaintiffs Nos. 7 and 8 to be restored to possession, and gave them the damages claimed.

The District Judge, on appeal, reversed this decree. He said:—"The suit arose out of a mortgage executed by one Peer Ammal in favour of the husband of her husband's sister. The plaintiffs are lessees of the mortgagee, Pampaya Ravuthan, and the first and second defendants lessees of the third and other defendants who claimed the right to disregard the mortgage as not binding upon them. The disputes culminating in a threatened breach of the peace, the Magistrate intervened and directed first and second defendants to retain possession of the suit land until evicted in due course of law. The suit was thereupon instituted. In original suit No. 3 of 1884 a decree was obtained against Peer Ammal and [181] third defendant, and in order to save the sale of land in execution of this decree, Peer Ammal executed the mortgage to Pampaya Ravuthan, with the permission of the Court. The chief question for consideration is therefore whether the third, fourth, fifth and sixth defendants are bound to recognize the mortgage and respect the claim of the mortgagees lessees."

He upheld the finding that defendants Nos. 3 to 6 had an interest in the mortgaged land; and that the mortgage was *bona fide*; but considered that the security given was unnecessarily large, and in consequence that the mortgage was only binding on the share of Peer Ammal, and the sons for whom she executed it. He concluded:—"It may be that, in a suit properly framed for the purpose, the mortgagee can obtain possession of a defined portion of the mortgaged property. In this suit it has not been shown that he has better title to the suit land than have the occupants, and the ejectment must fail unless this Court can go behind the Magistrate's order and declare that seventh and eighth plaintiffs were wrongfully ejected by that order. This cannot be done; the defendants Nos. 1 and 2 were in the possession at date of suit and that date was more than six months after the intervention of the Magistrate; the suit is in ejectment based on title and is not a summary suit for possession, and it is necessary for the plaintiffs to show a better title than defendant. They have failed and their suit must be dismissed with costs throughout."

Plaintiffs preferred this second appeal.

Sundara Ayyar, for appellant.—Section 9 of the Specific Relief Act, applies only where the plaintiff seeks to recover possession even if the defendant should be able to prove a better title. Here plaintiffs are entitled to recover on proving their previous possession unless the defendant can show a better title. The Act should not be held to

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deprive a plaintiff of his general right to be replaced in his possession because it provides an additional or special remedy in his favour. Moreover, possession is *prima facie* title, and plaintiffs having been in possession, it lay on defendants to prove a title otherwise. He referred to Section 110 of the Evidence Act and also to the following cases:—*Asher* v. *Whitlock* (1), *Mussammat Sundar* v. *Mussammat Parbati* (2), *Ismail Ariff* v. *Mahomed Ghouse* (3) and *Wise* v. *Ameerunnissa Khatoon* (4).

[182] *Seshagiri Ayyar*, for respondent No. 2.

Kuppusami Ayyar, for respondents Nos. 3 to 6.—Plaintiffs having been dispossessed more than six months before suit, they cannot succeed by merely proving their previous possession. They must prove their title as in an ordinary suit. If the Specific Relief Act is relied upon, the remedy must be enforced according to its provisions. He referred to Section 9, Specific Relief Act, and *Nisa Chand Gaita* v. *Kanchiram Bagani* (5).

JUDGMENT.

SUBRAMANIA AYYAR, J.—The Courts below having, upon the evidence, arrived at the conclusion that the land in dispute was not the exclusive property of the late Varisai Ravuthan but the common property of that man and his deceased brother Muhammad Ravuthan, it follows that the mortgage granted by one of the heirs of Varisai and the lease granted by the holder of that mortgage to the seventh and eighth plaintiffs are not binding upon the defendants Nos. 3 to 6 who are the heirs of Muhammad Ravuthan, and the first and the second defendants, who claim through the third defendant.

It was, however, contended on behalf of the seventh and eighth plaintiffs that, assuming they were not entitled to the land under the lease referred to, a finding should be called for as to the question whether they were dispossessed by the first and second defendants, inasmuch as if that question be found in their favour they should get a decree against the said defendants according to the rule that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title.

That the rule of law is as urged on behalf of the seventh and eighth plaintiffs cannot be doubted, notwithstanding *Nisa Chand Gaita* v. *Kanchiram Bagani* (5) cited for the respondents. The rule in question is so firmly established as to render a lengthened discussion about it quite superfluous. *Asher* v. *Whitlock* (1) and the rulings of the Judicial Committee in *Mussammat Sundar* v. *Mussammat Parbati* (2) and *Ismail Ariff* v. *Mahomed Ghouse* (3) not to mention numerous other decisions here and in England to **[183]** the same effect, are clear authorities in support of the view stated above. And with reference to the grounds on which the decision in *Nisa Chand Gaita* v. *Kanchiram Bagani* (5) seems to rest, it is necessary to make but two observations. The first is that Section 9 of the Specific Relief Act cannot possibly be held to take away any remedy available with reference to the well-recognized doctrine expressed in Pollock and Wright on possession thus :—Possession in law is a substantive right or

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(1) L.R. 1 Q.B. 1. (2) 16 I.A. 186=12 A. 51 (56).
(3) 20 I.A. 99=20 C. 834. (4) 7 I.A. 73. (5) 26 C. 579.

interest which exists and has legal incidents and advantages apart from the true owner's title (at page 19). The second observation is that in *Wise* v. *Ameerunnissa Khatoon* (1) relied on in *Nisa Chand Gaita* v. *Kanchiram Bagani* (2) the defendant had a better right than the plaintiff, since the possession of the former was authorised by the Government whose property the land in dispute was and consequently nothing said by their Lordships in a case wherein such were the facts can rightly be construed as intended to lay down the law differently from what it had been all along understood to be.

Though, therefore, the proposition of law, relied on on behalf of the seventh and eighth plaintiffs, is perfectly sound, yet it seems to be clearly inapplicable here having regard to the allegations of the plaintiff. For as I take those allegations, the ouster complained of was one by the first and the second defendants as tenants of the third defendant under a lease which had been executed by him to them before the ouster. The circumstances that mesne profits were obtained and awarded by the Court of First Instance against the third defendant also tends to show that he was treated as in possession through his tenants. Therefore the seventh and the eighth plaintiffs, who, according to the supposition under consideration, possess but the inferior right arising from mere legal possession, cannot have a decree that would have the effect of depriving the third defendant, who is a true owner, of his possession through the first and second defendants. I would, therefore, dismiss the second appeal with costs.

O'FARELL, J.—I concur in the order proposed. All the dictum of the Privy Council in *Wise* v. *Ameerunnissa Khatoon* (1) appears to amount to is this, that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only **[184]** do so under the provisions of Section 9 of the Specific Relief Act and not otherwise.

Here the first and second defendants held under a lease granted by the third defendant, who is found to have title. Following the observations of the Privy Council referred to, it must be held that a suit to recover possession will only lie under the provisions of Section 9, Specific Relief Act, and this is clearly not such a suit. I would add that, in any view, the plaintiffs having denied that the property belonged at all to the third defendant, and asserted that it was the sole property of their mortgagor, are not entitled when the contention has been found against them, to set up a new case founded upon mere possession.

(1) 7 I.A. 73. (2) 26 C. 579.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice O'Farrell.

NARAYANA PATTAR AND OTHERS (*Defendants Nos.* 4 *and* 6 *to* 20), *Appellants v.* VIRARAGHAVAN PATTAR AND OTHERS (*Plaintiffs and Defendants Nos.* 1 *to* 3 *and Legal Representatives of Plaintiff No.* 1), *Respondents.** [11th and 12th September and 20th October, 1899.]

Transfer of Property Act—Act IV of 1882, *Section* 53 *—Debtor and creditor—Intent to delay and defeat creditors—Statute* 13 *Eliz., cap.* V.

A mere preference by a debtor of one creditor to another, and *a fortiori* a mere *bona fide* security given to a creditor to the extent of his debt, is not within Section 53 of the Transfer of Property Act, 1882,—as it is not within the English Statute of 13 Eliz., cap. V. But where a document given by way of security goes further and secures debts that are not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors.

Where a party intends to rely upon a document as not within Section 53 of the Transfer of Property Act because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more.

[**F.**, 35 C. 1051=7 C.L.J. 586=12 C.W.N. 761; **R.**, 33 M. 334 (337)=5 Ind. Cas. 33=20 M.L.J. 211=7 M.L.T. 167; 13 C.P.L.R. 180; 6 P.R. 1901=1900 P.L.R. 523; **D.**, 25 B. 202 (206).]

[185] SUIT to set aside an order passed on a claim petition preferred by defendants Nos. 4 to 20 against the attachment before judgment of certain properties in a suit filed by plaintiffs against defendants Nos. 1 to 3, and for a declaration that the said properties were liable to be sold for the decree in the aforesaid suit free of a mortgage created by first defendant in favour of defendants Nos. 4 to 20. The Subordinate Judge found that the parties were all trading in proximity to each other; that one creditor had sued first defendant for money due, whereupon plaintiff and the other creditors assembled in first defendant's shop and agreed to take the assets of first defendant rateably amongst them all. First defendant, however, executed a mortgage-deed by which he assigned all his property to defendants Nos. 4 to 20 to the full extent of their debts, omitting plaintiffs and other creditors from participation in the transaction. The Subordinate Judge referred to Section 53 of the Transfer of Property Act, and to *Sankarappa* v. *Kamayya* (1), *Motilal Ravichand* v. *Utam Jagjivandas* (2), *Gopal* v. *Bank of Madras* (3), and found that defendants Nos. 4 to 20 knew that first defendant was indebted to plaintiffs and that the document in their favour was intended to defeat plaintiffs' claims. He set aside the order passed on the claim petition of defendants Nos. 4 to 20, and declared the property liable to be sold for plaintiffs' decree as prayed.

Defendants Nos. 4 and 6 to 20 appealed to the District Judge, who upheld the decree. The same defendants preferred this second appeal.

Sundara Ayyar, for appellants.—The mortgage is a valid one, and is not rendered invalid by reason of the agreement, even if that agreement

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* Second Appeal No. 972 of 1898 against the decree of W. H. Welsh, District Judge of South Malabar, in appeal suit No. 669 of 1897, affirming the decree of O. Chandu Menon, Acting Subordinate Judge of South Malabar at Calicut, in original suit No. 26 of 1896.

(1) 3 M.H.C.R. 231. (2) 13 B. 434. (3) 16 M. 397.

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was in fact entered into by all the creditors and was to the effect that all should participate in the distribution of assets. The case is not one of insolvency; if it were, no doubt the official assignee could claim on behalf of all the creditors, free from the encumbrance in favour of defendants Nos. 4 to 20. Knowledge that the mortgage would absorb all the assets of the debtor is not enough to invalidate that mortgage. Section 91 of the Indian Trusts Act provides that a subsequent transferee holds subject to the interests of a prior transferee; but that does not occur here. So in the Specific Relief Act. Section 53 of the Transfer of [186] Property Act does not apply where the sale is to a creditor. It only renders a sale void when a purchaser, other than a creditor, buys, knowing of the fraud which the purchase constitutes as against the other creditors, or when a creditor buys not in discharge of his debts solely but for an additional sum which he knows the debtor means to apply in such a way as to cheat his creditors. The present is not such a case the document being merely a security for debt due. The mortgage in itself contains no evidence of fraud. That can only be drawn from the agreement which is said to have been made for rateable distribution among all the creditors; but supposing plaintiff to have a cause of action on the breach of that agreement the suit is not so framed. The agreement was separate and forms no new element in the mortgage so as to affect the validity of the latter under Section 53. See *Alton* v. *Harrison* (1); *Ex parte Elliot* (2), *Ex parte Games* (3); *Ex parte Cooper* (4); Kerr on Fraud, page 214; May on Fraudulent Conveyances, page 101. It is submitted (i) that a mere preference of one creditor over another is not fraud; (ii) that the proviso to Section 53 of the Transfer of Property Act protects the assignee if he is a creditor, that fact showing his *bona fides*—*Ramasami Pillai* v. *Adinarayana Pillai* (5) following *Ex parte Games* (3) already cited; *Suba Bibi* v. *Balgobind Das* (6); *Sankarappa* v. *Kamayya* (7). In *Gopal* v. *Bank of Madras* (8) and *Motlal Ravichand* v. *Utam Jagjivandas* (9), the consideration consisted of a debt as well as a further payment of money. See also *Doorga Tewaree* v. *Nipal Aheer* (10) where a debtor was held entitled to prefer one creditor to another; and *Rajan Harji* v. *Ardeshir Hormusji Wadia* (11) which decides (though not a decision on Section 53), that Section 53 of the Transfer of Property Act has not altered the law as it stood under the 13 Eliz., cap. v. See Section 1 of the last-mentioned statute. It is submitted that the suit ought to have been dismissed.

The Acting Advocate-General (Hon. *V. Bhashaym Ayyangar*), with him *V. Krishnasawmy Ayyar*, and *Ananthakrishna Ayyar*, for [187] respondents Nos. 2, 3 and 7:—The suit is under Section 283 of the Code of Civil Procedure to get rid of the conclusive effect of a summary order passed by the Judge. The question is if under Section 53 of the Transfer of Property Act this mortgage is voidable as against plaintiffs. I do not deny that some defendants are creditors. The terms of the mortgage are:—"is the amount borrowed from you, &c." None of the English cases apply; but it is submitted that Section 53 has a wider scope than the English law under 13 Eliz. Unless defendants come within the exception, the transfer to them by mortgage will be voidable, *i.e.*, their mortgage

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(1) L.R. 4 Ch. App. 622. (2) L. R. 2 Ch. D. 104. (3) L.R. 12 Ch. D. 314. (4) L.R. 10 Ch. App. 510. (5) 20 M. 465. (6) 8 A. 817 (7) 3 M.H.C.R. 231. (8) 16 M. 397. (9) 13 B. 434. (10) 2 N.W.P.H.C.R. 224. (11) 4 B. 70.

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right or mortgage will be voidable at the instance of plaintiff, a simple creditor. In every transfer made with intent to defeat the creditor the defeating may be entire or partial. So far as consideration is concerned it is applicable to a creditor transferee as well as to a purchaser. The fact of being a creditor is the consideration, if he takes the transfer for his debt. Therefore it all depends on whether defendants have brought themselves within the exception. It is not a question of "defrauding" but of "defeating." The decisions cited show that the fact of a transferee being a creditor makes the transfer one of good faith, because there is no duty on a creditor to look after the interests of other creditors; and he may take the transfer though he knows that by so taking it he will deprive other creditors of their payments. This case does come within the first part of the section because here the object was to defeat. The intent to defeat refers only to the transferor and not to the intent of both parties. But for the proviso, a transfer by a person in insolvent circumstances with intent to defeat his creditors would be voidable even if the transferee did not know of the transferor's circumstances. The ignorance of the transferee would be no answer. [O'Farrell, J.—The proviso prevents the fraud of the transferor from prevailing over the innocence of the transferee.] Yes: and the decisions cited only decide that a creditor who obtains a transfer equal to his debt may retain it notwithstanding that the intention of the transferor was to defeat or delay his creditors, and that the transfer did so defeat. The argument has been put forward on the footing that the mortgage transfer was only for a consideration equal to the debt due. The cases cited do not touch the point. There was no question of a prior agreement in any of them. Nor do they decide that a transfer to a creditor is conclusive **[188]** evidence of good faith. The intent would be more readily presumed where the transferee is a stranger. The words of the section apply to the whole body of creditors if the transfer is to a stranger, and only to the remaining creditors if the transfer is to a creditor. There are three paragraphs:—the first is substantive law; the second, a presumption; and the third, a rule of evidence, and an exception to the section. [He dealt with *Ex parte Elliot* (1).] In *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (2) the question is clearly explained at page 828—the case of a creditor transferee is distinguished, and it is there said that the Indian law goes much further than the English Statute. [He then dealt with the facts.] The agreement operates in two ways:—(1) it proves the want of *bona fides*, and (2) it reduces what plaintiff is entitled to. The mortgage should be declared fraudulent. [Subrahmania Ayyar, Offg. C J.—It must be assumed that there was an agreement that could be enforced.] I rely on the agreement only to show that defendants were transferees in bad faith, and so I claim to have the mortgage set aside. The mortgage is not binding on plaintiff to the extent of such debt as he is entitled to. The Statute of Elizebeth refers to bonds and other moveable property whereas Section 53 relates only to immoveables. *McKewan* v. *Sanderson* (3) shows that where a person is in insolvent circumstances and there is an agreement to share and share alike, and one creditor gets assets unknown to others, he will be made to give them up. Altogether apart from bankruptcy law it is a fraud on the other creditors. *Jackman* v. *Mitchell* (4) is to the same effect. In *Cockshott* v. *Bennett* (5), the creditors had agreed to accept a composition, but one creditor

(1) L.R. 2 Ch. D. 104.
(2) 24 C. 825.
(3) L.R. 24 Eq. 65 (72, 75).
(4) 13 Ves. 581=9 R.R. 29 (233).
(5) 2 T.R. 763 =1 R.R. 617, (618).

refused to execute it unless he was secretly given a promissory note for the difference between it and the full debt. It was held invalid. See also *Leicester* v. *Rose* (1); *Corlett* v. *Radcliffe* (2).

Their Lordships passed the following order:—" The Lower Appellate Court has recorded no distinct findings upon the questions at issue. We must call for findings on the following issues:—

(1) Whether there was an agreement, as alleged, between the creditors to accept a rateable proportion of the assets of the debtor in lieu of their claims?

[189] (2) Which of the debts, if any, mentioned in Exhibit II, were really due."

[In compliance with the above order, the District Judge submitted findings to the effect that the alleged oral agreement had not been proved; and that all the debts except two were realy due.]

This second appeal coming on again for final hearing after the return of the above finding the Court delivered the following

JUDGMENT.

We accept the findings of the District Judge that there was no agreement come to between the creditors to accept a rateable proportion of the debtor's assets in lieu of their claims, and also that the debts Nos. 9 and 10, amounting to Rs. 400, are not proved to be really due.

On the second of these findings we think the decree of the District Court dismissing the appeal should be upheld. No doubt a mere preference of one creditor to another, and *a fortiori* a mere *bona fide* security given to a creditor to the extent of his debt, is not within the English Statute 13 Eliz., cap. V, and we also think it is not within Section 53 of the Transfer of Property Act. But where a document given by way of such security goes further and secures debts not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors We think that the inclusion of such debts in a document which would otherwise not be within the section, is *prima facie* evidence of an intention to defeat or delay the creditors, and it would lie upon the parties who wish to take advantage of the document to show that there was no such intention. In other words, a party who intends to rely upon a document as not within Section 53, Transfer of Property Act, because it merely creates a preference in favour of certain creditors over the rest, must show strictly that the document is such and nothing more.

We therefore dismiss the second appeal with costs.

(1) 4 East. 372.

(2) 14 Moore's P.C. 121 (135.)

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[190] APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice Benson.

ANGAMUTHU PILLAI (*Defendant*), *Appellant v.* KOLANDAVELU PILLAI (*Plaintiff*), *Respondent.** [24th October, 1899.]

Hindu Law—Suit by managing member on behalf of his undivided family, other members not being joined—Maintainability of suit.

The managing member of an undivided Hindu family sued in his own name for the recovery of certain land and asked for a declaration that it belonged to the plaintiff's family. Plaintiff had an undivided brother, and there was no evidence that he assented to or acquiesced in the institution of the suit:

Held, that the plaintiff was not entitled to sue without making his brother, the other member of the undivided family, a party to the suit. *Alagappa Chetti* v. *Vellian Chetti*, (I.L.R. 18 Mad. 33), followed; *Mahabala Bhatta* v. *Kunhanna Bhatta* (I.L.R. 21 Mad. 373), distinguished.

[F., 29 A. 311=4 A.L J. 194=A.W.N. (1907) 58; R., 34 A. 549 (567)=9 A.L.J. 819=15 Ind. Cas. 126; 28 B. 11; 32 M. 284 (289)=4 Ind. Cas. 38=19 M.L.J. 372; =5 M.L.T. 351=35 M. 685 (689)=10 Ind. Cas. 874=21 M.L.J. 508=(1911) 1 M. W.N. 442; 7 Ind. Cas. 584=4 S.L.R. 2; 17 M. L. J. 25 (N); 57 P. R. 1905=76 P.L.R. 1905; 69 P.R. 1906=118 P.L.R. 1906.]

SUIT by the managing member of a Hindu family for the recovery of land and for a declaration that it was the property of the said family and not liable to attachment in execution of a certain decree, and for damages and subsequent profits. The defence was that plaintiff was not competent to sue alone inasmuch as he had an undivided brother, and that his sister (Onthayi Ammal) was the proper person to sue for the land, she being in possession of it at the time at which the suit had been instituted. It did not appear that the plaintiff's brother acquiesced in or assented to the institution of the suit. The District Munsif framed the following among other issues :—" (1) Whether plaintiff is the owner and Onthayi Ammal was in possession under him with his permission; (3) whether plaintiff is not the right person to sue; (4) whether he is not the only person to sue." With regard to the first issue, he found that the land was the property of the plaintiff, but that it was enjoyed by his sister Onthayi Ammal with his permission; with regard to the third and fourth issues, he found [191] that the plaintiff was the right and only person to sue; and he decreed as prayed. Defendant appealed on the ground among others, that the Lower Court was wrong in holding that plaintiff alone could sue. The Subordinate Judge dismissed the appeal. On this point he said:— " The question of non-joinder is raised. It is urged that plaintiff having an undivided brother could not singly maintain the suit; but plaintiff sues as manager of the family and he is entitled to maintain the suit—*vide Arunachala* v. *Vythilinga* (1)."

The defendant preferred this second appeal on the ground that the suit was bad for non-joinder of plaintiff's brother; and that plaintiff's sister was entitled to possession according to plaintiff's case, and that plaintiff was therefore not entitled to maintain the suit.

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* Second Appeal No. 1495 of 1898 against the decree of S. Subba Ayyar, Subordinate Judge of Trichinopoly, in appeal suit No. 181 of 1897, affirming the decree of A. David Pillai, District Munsif of Srirangam, in original suit No. 452 of 1895.

(1) 6 M. 27.

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Ramachandra Ayyar, for appellant.—Plaintiff sues as a member of an undivided family and has not joined his brother. All the co-owners should have been joined, *Alagappa Chetti* v. *Vellian Chetti* (1). Though that was a case of partnership no distinction is made in the judgment between partners and members of a family. See also *Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad* (2) ; *Hari Gopal* v. *Gokaldas Kushabashet* (3) ; *Kanna Pisharody* v. *Narayanan Somayajipad* (4). The same rule applies to trustees : all should be joined ; *Rajendronath Dutt* v. *Shaikh Mahomed Lal* (5). On the next point, the beneficial enjoyment of the lands is found to be with the sister. [BENSON, J.—She had no right of possession, but was allowed to have the enjoyment till further orders.] She is found to have enjoyed them by virtue of her stridhanam ; and so would be entitled to the present possession. The proper person to sue is the person entitled to immediate possession—*Ramanadan Chetti* v. *Pulikutti Servai* (6).

Rangachariar, for respondent.—The plaintiff here is the managing member of the family : and the suit is based on tort. In *Mahabala Bhatta* v. *Kunhanna Bhatta* (7) and the cases there referred to, it is laid down that one tenant-in-common can sue in tort without joining others. The suit is for the benefit of the family. *Alagappa Chetti* v. *Vellian Chetti* (1) does not apply as in that case **[192]** the family had a business and plaintiff was not managing member, and it was a partnership suit. They go beyond the subject-matter of the suit and are *obiter dicta*. See *Ramayya* v. *Venkataratnam* (8), where Muttusami Ayyar and Best, JJ., held that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit. *Kunjan Chetti* v. *Sidda Pillai* (9) was a suit against a managing member and the decree was held to be binding on the sons though the latter had not been made parties. In Malabar cases the same principle is recognized,—the whole tarwad being bound by a decree. Every undivided member of a family has an interest in the whole of its property. Each has a cause of action against a trespasser. In *Jagdeo Singh* v. *Padarath Ahir* (10), the distinction between contract and tort is recognised. That principle is well established in the English authorities, which form the basis of the decisions here. In *Kanna Pisharody* v. *Narayanan Somayajipad* (4), some members of a club brought the suit, which is quite different. *Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad* (2) was also not a case of a suit by a managing member ; and in *Hari Gopal* v. *Gokaldas Kushabashet* (3), there was a doubt if the plaintiff was managing member or not. The ruling in *Arunachala* v. *Vythialinga* (11), has never been doubted, but for the remark, in *Alagappa Chetti* v. *Vellian Chetti* (1), and should not be departed from, though, to succeed, it is admitted that plaintiff must sue as managing member, *Radha Prashad Wasti* v. *Esuf* (12). If it be found necessary I ask that the plaintiff's brother be added instead of the suit being dismissed. See *Hari Gopal* v. *Gokaldas Kushabashet* (3).

Ramachandra Ayyar in reply.—In *Kunjan Chetti* v. *Sidda Pillai* (9), the co-owners had not been joined as defendants and the ruling in that case does not conflict with the proposition that all co-owners should be

(1) 18 M. 33 (35). (2) 10 B. 32. (3) 12 B. 158.
(4) 3 M. 234. (5) 8 C. 42. (6) 21 M. 288.
(7) 21 M. 373 (380). (8) 17 M. 122. (9) 22 M. 461.
(10) 25 C. 285 (289). (11) 6 M. 27. (12) 7 C. 414.

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joined as plaintiffs. *Alagapa Chetti* v. *Vellian Chetti* (1) distinctly departs from *Arunachala* v. *Vythialinga* (2).

JUDGMENT.

[193] In this case two points were relied on on behalf of the defendant. The first point was that the suit wat not maintainable on the ground that the plaintiff was a member of an undivided family and could not maintain the suit in his own name without joining the other members of the family as parties to the suit. The second point was that the plaintiff's sister, one Onthayi Ammal, and not the plaintiff, was the proper person to sue, on the ground that at the time of the institution of the suit the sister was in possession of the plaint property. As regards the second point we are clearly of opinion that, as between the plaintiff and his sister, the plaintiff had the right to the immediate possession of the plaint property, and we therefore hold that the suit was properly instituted in the name of the plaintiff.

As regards the first point, it is conceded that the plaintiff has an undivided brother. The plaintiff describes himself in the plaint as family manager and he asks in his prayer that it may be held that the plaint property belongs to the plaintiff's family.

There is no evidence that the plaintiff's brother assented to, or acquiesced in, the bringing of the suit by the plaintiff.

An issue was raised as to whether the plaintiff was the only person to sue, and the District Munsif held that the plaintiff was entitled to sue as the managing member of the family and the Subordinate Judge affirmed this finding. The Courts below appear to have relied upon the authority of a passage in the judgment in *Arunachala* v. *Vythialinga* (2). The passage is as follows :—"It is admitted apparently that the plaintiff "is only one member of a joint undivided Hindu family, in whom the "right claimed, if it exists, inheres, and it seems to us that as the right "is one belonging to the joint undivided family, and not to any individual "member thereof, the plaintiff was bound to join in the suit, either as "plaintiffs or defendants, the remaining members of the family, and that "unless he was the managing member of the family and brought the suit "in that capacity, which he does not profess to do, he alone cannot "institute the suit, as otherwise, notwithstanding any decree given the "plaintiff herein, the other members of his family may at some future "period bring a suit or suits for the establishment of some different and "possibly much higher right."

[194] The appellant relied on a passage in the judgment of *Alagappa Chetti* v. *Vellian Chetti* (1). "The proposition that the manager of a "Hindu family can sue without joining those interested with him is one "which cannot be supported and no authority was cited in support of it "save a *dictum* in *Arunachala* v. *Vythialinga* (2)."

This proposition, it is true, is in the nature of an *obiter dictum*, but it is an express authority for the contention which is put forward by the appellant.

The respondent sought to draw a distinction between suits founded on contract and suits founded on tort, and contended that the well-established principle of English law that a tenant-in-common is entitled to

(1) 18 M. 33 (35). (2) 6 M. 27.

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sue a trespasser in his own name without joining his co-tenants, is applicable to the present case. In the face of an express authority as to the rights of a managing member of a Hindu family we do not think that this principle of English law can be held applicable to the present case. It was conceded by the vakil on behalf of the plaintiff (the respondent) that he could only contend that the plaintiff could sue alone *qua* managing member and not that he could sue alone *qua* member of an undivided family.

The authority relied upon by the respondent (*Mahabala Bhatta* v. *Kunhanna Bhatta* (1)) is clearly distinguishable on the ground that in that case, the plaintiff's family had become divided at the time of the institution of the suit.

We adopt the proposition of law contained in the judgment in *Alagappa Chetti* v. *Vellian Chetti* (2), and we hold that the plaintiff was not entitled to sue without making his brother, the other members of the undivided family, a party to the suit.

We do not think, however, that the suit ought to be dismissed on the ground of non-joinder. Both the Lower Courts upheld the plaintiff's contention that he was entitled to sue alone. We think this is a case in which we should give the plaintiff an opportunity to amend his plaint.

We allow this appeal and set aside the decrees of the Courts below. We give the plaintiff leave to amend the plaint and we remand the suit to the Court of First Instance in order that the plaintiff's brother may be made a party to the suit and the case **[195]** re-tried. Defendant will have leave to put in a new written statement, if so advised. The costs of the appeal to the Lower Appellate Court and to this Court must be paid by the plaintiff. The costs before the Court of First Instance including costs already incurred will be dealt with by that Court.

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23 M. 195 (F.B.) = 10 M.L.J. 64.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Boddam, Mr. Justice O'Farrell and Mr. Justice Michell.

RAMANATHAN CHETTIAR (*Counter-petitioner and Plaintiff*), *Appellant* v. LEVVAI MARAKAYAR AND ANOTHER (*Petitioners—Defendant No. 4 and son of Defendant No. 1*), *Respondents.**
[11th November, 1898, and 2nd, 9th and 17th October and 7th November, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 244, 278 *to* 283*—Party to the suit—Order on claim by trustee for release of trust property attached under personal decree against trustee—Appeal from such order.*

A decree-holder having attached certain property in the course of execution, two of the defendants in the suit in which the decree had been passed presented a petition praying that the property might be released from the attachment on the ground that it had been set apart for charitable purposes and that it was held by defendants as trustees. The Subordinate Judge upheld the trust and ordered the properties to be released from the attachment. Plaintiff then appealed to

* Civil Miscellaneous Appeal No. 6 of 1898 against the order of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, on civil miscellaneous petition No. 633 of 1897, in original suit No. 43 of 1895.

(1) 21 M. 373. (2) 18 M. 33

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the High Court, when objection was taken that no appeal lay against the order of the Subordinate Judge. The Court referred to a Full Bench the question whether an appeal lies against an order passed with regard to a party to a suit against whom there is a personal decree, in respect of a claim he may set up to hold property, attached in execution of that decree, as a trustee on behalf of third persons not parties to the suit:

Held, that such a claim falls under Section 278 and not under Section 244 of the Code of Civil Procedure and that no appeal lies against any order passed on it by the Court executing the decree.

The claims of third parties, whether put forward by themselves or by a party to the suit, must be dealt with under Sections 278 to 283 of the Code of Civil Procedure, and not under Section 244. *Roob Lall Dass* v. *Bekaai Meah* (I.L.R. 15 Calc. 437), referred to.

Section 244 presupposes that the questions with which it deals are such as can be finally determined in the execution proceedings. If they cannot, it has **[196]** no application. The Court should look to the substance of the objection and not to the accident that it is put forward by one person rather than another. *Upendra Bhatta* v. *Ranganatha Bhatta*, (I.L.R. 17 Mad. 399), considered: *Punchanun Bundopadhya* v. *Rabia Bibi* (I.L.R. 17 Calc. 711), and *Murigeya* v. *Hayat Saheb* (I.L.R. 23 Bom. 237), referred to.

[**F.**, 10 M.L.J. 85; **R.**, 31 M. 125=18 M.L.J. 21=3 M.L.T. 325; 12 Ind. Cas. 411; **D.**, 30 M. 215=17 M.L.J. 377=2 M.L.T. 31=8 C.L.J. 20.]

PETITION by the fourth defendant and by the son of the first defendant in a suit, for the release of certain properties from an attachment effected in the execution of a decree against the petitioners and two other defendants. Plaintiff had obtained a decree against the petitioners in execution of which the attachment referred to had been made. The petition stated that the properties so attached had belonged to the first defendant and another, who had set them apart for charity appointing the petitioners as trustees by a deed executed in 1893. It alleged that the properties had been delivered to the petitioners and that charities had been conducted with the income arising therefrom. The petitioners claimed that the plaintiff had unlawfully attached the said properties for the decree amount due to him in the suit, and that they could not be made liable in respect of it, and that the attachment was invalid. Plaintiff presented a counter-petition alleging that the claim was false, and that the fourth defendant was not entitled to present the petition, since all disputes arising between him and plaintiff in execution proceedings should be decided under Section 244 of the Code of Civil Procedure. The Subordinate Judge, holding that the gift of the properties was for pious and charitable purposes and that it was a valid wakf under Muhammadan Law, ordered the properties to be released from attachment.

Plaintiff preferred this appeal on the ground among others that inasmuch as fourth defendant was a party to the decree he could not apply under Section 278 of the Code of Civil Procedure to have the properties released from attachment.

The appeal first coming on for hearing before COLLINS, C.J., and SHEPHARD, J., the preliminary objection was raised on behalf of the respondents, that no appeal lay against the order of the Subordinate Judge. The Court then made the following

ORDER OF REFERENCE TO FULL BENCH.

We have some doubts as to whether the ruling in *Upendra Bhatta* v. *Ranganatha Bhatta* (1) is correct. The question is one of some importance, **[197]** We think it better to refer to a Full Bench the question

(1) 17 M. 399.

whether an appeal lies against an order passed with regard to a person who claims attached property on the ground that he holds it as trustee." **1899 Nov. 7.**

The case then came on for hearing before the Full Bench as constituted above. **Full Bench.**

V. Krishnasami Ayyar, for appellant.—Appellant, who was plaintiff, obtained a decree against defendants Nos. 1 and 4. Defendants Nos. 2 and 3 are the representatives of defendant No. 1, who has since died. In execution of the decree, certain properties were attached, whereupon defendant No. 4 and the representatives of defendant No. 1 objected to the attachment on the ground that it was property in the nature of wakf, and the Subordinate Judge, accepting that view, cancelled the order of attachment. The question is whether an appeal lies against an order passed with regard to a person who claims attached property on the ground that he holds it as a trustee. I rely on *Upendra Bhatta* v. *Ranganatha Bhatta*(1) and submit that that case was correctly decided. The question referred should be considered with regard to claims by a judgment-debtor or his legal representatives. When a party prefers a claim as trustee for another he is still a party to the suit. The difference in capacities makes no difference in his right to proceed under Section 244. In *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(2), the Privy Council held that Section 244 applied notwithstanding that the purchaser, a stranger, was interested. The words "claim" and "objection" as used in Section 278 of the Code of Civil Procedure are the same. A person may either claim property or object to an attachment. He is not the less a party by reason of his representative character. The concluding words of the first paragraph of Section 278 of the Code empower the Court to investigate a claim or objection of a claimant or objector as if he were a party to the suit, which indicates that a claimant is not contemplated as being a party. Section 280 presents an apparent difficulty, but not when read with Section 278, for whilst in the earlier section the person is referred to as not a party to the suit and the Court is directed to investigate his claim. Section 280 deals with the result to be arrived at, namely, whether the judgment-debtor is in possession on his own behalf or on behalf [198] of another as trustee, and the order to be passed, see *Chowdry Wahed Ali* v. *Mussamut Jumaee* (3); also *Kuriyali* v. *Mayan*(4) approved by Privy Council in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (2); *Punchanun Bundopadhya* v. *Rabia Bibi*(5), in which Section 244 was held to apply. Against these there are mere *obiter dicta* in some other cases: as in *Murigeya* v. *Hayat Saheb* (6), *Seth Chand Mal* v. *Durga Dei* (7), *Roop Lall Dass* v. *Bekani Meah* (8), *Rajrup Singh* v. *Ramgolam Roy* (9), *Ram Ghulam* v. *Hazaru Kuar*(10) following *Shankar Dial* v. *Amir Haidar* (11). The latter case is founded on two Bengal cases (*Haris Chandra Guptō* v. *Srimati Shashi Mala Gupti* (12) and *In the matter of the petition of J. B. Rainey* (13)), which are really not authorities, since they decide that when representatives claim in their own right they come under Section 276 of the old Code, corresponding to Section 278 of the new Code,—a proposition that cannot be supported after the recent Calcutta cases.

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Ramachandra Rao Saheb (with him *Sundara Ayyar*), for respondents,

(1) 17 M. 399. (2) 19 I.A. 166 = 19 C. 683. (3) 11 B.L.R. 149.
(4) 7 M. 255. (5) 17 C. 711. (6) 23 B. 237.
(7) 12 A. 313. (8) 15 C. 437. (9) 16 C. 1.
(10) 7 A. 547. (11) 2 A. 752. (12) 6 B.L.R. 721.
(13) 6 B.L.R. 725, Note.

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referred to Sections 280 and 283 of the Code of Civil Procedure and contended that the procedure under Section 244 did not apply. A beneficiary could not be bound because a trustee kept quiet without objecting. The foundation for the decision in *Upendra Bhatta* v. *Ranganatha Bhatta* (1) was the decision of the Privy Council in *Abedoonissa Khatoon* v. *Ameeroonissa Khtoon* (2), which, however, had no application to the present case. *Kuriyali* v. *Mayan* (3) was a case of karnavan, whose position differed from that of a trustee. He also referred to *Vasudevan* v *Sankaran* (4)and *Varanakot Narayanan Namburi* v. *Varanskot Narayanan Namburi* (5).

JUDGMENT OF THE FULL BENCH.

O'FARRELL, J.—The question evidently intended to be referred is whether an appeal lies against an order passed with regard to a party to a suit, against whom there is a personal decree, in respect of any claim he may set up to hold property attached in [199] execution of that decree as a trustee on behalf of third persons not parties to the suit. The answer to the question depends upon whether such a claim falls under Section 244, Civil Procedure Code, or under Section 278. It is conceded that the Privy Council decision relied on in *Upendra Bhatta* v. *Ranganatha Bhatta* (1) does not touch the point. The addition of the words " or their representatives" to the words " parties to the suit" in Section 244 as it originally stood is really beside the point where the claim is put forward by the representative, not as representative of the parties, but on behalf of third persons. A large number of decisions have been cited but a good many of them, in my opinion, throw no light upon the question. They deal with the converse case of a trustee sued in his representative character claiming property attached as his personal property, and follow the principle laid down by the Privy Council in *Chowdry Wahed Ali* v. *Mussamut Jumaee* (6). Although that case was regarded in *Kuriyali* v. *Mayan* (3), (a case which involved both the present question and its converse), as an authority for the wider proposition ultimately laid down in *Upendra Bhatta* v. *Ranganatha Bhatta* (1), I am of opinion that, on examining the reasons given by the Privy Council for its decision, it will be found that they do not support the view taken in the latter case, but rather the reverse. Their Lordships say :—" It is obvious, therefore, that a party " in a representative character is so distinctly a party to the suit, that " under certain conditions his own private property may be attached and " sold. It is true, that to fix him with this liability, it must be shown that " he has received property of the deceased of which he has failed to prove a " proper disposition. But these things are all cognizable, and proper to " be ascertained in the suit in which the decree is made, during the pro- " gress of the execution proceedings founded upon such decree."

These reasons cannot apply to what I have termed, and shall for brevity's sake continue to term, the " converse case." Property which a judgment-debtor holds as a trustee can never be liable for claims against the judgment-debtor personally. In the Privy Council case just cited the question was whether certain property was the assets of the deceased party or liable as such. This is [200] clearly a question falling under Section 245 as between the parties to the suit in the strictest sense of the term—taking it, that is, that the defendant was a party to the suit only in his representative capacity.

(1) 17 M. 399.
(2) 4 I.A. 66 = 2 C. 327.
(3) 7 M. 255.
(4) 20 M. 129.
(5) 2 M. 328.
(6) 11 B.L.R. 149 (155).

I do not think it necessary to refer at length to all the cases cited, as they are not unanimous and the distinction I have pointed out between the present question and its converse is not always clearly borne in mind. I think, however, that there can be no doubt that the balance of authority is in favour of the view that the claims of third parties, whether put forward by themselves or by a party to the suit, must be dealt with under Sections 278 to 283 and not under Section 244. A considerable number of these decisions are collected and considered in *Roop Lall Dass* v. *Bekani Meah* (1). I agree with the remarks of Norris and Beverley, JJ., that the test whether the order as to the objection falls under Section 244 or not, is whether all the necessary parties are before the Court or not. If they are not, those not before the Court are not bound by any order passed and can take separate proceedings, thereby tending to an increase of litigation. It appears to me obvious that in a suit where a person who happens to be a trustee is proceeded against for a mere personal debt, the beneficiaries who could under no circumstances be parties to such a suit, are not in any way before the Court. The trustee in no way represents their interests—to which his own is necessarily adverse in such a suit—and there is no machinery by which they can be added as parties to the suit in execution proceedings.

In other words, Section 244 presupposes that the questions with which it deals are such questions as can be finally determined in the execution proceedings. If they cannot, I think it has no application. This view is in accordance with the principle that a Court should look to the substance of the objection, and not to the accident that it is put forward by A rather than by B. If it is, in substance, an objection that falls under Section 278, it should be dealt with under that section. This view is in accordance, also, with the dictum in *Ravunni Menon* v. *Kunju Nayar* (2) and a number of authorities, among which may be mentioned *Nath Mal Das* v. *Tajammal Husain* (3), *Ram Ghulam* v. *Hazaru Kuar* (4), **[201]** *Seth Chand Mal* v. *Durga Dei* (5), *per* Edge, C.J.; *Bahori Lal* v. *Gauri Sahai* (6), as well as the case already referred to, *Roop Lall Dass* v. *Bekani Meah* (1), where the authorities are discussed. See also *Murigeya* v. *Hayat Saheb* (7), where Parsons, J., who took the contrary view, admitted that the balance of authority was against it. In *Rajrup Singh* v. *Ramgolam Roy* (8), the same view is taken and at page 6 the distinction between the two classes of cases is clearly brought out. In *Punchanun Bundopadhya* v. *Rabia Bibi* (9), the question was what I have called "the converse case" and the opinions of the majority as to the construction of Sections 278 to 283 must be regarded as merely *obiter*. I think too much stress was laid by the learned Judges who constituted the majority (as well as by Parsons, J., in *Murugeya* v. *Hayat Saheb* (7)) on the words in Section 278 "in all other respects as if he was a party to the suit." This is an enabling and not a restricting clause, in my opinion; and if it were a restricting clause, the question would still remain—is a judgment-debtor, raising an objection in the character of representative of third persons not before the Court, 'a party to the suit,' at all? I think he is not. It may be pointed out, in addition to what has been already said, that the view that a *jus tertii* set up by a judgment-debtor must be dealt with under Section 244, Civil Procedure Code, leads to

(1) 15 C. 437 (444). (2) 10 M. 117 (119). (3) 7 A. 36.
(4) 7 A. 547. (5) 12 A. 313 (324). (6) 8 A. 626.
(7) 23 B. 237. (8) 16 C. 1. (9) 17 C. 711.

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this anomaly—that the trustee who has no real interest in the property attached may resort to appeal and second appeal, while the beneficiaries, if they put forward the claim themselves under Section 278, have no right of appeal at all, and are driven to a separate suit to establish their claims. It would further tend in practice to lead to great complications, as the trustee might proceed under Section 244, while the beneficiaries or some one in their behalf (*e.g.*, a joint trustee who is no party to the suit) might simultaneously conduct proceedings under Section 278. This seems to be a sufficient answer to the remarks of Prinsep and O'Kinealy, JJ., in *Punchanun Bundopadhya* v. *Rabia Bibi* (1), that Section 244 should be "liberally construed so as to prevent litigation." The view for which I am contending would, I think, be best calculated to have that effect.

My answer to the question proposed is that, when a person against whom there is a personal decree claims attached property **[202]** on the ground that he holds it as trustee for persons not parties to the suit, such claim falls under Section 278 and not under Section 244, Civil Procedure Code, and no appeal lies against any order passed on such claim by the Court executing the decree.

MICHELL, J.—I agree with Mr. Justice O'Farrell in his conclusion as well as his reasons for arriving at it on the question referred. It was contended that the case came within Section 244 of the Civil Procedure Code because a trustee represents the beneficiaries. But, though the persons beneficially interested need not, ordinarily, be joined in a suit against a defendant as trustee, executor or administrator (Section 437, Civil Procedure Code) he must be impleaded as such, otherwise the suit would not be properly framed, and a decree passed against him simply would not be a decree against him as trustee, executor or administrator. The case referred to us, however, is not a case of a judgment-debtor against whom a decree has been passed as trustee or who was sued as such, but of one against whom a decree has been passed, and the suit brought, in his own personal capacity. The suit not having been brought, nor the decree passed, against him in his *persona* as trustee, he is, as such trustee (in which capacity he makes the claim to the attached property), in my opinion, no party to the suit.

BODDAM, J.—I concur.

This appeal coming on for final hearing after the above decision of the Full Bench, the Court (SHEPHARD and SUBRAMANIA AYYAR, JJ.) delivered the following

JUDGMENT.*

The appeal is dismissed with costs.

* Final Judgment of the Division Bench.—ED.

(1) 17 C. 711.

23 M. 203=1 Weir 687.

1899 DEC. 15.

APPELLATE CRIMINAL.

23 M. 203= 1 Weir 687.

[203] APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Benson.

TANGI JOGHI (*Accused*) v. HALL (*Complainant*).*
[7th and 15th December, 1899.]

Criminal Breach of Contract Act—Act XIII of 1859, *Section* 2—*Money advanced on account of work to be performed—Loan on condition that the workman should enter into a contract of service.*

A workman agreed in writing to work for the proprietors of an estate for four years and one month, from 1st March 1899 to 31st March 1903, for an initial advance of one rupee, which was not to be repaid till after the expiration of the agreement. The same person subsequently obtained an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from his wages. He worked from 1st March 1899 till 18th September 1899 when he ceased to work, leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. He was subsequently charged and convicted under Section 2 of the Criminal Breach of Contract Act XIII of 1859 :

Held, that the initial advance of one rupee was not money advanced on account of work to be performed, but rather a loan made without interest on the condition that the workman would enter into a contract of service for the duration of the loan ; and that the Criminal Breach of Contract Act, 1859, was inapplicable to this case ;

that, with reference to the ten rupees to be repaid out of wages, the Act applied, and an order should be made directing the workman to work until the expiration of the term of the contract on account of which this sum had been advanced.

[F., 17 Ind. Cas. 420=23 M.L.J. 513=(1912) M.W.N. 1152.]

BY a written agreement entered into with the proprietors of the Mountain-Glen Estate, the accused, one Tangi Joghi and two others, agreed to work on that estate for a period of four years and one month, commencing from 1st March 1899 to 31st March 1903, for an initial advance of one rupee each in respect of which it was expressly stipulated that it should not be repaid till after the expiration of the agreement. The accused obtained subsequently an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from the wages, which were fixed at Rs. 8 per mensem, and worked on the estate from 1st March 1899 until the 18th September 1899 when he ceased to work (owing, it was [204] said, to family difficulties), leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. The accused was subsequently charged and convicted by a Stationary Sub-Magistrate under Section 2 of the Criminal Breach of Contract Act XIII of 1859—and was ordered to complete the contract until 31st March 1903 and to pay Court costs (Rs. 1-4-0).

The parties were not represented.

JUDGMENT.

We agree with the District Magistrate that the sum of Rupee 1 given to the defendant on the date of the agreement was not "money advanced on account of work to be performed." It was rather a loan made without interest on the condition that the defendant would enter

* Criminal Revision Case, No. 466 of 1899, referred for the orders of the High Court, under Section 438 of the Criminal Procedure Code, by C.J. Weir, District Magistrate of Nilgiris, in letter, dated 30th October 1899.

1899 DEC. 15. — APPELLATE CRIMINAL. — 23 M. 203 = 1 Weir 687.

into a contract of service for the duration of the loan, *viz.*, four years and one month.

The provisions of Act XIII of 1859 are therefore inapplicable to this loan (see Proceedings of the Madras High Court, dated 9th January 1880, No. 39 (1), and *Queen-Empress* v. *Kandappa Goundan* (2)).

As regards the sum of Rs. 10 advanced on the same date and to be repaid out of wages earned by instalments of one rupee in each month, it is not clear why this sum should not be regarded as "money advanced on account of work to be performed." The case is similar to *The Queen* v. *Tulukanam*(3), in which it was held that the provisions of Act XIII of 1859 were applicable. The term of the contract, on account of which this sum of Rs. 10 was advanced, is not clearly stated in the papers, but apparently it was for ten months, as that was the time required to work off the advance at Rupee 1 per mensem. The order of the Magistrate should, therefore, have directed the defendant to work until the 31st December 1899 instead of until the 31st March 1903. We modify the order accordingly.

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23 M. 205 = 2 Weir 161 & 601.

[205] APPELLATE CRIMINAL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

QUEEN-EMPRESS *v.* ANKANNA AND ANOTHER.*
[28th September, 1899.]

Criminal Procedure Code—Act V of 1898, *Sections* 195, 476—*Order by Deputy Magistrate sanctioning prosecution—Complaint by Deputy Magistrate—Jurisdiction of Sessions Court to interfere.*

A Deputy Magistrate having decided that certain witnesses, (who had given evidence before himself and before two other Magistrates on different occasions relating to charges of rioting and causing hurt) had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances:

Held, that whether the Deputy Magistrate had intended to pass an order under Section 476 or to make a complaint under Section 195 (1) (*b*) of the Code of Criminal Procedure, the Sessions Judge had no power to interfere: also that the power of revoking given under Section 195 (*b*) is only in respect of sanctions, and not of complaints

[F., 7 Bom. L.R. 84 (85) = 2 Cr. L.J. 54; R., 13 Cr. L.J. 209 (211) = 14 Ind. Cas. 305 = 22 M.L.J. 419 = 11 M.L.T. 367 = (1912) M.W N. 499.]

PETITION to revise an order of a Sessions Judge setting aside an order of a Deputy Magistrate binding over two persons who had given evidence in a criminal case to appear for trial on a charge of perjury. The Deputy Magistrate in his order said that the two witnesses in question had been examined by himself in a case of rioting and hurt on 25th and

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* Criminal Revision Case, No. 238 of 1899, under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of V. Srinivasa Charlu, Acting Sessions Judge of Cuddapah, in criminal miscellaneous petition No. 1 of 1899.

(1) Weir's Criminal Rulings, 3rd Ed., p. 455.
(2) Weir's Criminal Rulings, 3rd Ed., p. 456.
(3) 7 M. 131.

26th March 1898, respectively, when they had deposed to the same facts that they had previously deposed to before another Magistrate on 17th August 1896, relating to the same offences. The evidence last referred to had been given within three months of the occurrence. In July and August 1897 the said witnesses had been examined by a third Magistrate, also with reference to the same occurrence. In the examination in July 1897 they denied all knowledge of the affair: whilst in August 1897, they admitted the correctness of their previous depositions given on 17th August 1896. The Deputy Magistrate held [206] it to be clear from these conflicting and contradictory depositions that the witnesses had wilfully perjured themselves on one occasion or another and ordered them to be prosecuted for perjury under Section 195 of the Code of Criminal Procedure. He bound them over to appear to take their trial for an offence under Section 193 of the Indian Penal Code. On a petition being presented to the Sessions Court, the order of the Deputy Magistrate was set aside, the Acting Sessions Judge treating it as an order granting sanction to prosecute the said witnesses for statements between which no substantial contradiction existed. He considered it undesirable that sanction to prosecute should be given under the circumstances.

1899 Sep. 28. — Appellate Criminal. — 23 M. 205 = 2 Weir 161 & 601.

This criminal revision petition was preferred on behalf of Government, on the ground that the Acting Sessions Judge had acted without jurisdiction in setting aside the Deputy Magistrate's order; that there was no order granting sanction under Section 195 of the Code of Criminal Procedure, as had been assumed by the Acting Sessions Judge; that the order of the Deputy Magistrate was in fact passed under Section 476 of the Code of Criminal Procedure; and that the Acting Sessions Judge had no power to set aside or interfere with proceedings passed under that section.

The Acting Public Prosecutor (*Sankaran Nayar*), for the Crown.

Mr. *John Adam*, for accused No. 1.

Accused No. 2 was not represented.

JUDGMENT.

It is not quite clear whether the Deputy Magistrate intended to pass an order under Section 476, Criminal Procedure Code, or to make a complaint under Section 195 (1) (*b*). In either case the Sessions Judge had no power to interfere with this order. This is conceded as regards Section 476, Criminal Procedure Code, by Mr. Adam who appears for the first accused, and it is equally clear, we think, as regards a complaint under Section 195 (1) (*b*).

The power of revoking given under Section 195 (*b*) is only in respect of sanctions and not in respect of complaints. We set aside the order of the Sessions Judge, dated 21st April 1899, and restore that of the Deputy Magistrate, dated 12th December, 1898.

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Appellate Civil.
23 M. 207.

23 M. 207.

[207] APPELLATE CIVIL.

Before Mr. Justice Boddam, Mr. Justice O'Farrell and Mr. Justice Michell.

REFERENCE UNDER STAMP ACT, 1879, SECTION 46.*
[2nd October, 1899.]

Stamp Act—Act I of 1879, *Sections* 3, 46, *Schedule I*, *Articles* 13, 44 (*a*)—"*Mortgage-deed.*"

By a clause in a document referred to the High Court for an opinion as to the stamp duty payable thereon, the A company agreed that, on execution of the document, they would issue and hand to the B company £8,000, part of the £25,000 second debentures, and that such second debentures, together with the £20,000 first debentures already issued to the B company, and the remaining £5,000 first debentures, subject to the prior charges thereon, should be held by the B company as security for a sum of £32,009-15-10 previously mentioned in the deed :

Held, that the clause constituted the document a "mortgage deed" within the meaning of the Indian Stamp Act, 1879. The whole debt of £32,009-15-10 being, by the said document, secured not only upon the old security of £20,000 first debentures, but also upon the £8,000 second debentures and the remaining £5,000 of the first debentures, stamp duty was payable on the new security, though a portion of the debt secured was included in the previous document on which duty had been paid ;

that the document was not a mere agreement to make a transfer, but an agreement to hand over the debentures on the execution of the document, and was therefore in effect an actual transfer ;

that the "mortgage-deed" wa one with possession within Article 44 (*a*) of Schedule I of the Stamp Act, 1879, by which this document was governed ; and that in respect of the undertaking to make further advances, the document was liable to further duty as an agreement "not otherwise provided for."

THE question referred was as to the stamp duty chargeable on a document, which, among other matters not material to the reference, contained an admission that a sum of £32,009-15-10 was due by the Madras Electric Tramway Company, Limited, to the Electric Construction Company, Limited, and an undertaking, on execution thereof, to issue and hand to the Construction Company second debentures for £8,000, to be held, together with debentures for £25,000 already deposited, by the Construction Company as security for the said sum of £32,009-15-10. The document also contained an agreement on the part of the Construction Company to grant further advances for the purpose of constructing certain new lines, and an agreement by the Tramway Company to give **[208]** the Construction Company, in respect of such advances and the interest accruing thereon, a second charge on the undertaking property and assets of the company.

The document was held by the Collector to be an acknowledgment of a debt attested by a witness and not payable to order, and therefore a bond, chargeable under Article 13, of Schedule I of the Stamp Act I of 1879,—as well as an agreement not otherwise provided for by the Act. It was contended, on the other hand, that the document was merely an acknowledgment of a debt and a promise to provide security. The questions were :—Whether it was merely an acknowledgment of a debt, or a

* Referred Case, No. 10 of 1899, stated under Section 46 of the Stamp Act, 1879, by the Board of Revenue, Separate Revenue, in letter dated 15th June, 1899.

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bond, having regard to the definition in Section 3 (4), and as such chargeable under Article 13; or a mortgage-deed chargeable under Article 44 of Schedule I of the Stamp Act I of 1879. Further questions were:—Assuming that the document required to be stamped as a mortgage-deed, whether it should be treated as one with or without possession and on what amount the stamp duty should be calculated.

Mr. *N. Subrahmaniam*, for the Board of Revenue, Separate Revenue.
Mr. *E. Norton*, for the Electric Construction Company, Limited.

JUDGMENT.

We are of opinion that the provisions of the third clause of the operative part of the document under consideration constitute the document a "mortgage-deed" within the meaning of the Indian Stamp Act. By that clause the Madras Electric Tramways Company (Limited) agree that, on execution of the document, they will issue and hand to the Construction Company £8,000, part of the £25,000 second debentures, and that such second debentures, together with the £20,000, first debentures already issued to the latter company, and the remaining £5,000, first debentures, subject to the prior charges thereon, shall be held by them as security for the sum of £32,009-15-10 previously mentioned in the deed.

It is contended that this document is itself a debenture, and Mr. Norton relied for this view on the decision of Mr. Justice Chitty in *Edmonds* v. *Blaina Furnaces Company* (1) and also on *Levy* v. *Abercorris Slate and Slab Company* (2), and he contended **[209]** that, under the notification of the Government of India of 4th December 1884, No. 1945, the document is exempt from stamp duty. But neither that notification nor those decisions have any application, in our opinion to the present case. By this present document the whole debt of £32,009-15-10 is secured upon not only the old security of £20,000 first debentures, but also on the £8,000 second debentures and remaining £5,000 of the first debentures. It is clear, therefore, that for the new security the company are liable to pay stamp duty, though a portion of the debt secured was included in the previous document on which duty was paid.

It is also contended that this is not a completed transfer, but only an agreement to make a transfer; but the agreement is to hand over the debentures on the execution of the document, and is, therefore, we think, in effect an actual transfer.

As the debentures are handed over to the transferee company "the mortgage-deed" is, in our opinion, one with possession (Article 44, (*a*) Schedule I of the Stamp Act I of 1879, by which Act this document is governed.)

In respect of the undertaking to make further advances, we think the document is liable to further duty as an agreement "not otherwise provided for."

Messrs. *H. C. King & John Josselyn*—Attorneys for the Electric Construction Company, Limited, and for the trustees to the debenture-holders of the Madras Electric Tramways Company, Limited.

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(1) L.R. 36 Ch. D. 215. (2) L.R. 37 Ch. D. 260.

1899
OCT. 5.

APPEL-
LATE
CRIMINAL.

23 M. 210=
2 Weir 186.

23 M. 210=2 Weir 186.

[210] APPELLATE CRIMINAL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

PAMPAPATI SASTRI (*Counter-petitoner*), (*Petitioner*) *v.*
SUBBA SASTRI (*Petitioner*), (*Counter-petitioner*).*
[29th September and 5th October, 1899].

Criminal Procedure Code—Act V *of* 1898, *Section* 195—*Sanction for prosecution—Notice to person to prosecute whom sanction is sought—Proceedings before Sessions Court—Proper exercise of discretion.*

A Sessions Court when grantng sanction to prosecute under Section 195 of the Code of Criminal Procedure should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exercised unless the persons sought to be prosecuted have given an opportunity to be heard.

An order of a Sessions Judge, sanctioning a prosecution, containing nothing from which the High Court could conclude that he had directed his mind to the real question in such cases, namely, whether there was a *prima facie* case on which a prosecution could be instituted with a fair chance, of success, the High Court revoked the sanction.

[F., 13 Cr-L.J. 1 (2)=13 Ind. Cas. 111; R., 28 A. 142 (145)=A.W.N. (1905) 231=2 Cr. L.J. 598; 26 M. 592 (593)=2 Weir 297].

THE material portions of a petition to a Sessions Judge upon which sanction to prosecute had been granted were as follows:—" In the sessions case No. 14 of 1899 the counter-petitioner was the first prosecution witness. He said in his evidence :—' (*a*) We and his sister's husband Timmappa attended on him (Venkatadri Bhat) during his illness. (*b*) A year before his death Venkatadri had lost the top joint of his right thumb from leprosy. He had lost all his nails. He could not hold a pen. (*c*) On the 10th of May 1895 I was attending him from 6 to 10 P.M. (*d*) I heard of this will for the first time when he (Subba Sastrulu) presented it in Court with a petition for probate. (*e*) I was friendly with deceased. (*f*) He (Venkatadari Bhat) had been suffering from leprosy for three years. For a year before his death he was [211] entirely unable to write. (*g*) During his last illness Hakim Dada Sahib was giving medicine to him. (*h*) Before Dada Sahib, Kunti Kondappa gave medicine to deceased. He has become mad. (*i*) There was never any dispute between me or my father and deceased or his father. (*j*) He (Venkatadri Bhat) got food from us. (*k*) The delirium began on the evening of Wednesday or Thursday. Dada Sahib was treating him at the time. (*l*) She (Pattamma) was not treating him during his illness. (*m*) It (the will) was not shown to me on the second day. (*n*) I first went to the house of Rajeswara Sastri for medicine when I heard of Venkatadri's illness. (*p*) He came and prescribed medicine for Venkatadri during three days. Afterwards Krishna Sastri treated Venkatadri for two days. (*q*)

* Criminal miscellaneous petition No. 70 of 1899 praying the High Court to revoke the sanction given by the Acting Sessions Judge of Bellary for the prosecution of the petitioners, under Sections 193 and 195 of the Indian Penal Code, in sessions case No. 14 of 1889.

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APPELLATE CRIMINAL.

23 M. 210= 2 Weir 186.

After Krishna Sastri, Kunti Kondappa treated him (Venkatadri Bhat) for three days. (*r*) For eight days after removal of the corpse the house remained in my possession. (*s*) On the 9th while we were absent at a ceremony first defendant put twenty Mussalmans at the door and kept us out.' All these statements are false, proved to be false by the evidence of some of the disinterested prosecution witnesses and many of the defence witnesses and known by the counter-petitioner to be false. The statements are further falsified by the probabilities of the case, and can still further be proved to be false by evidence to be adduced in the case. The petitioner (Subba Sastri) prays that sanction may be accorded to prosecute the counter-petitioner for offences under Sections 193 and 195 of the Indian Penal Code."

The Acting Sessions Judge allowed two days for the return of notice to the counter-petitioner, which was, in fact, not served. He then passed the following.

ORDER:—"I sanction the prosecution of Pampapati Sastri under Sections 193, and 195, Indian Penal Code, with reference to the aforesaid statements made by him on oath in sessions case No. 14 of 1899."

Against this above order the counter-petitioner now preferred this criminal miscellaneous petition.

Mr. *Allan Daly* and *Venkataramana Ayyar*, for the petitioner.

S. Subrahmania Ayyar, for the counter-petitioner.

JUDGMENT.

The Acting Sessions Judge of Bellary has sanctioned the prosecution of the petitioner and three others for offences under Sections 193 and 195, Indian Penal Code, in regard to [212] statements made before him in sessions case No. 14 of 1899. The application for sanction sets out *seriatim* the statements alleged to be false, and avers that they are so and are proved to be so by the evidence of other witnesses, (who are not particularised) and by the probabilities also not specifically set out.

The judge originally considered notice to the counter-petitioners to be necessary, but he unfortunately only allowed the short space of two days for the return of the notices. They were not served, the counter-petitioners being absent from their usual places of residence, and the Sessions Judge accorded sanction witout issuing any further notice.

His order was in these terms:—"I sanction the prosecution of Pampapati Sastri under Sections 193 and 195, Indian Penal Code, with reference to the aforesaid statements made by him on oath in sessions case No. 14 of 1899."

It was held by the High Court of Calcutta in *Kedarnath Das* v. *Mohesh Chunder Chuckerbutty* (1) that a subordinate Court granting sanction to prosecute under Section 195, Criminal Procedure Code, should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not and that if this is not done the High Court will revoke the sanction. It was further held that in the circumstances the Lower Court did not exercise a proper discretion in not giving the party against whom sanction was sought notice of the application.

We concur generally in these views of the Calcutta High Court. No doubt it has been held that notice is not invariably necessary in cases

(1) 16 C. 661.

1899 Oct. 5. — Appellate Criminal. — 23 M. 210 = 2 Weir 186.

under Section 195, Criminal Procedure Code (see *Queen-Empress* v. *Sheik Beari* (1)). But it was also held in that case that sanctioning a prosecution was a judicial act, and having regard to the peculiar circumstances of the present case and the fact that a previous District Judge had come to a different conclusion from the Acting Sessions Judge in regard to its main features, we think it was certainly one in which a proper discretion could not be said to be exercised unless the parties sought to be prosecuted were given an opportunity to be heard. That was clearly also the opinion of the Acting Sessions Judge in the first instance. There is nothing in the Acting Sessions Judge's order sanctioning the [213] prosecution from which we can come to the conclusion that he ever directed his mind to the real question in such cases, *viz.*, whether there was a *prima facie* case on which a prosecution could be instituted with a fair chance of success. We have been referred by the learned vakil for the counter-petitioner (petitioner in the Lower Court) to certain passages in the judgment in the sessions case (which however forms no part of the records in these proceedings) but all they appear to show is that the Judge was not prepared to rely upon the evidence of the counter-petitioners (petitioners here) as a basis for the conviction of the then accused before him. That is not a sufficient ground for sanctioning a prosecution for giving false evidence. In the circumstances we resolve to revoke the sanction accorded by the Acting Sessions Judge, but we do so without prejudice to any further application the counter-petitioner may think proper to make in the matter.

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23 M. 213 = 1 Weir 750.

APPELLATE CRIMINAL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice Benson.

PARIMANAM PILLAI *(Accused)*, *Petitioner* v. CHAIRMAN, MUNICIPAL COUNCIL, OOTACAMUND *(Complainant)*, *Counter-petitioner.** [21st December, 1899.]

District Municipalities Act (Madras)—Act IV of 1884, *Bye-law No.* 48—*District Municipalities Act Amendment Act (Madras)—Act III of* 1897—*Covering a drain without municipal permission.*

A bye-law of a municipality had been framed under the powers conferred by an Act of 1884 as amended by an Act of 1897, and was to the following effect :—"No public drain shall be covered without the permission of the municipal council." It had come into force in 1890. Prior to its coming into operation an earlier bye-law had subsisted, in substantially the same terms. An occupier of premises, who had covered a drain during the subsistence of the earlier bye-law, was charged with having committed an offence under the later bye-law, and contended by way of defence that he could not be convicted inasmuch as the [214] act complained of had been committed before the passing of the Act under which the complaint was laid. He was convicted by a Bench of Magistrates :

Held, that the conviction was right.

Per ARNOLD WHITE, C.J.—The bye-law applies to all drains which existed in a covered state at the time when it came into operation. The word "shall" is used throughout the bye-laws in the imperative, and not with reference to time, and this is the sense in which it is used in the bye-law in question.

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* Criminal Revision case No. 477 of 1899, under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Proceedings of the Court of the Bench of Magistrates, Ootacamund, in summary case No. 660 of 1899.

(1) 10 M.232.

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Per BENSON, J.—A bye-law similar in terms to that under which the accused had been convicted having been in existence under the then Municipal Act at the time when the accused first covered the drain in question, the liability then incurred by him continued, under the General Clauses Act (Madras) unaffected by the passing of the present Municipal Act. The contention that the accused could not be convicted because the act complained of was committed before the present Municipal Act was passed, therefore, failed.

PARIMANAM PILLAI was charged before a Bench of Magistrates of Ootacamund with covering a drain without permission, in contravention of bye-law No. 48 framed under Madras Act IV of 1884 as amended by Madras Act III of 1897. He pleaded not guilty, and stated that the said drain had been covered with the plank now upon it for thirteen years and that there had been no interference with the drain or its cleansing. He said the plank had been placed where it was for the safety of the people coming to the bazaar, and that the municipality had done the same in several places. The Bench found that the municipal drain in front of the bazaar had been covered with a plank which had been there placed without municipal permission, and that the officials of the municipality had directed its removal. A fine of Rs. 10 was imposed, and the accused was ordered to remove the plank.

The accused preferred this petition.

Mr. *W. Barton*, for the petitioner.

Mr. *J. H. M. Ryan*, for the complainant.

JUDGMENT.

ARNOLD WHITE, C.J.—The bye-law in question was made under the powers conferred by Act IV of 1884 as amended by Act III of 1897. The bye-law is as follows :—"No public drain shall be covered without the permission of the Municipal Council." This bye-law came into force in 1890. The petitioner contends that the bye-law in question has no application where a public drain was in fact covered at the time the bye-law came into operation. It is to be observed that an earlier bye-law made under the law in force prior to the coming into operation of Act IV of 1884 is in the same terms as the existing bye-law with the **[215]** exception that the earlier bye-law required the permission of the municipal council to be a written permission. It would seem therefore that the existence of this covered drain was a contravention of the law as it stood prior to the coming into operation of the bye-law in question.

On the question of the construction of the bye-law of 1890—the bye-law now in question—I am of opinion that it applies to all drains which existed in a covered state at the time the bye-law came into operation. The word " shall " is used throughout the bye-laws as the imperative "shall"—and not with reference to time—and this is the sense, in my view, in which it is used in the bye-law in question. What the bye-law means is :—It is unlawful for a public drain to be covered without the permission of the municipal council.

I think the conviction was right and that the petition ought to be dismissed.

BENSON, J.—A bye-law similar in terms to that under which the petitioner has been convicted was in existence under the then Municipal Act at the time, some 13 years ago, when, according to the petitioner, he first covered the drain in question. The liability then incurred has continued, and is, under the Madras General Clauses Act, unaffected by the

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passing of the present Municipal Act. The argument therefore that the petitioner cannot be convicted because the action complained of was committed before the present Municipal Act was passed fails.

I would refuse to interfere with the conviction.

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23 M. 216 = 9 M.L.J. 338.

[216] APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

SRIRANGAMMAL (*Plaintiff*), *Appellant* v. SANDAMMAL AND OTHERS (*Defendants Nos.* 1 to 8 and 11 to 14) *Respondents.**
[14th, 15th and 26th September, 1899.]

Succession Act—Act X *of* 1865, *Section* 202—*Estate of intestate Native Christian—Suit for partition of estate by purchaser of widow's share before completion of administration—Dismissal of suit—Only remedy by way of administration suit.*

A person to whom the Indian Succession Act, 1865, applied having died intestate in April 1884, his widow and son were in September of the same year granted letters of administration, which were cancelled for want of stamp duty, a fresh grant being made on 19th January 1885. Plaintiff, alleging that the said widow had executed a promissory note in her favour in September 1884, filed a suit against her on 6th January 1885, and, there, being no appearance of the defendant, obtained an *ex parte* decree. In execution of the decree so obtained plaintiff attached portions of the estate of the deceased and brought them to sale, becoming herself the purchaser of the one-third share of the widow in each lot sold. In March 1885 the son was appointed sole administrator; in January 1888 he died and the letters of administration were revoked in consequence, and the amin of the District Court was appointed administrator of the estate until October 1894, when the son's widow was so appointed in his stead. Plaintiff now sued for partition of the property comprised in the estate of the deceased inorder that she might obtain delivery of the portions of it which she had purchased in execution of the decree against the widow previously obtained as aforesaid. The estate of the deceased had never been administered or distributed. The defence was that the said previous decree had been obtained by fraud:

Held, that under Section 44 of the Indian Evidence Act, the defendants were entitled to set up this defence; and that the property of the deceased having become vested in his administrator under the Indian Succession Act, it remained so vested until the administrator had distributed the estate, and that, in consequence, the widow had no saleable interest in any part of the estate until in the course of the administration thereof her share had been determined and allotted to her. Until such allotment (which had not yet taken place) the only process by which plaintiff could legally claim the widow's interest in the estate was by a suit for the administration of the estate, to which suit the widow, if alive, would be a necessary party. If not alive, letters of administration to her estate would be necessary, the administrator being made a party.

Held also, that the suit could not be treated as an administration suit.

[R., 13 Ind. Cas. 795 = 22 M.L.J. 228 = 11 M.L.T. 27 = (1912) M.W.N. 56.]

SUIT for partition by metes and bounds of certain portions of the estate of one John Arivanandam Pillai, deceased, by an alleged [217] purchaser of that share. The said Pillai was a Native Christian and had died intestate in April 1884 leaving him surviving his widow Sara Ammal, a son

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* Appeal No. 187 of 1898 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in original suit No. 10 of 1895.

Somasundaram Piliai, husband of the first defendant, and a daughter Ratnavati Ammal, now impleaded as fourth defendant. The widow applied under the Succession Act for letters of administration to the estate, which comprised a considerable amount of property, and, the son also applying under Section 202 of the said Act, letters were, on September 1884, granted jointly to the widow and the son. These were however cancelled as stamps were not furnished, and on 19th January 1885, a fresh joint grant was made though the son acted as sole administrator in fact. On 6th January 1885 plaintiff, (who, as was afterwards found, had much influence over the widow), filed a suit, (civil suit No. 2 of 1885), in the High Court at Madras claiming Rs. 15,000 from the widow, on a promissory note alleged to have been executed by the latter on 5th September 1884 in plaintiff's favour. The suit was not defended, and plaintiff obtained a decree *ex parte* for the amount claimed. In execution of the decree so obtained plaintiff attached various portions of the property of the deceased and brought them to sale, becoming herself the purchaser of the one-third share of the widow in each lot sold. The partition now sued for related to these properties; and plaintiff asked for delivery of the same. In February 1885 the son applied that letters of administration to the estate of the deceased should be granted to him alone, and an order was made to that effect on 6th March 1885. In January 1886 plaintiff caused a warrant to be issued for the arrest of the widow, but she was nowhere to be found; and in October 1887, the son applied unsuccessfully to set aside the attachments obtained by the plaintiff in execution of her decree in civil suit No. 2 of 1885; he also in the same month filed a suit in the High Court at Madras to set aside the said decree and for a declaration that the promissory note on which it had been obtained was a forgery. In January 1888 the son died, and the representatives not coming in, the suit abated. In August 1888, the letters of administration were revoked, because of the death of the son and the unfitness of the widow, and the amin of the Court was appointed administrator of the estate. In May 1890 the son's widow (the present first defendant (applied to be appointed interim administratrix of her late father-in-law's estate and ultimately, on 30th October 1894, she was so appointed, [218] the District Judge expressing the belief that a gross fraud had been played upon the Court in connection with the deceased's widow. The appointment of first defendant was confirmed on appeal by the High Court on 4th December 1896. The estate had, at the date of suit, not been administered or distributed. The defence to the present suit was that the promissory note upon which the *ex parte* decree in civil suit No. 2 of 1885 had been obtained and in execution of which plaintiff had purchased the properties, of which she now sued for partition, was a forgery. The District Judge held that the proceedings were not *bona fide*, that the promissory note sued on in civil suit No. 2 of 1885 had been given without consideration and that the decree in that suit had been fraudulently obtained, and that plaintiff had no rights as purchaser under the said decree, the sale having been in pursuance of a decree obtained by her own fraud on the Court. For these and other reasons he dismissed the suit.

The plaintiff preferred this appeal.

Mr. *John Adam* and Mr. *Joseph Satya Nadar*, for appellant.

Hon. *Bhashyam Ayyangar*, *Sivasami Ayyar*, *Sundara Ayyar* and *Rangachariar*, for respondents.

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JUDGMENT.

(After fully setting out the facts * their Lordships continued).—We agree with the District Judge and do not believe the plaintiff's story. We

* [The following, forming the first portion of the judgment of the case reported in 23 M. 216—though omitted in the I.L.R.—is given *in extenso* for facility of reference.—ED.]

The plaintiff's action is for partition by metes and bounds of certain properties set out in the schedule to her plaint and that one-third thereof may be given to her, she having purchased in Court auction under a decree obtained by her in C.S. No. 2 of 1885, the one-third share therein of one Sara Ammal, the widow of one John Arivanandam Pillai, deceased.

The defendants denied her right to the relief asked for and alleged that the decree obtained by the plaintiff in C.S. No. 2 of 1885, was obtained by fraud.

The story is an extraordinary one. John Arivanandam Pillai, a Native Christian pleader, died intestate on the 4th April, 1884 at Trichinopoly where he had resided, leaving him surviving his widow Sara Ammal, a son Somasundram Pillai (the husband of the first defendant) and a daughter Ratnavati Ammal, the 4th defendant.

Being a Native Christian, the Indian Succession Act (Act X of 1865) applied to the estate of the deceased. He was a rich man and left considerable property. His widow, who was an intemperate woman and very much under the influence of the plaintiff, applied for letters of administration to his estate. His son Somasundaram Pillai applied to be joined with her under Section 202, in the grant and on the 10th September 1884, an order was made by the District Judge of Trichinopoly granting letters of administration to the petitioner and her son jointly. As stamps were not furnished this order was cancelled, but on the 29th October 1884 a fresh petition was put in on behalf of the widow asking that letters should be granted to her alone excluding her son, and on the 17th December the son put in a petition asking for grant to him alone. On the 19th January, 1885, however, letters were issued jointly. The son acted solely, however, for from this time the whereabouts of the widow became lost in mystery and no one who had known her before is proved to have since seen her unless the plaintiff has, as she alleges—as will be shown later on.

On the 6th January 1885 the plaintiff put in a plaint in the High Court at Madras claiming from the widow of the deceased Rs. 15,600 (C. S. No. 2 of 1885). By her plaint she stated that, on the 5th September 1884, at Madras, the defendant by her promissory note promised to pay on demand to the plaintiff or her order Rs. 15,000 with interest, at 12 per cent. and that she had not paid the same or any part thereof in spite of frequent demands. The return day fixed in the summons was the 22nd January; and on that date the plaintiff obtained an *ex-parte* decree against the widow for Rs. 15,600 and costs. On the summons is written—as an acknowledgment of service—"Mrs. S. Areevanandam." The promissory note put in by the plaintiff is signed "Mrs. S. John Arivanandam.." Both are written in English. It appears from a perusal of the Judge's notes at the hearing that the plaintiff at that time merely stated that she saw the defendant sign the note and that she paid her the Rs. 15,000. The plaintiff in execution of this decree attached various portions of the property of the late John Arivanandam Pillai and brought them to sale, becoming herself the purchaser of the one-third share of Sara Ammal in each lot so sold. She says she purchased for Rs. 100 property worth many thousand rupees. She now, in this action, asks for partition of these properties by metes and bounds and that the third share of Sara Ammal should be delivered to her.

In February 1885 the son Somasundaram Pillai applied to the Court that letters of administration to the estate of his father should be handed over to him alone as he was unable to see or communicate with his mother, and on the 27th February 1885, when the application came on, the vakil who had appeared for the widow said he did not know where she was, but would enquire and the case was adjourned to the 6th March for that purpose. On the 8th March the vakil said he had been unable to ascertain her whereabouts and an order was made directing letters of administration to be handed over to the son (see Exhibits XXIII *a* and *b*). In August and September 1885, the daughter presented petitions against the administrators, but the widow could not be found (see Exhibits XXIV and XXVII and XXVIII). In October 1885 the surety for the widow desired to withdraw, but notice could not be served as the widow could not be found (see Exhibits XXIX, XXXI*a* and XXXI*b*.).

In January 1886 a warrant was issued for the arrest of the widow at the plaintiff's instance but she could not be found even by the plaintiff (see Exhibit XXXV*a*). In January 1887, again she could not be found (see Exhibits XXXV and XXXVI). Exhibit XXXVI is signed by the Village Munsif of Pandamangalam, who says that when he and the peon enquired at the village of Pandamangalam for Sara Ammal

go further, however, and say we do not believe that the plaintiff had Rs. 15,000 or that she paid Rs. 15,000 to Sara Ammal in Madras. We do

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alias Mrs. John Arivanandam "the people say there is no person of that name in this village. I know this fact." This is dated the 28th January 1887, and yet according to Exhibit XXXVII a notice is endorsed. "I received copy of this notice, on the 27th January 1887. Signed Mrs. S. Arivanandam" (the name being the same as in the endorsement as the original summons in C. S. No. 2 of 1885), the notice as far as can be gathered from it having been served at Pandamangalam, the very place where on the following day the Munsif says there is no person of that name in the village. It is observable, too, that one of the witnesses to the signature in Exhibit XXXVII is a native of Srirangam where the plaintiff lives. However, the District Judge held that "this service appears not to have been made on the person named in the summons" and declares the service insufficient. Exhibits XXXVIII*a* and XXXVIII*b* show that, in like manner, in April 1887 the widow could not be served; and in August 1887 an order is passed by the District Judge of Trichinopoly: "As it appears impossible to procure the attendance of the judgment-debtor, the Court must dispense with examining her." In April 1887, however, a petition had been presented to the District Court at Trichinopoly purporting to be presented by the widow which is signed "Mrs. S. Arivanandam" (the same signature again) consenting to the sale of her properties but it is not proved to have been signed by the widow nor that the gentlemen who purported to witness the signature knew her (see Exhibit M). In October 1887 the son Somasundaram Pillai put in a petition to set aside the attachments obtained by the plaintiff in execution of C.S. No. 2 of 1885 alleging that the widow's whereabouts were unknown but the petition was dismissed—Exhibit D. He also in the same month filed a plaint in the High Court, Madras, to set aside the decree in C.S. No. 2 of 1885 and to declare the promissory note on which it was obtained a forgery. In his plaint he alleges that since administration no tidings have reached the family as to his mother's whereabouts and that all attempts to trace her have proved of no avail. In January 1888, however, Somasundaram Pillai died and when the case came on for issues, as the representatives had not come in, it was ordered that the suit should abate. On the 23rd March 1888 the widow of Somasundaram Pillai (the 1st defendant in this suit) got an order that an Amin of the District Court of Trichinopoly should take charge of the property of Somasundaram Pillai. In July 1888 an order was made on a petition wherein the petitioner is called Mrs. Arivanandam Sara Ammal—Exhibit L. The petition is not exhibited and who put it in cannot be ascertained. The order precludes the Amin from interfering with the estate of Arivanandam whilst petitioner's letters of administration are still in force.

In August 1888 an order was made by the District Judge of Trichinopoly revoking the grant of letters of administration to the estate of the late John Arivanandam Pillai because of death of the Somasundaram Pillai and the unfitness of the widow, if she was alive, and appointing the Amin of the Court the administrator of the estate of the late John Arivanandam Pillai. In his order (Exhibit XLIV) the Judge speaking of the widow Sara Ammal says: "It is evident that if she is alive, which is doubtful, she is kept out of the way by persons who wish to make use of her name. She is further disqualified for being administrator by having parted with nearly all her interest in the estate of the deceased (1/3) to one Srirangammal of Srirangam who is evidently the real counter-petitioner. This person has seized control of the estate under cover of the grant of letters of administration to Sara Ammal," &c.

In May 1890 an application was made by the present 1st defendant, the widow of Somasundaram, to appoint her *interim* administratrix of the estate of the late John Arivanandam Pillai and thereupon the District Judge made a special order adjourning the case in order to communicate, if possible, with Sarah Ammal. "If Sara Ammal is not produced before the 1st June petitioner may apply to me to be appointed *interim* administratrix *pendente lite* and I will grant it." She was not produced, and on the 12th March 1891 the District Judge in an admirable judgment revoking the grant of letters of administration to Sara Ammal gives his reasons for concluding that a gross fraud was being attempted to be played on the Court, and we are fully satisfied that he is right in his conclusions. On the 30th October 1894 an order was passed granting to the 1st defendant letters of administration to the estate of the late John Arivanandam Pillai, and this was confirmed on appeal to the High Court by their decree, dated 4th December 1896.

This was the state of affairs prior to the commencement of this action, from which it appears that, since January 1885, there has been continuous litigation between the plaintiff and the representatives of the deceased John Arivanandam Pillai, only a portion of which has been referred to above, and in almost the whole of which efforts have been made unsuccessfully to obtain the appearance of Sara Ammal. It is also clear

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not believe that Sara Ammal executed the promissory note in Madras and we are not satisfied that she ever in fact signed the promissory note or that, from time to time, though Sara Ammal has never been seen by any one interested in the proceedings and who knew her, she has been represented occasionally but invariably by a vakil who does not pretend to know anything of her or of her whereabouts. If she is alive and capable, she has successfully evaded all the efforts of the Courts to get her to appear, in a way which, to say the least, is surprising; and if she is incapable or dead, she is being personified by some one for purposes of their own; and it is difficult to see how her relations could benefit by her appearances on the occasions on which she has purported to take any interest in what has been going on. She purports to have signed the promissory note upon which C. S. No. 2 of 1885 is based and to have endorsed the summons. From that time, January 1885, if in fact she did endorse the summons, till the 27th January 1887, she cannot be served; then, on that date, a notice is endorsed "received copy of this notice—Mrs. S. Arivanandam" at the place and on the day before the villagers and Munsif of Pandamangalam say there is no such person there. This is a notice that a day has been fixed for enquiring as to her interest in properties attached by the plaintiff and the plaintiff alone could be benefited by the notice being shown to have been served. In April 1887 there is a petition purporting to be put in by the widow consenting to the sale by the plaintiff of her properties—the plaintiff alone could benefit by this. In November 1887, the plaintiff having been refused leave to bid at the Court sale of the widow's property, a vakil appears for the widow on the appeal of the plaintiff to the High Court and consents; and lastly, in July 1888, a petition is put in, in her name objecting to the Amin of the Court being appointed to take possession of the estate which the plaintiff desires to dispose of. On every occasion, therefore, in which she has purported to appeal, the only person who could have benefited by her appearance has been the plaintiff. If, therefore, she is being personated, the assumption would naturally be that it is by the plaintiff or at the plaintiff's instance.

We now come to this action, and the onus being on the defendant they commence their evidence by calling the plaintiff and, having regard to what she proved in C. S. No. 2 of 1885, her evidence is remarkable. Her story now is not that she lent Sara Ammal Rs. 15,000 on a promissory note, but quite a different story. In effect she says Sara Ammal and her son and daughter before letters were granted wanted her to buy a village for Rs. 15,000; she spoke to Somasundaram and the 4th defendant about it and they all arranged the sale at Trichinopoly; that she and Sara Ammal and Somasundaram (but not the 4th defendant) came to Madras to take the opinion of Mr. O'Sullivan and get the deeds prepared; and that she brought the money with her and without any receipt or any deed she paid Rs. 15,000 to Sara Ammal who gave it to Somasundaram who went off with it and they all then declined to carry out the agreement. They said they would do so after getting letters, however, but after they got letters they refused to do so and on their refusal the plaintiff filed her suit. She also says the suit was filed before the letters were granted. Money was paid at the time the promissory note was given. Money was paid in Madras and promissory note was given in Madras and at the same time she says the family was not in debt. Sara Ammal had money enough. They were selling the land to effect division of properties.

Now, if that story is true, it is difficult to understand why the action was brought against Sara Ammal alone on the promissory note, or why Sara gave the promissory note. Why should the plaintiff have brought the money to Madras? Why should Sara have given the promissory note in Madras since they were all at Trichinopoly when they finally refused to sell? Why should the plaintiff have paid the money before the deeds were prepared and executed and why has nothing been said about this supposed agreement to sell before? Why did she pay the money in the absence of the 4th defendant who remained in Trichinopoly? Indeed, the story is, on the face of it, so utterly improbable that, in the absence of strong corroboration, no one could believe it. It is not corroborated, but its improbabilities are added to by the rest of her evidence. The explanation given of where the money came from is quite incredible. She says that she became a widow in 1862. She was in litigation with her husband's family and her father gave her Rs. 40,000 in cash for her maintenance—a most improbable story, for no rich native would give cash to a young widow when he could have settled other property on her; and, if he had done so, how much of it would have been left in the hands of a young widow 22 years afterwards? She further says that she saw Sara Ammal a week ago in the house of her pleader and spoke to her and spoke to her counsel about it afterwards. Her counsel does not go into the box and she calls no one to corroborate her in any way. On the other hand, there is abundant evidence to show that her story is untrue, without going into it in greater detail.

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that, if she did, she knew what she was doing. If she did, it is by no means certain that she ever endorsed the plaint or was aware that any action had been brought against her; and we have no hesitation in finding, as a fact, that the decree in civil suit No. 2 of 1885 was obtained by fraud and is null and void against the defendants.

We have no doubt that the defendants are entitled to set up this defence under Section 44 of the Evidence Act. If authority were wanted for this decision the two cases (*Rajib Panda* v. *Chowdhry Lekhan Sendh Mahapatra* (1) and *Sreemutty Nistariney Dassee* v. *Rai Nundo Lall Bose*(2)) are in point; but apart from authority it is [219] clear that by the words of the Act as by the English Law a person not an actual party to the fraud may set up fraud as an answer to a decree either of an English or any foreign Court —See *Cole* v. *Langford* (3).

All these questions are, however, matters which are entirely immaterial in this case, for in no circumstances can the plaintiff succeed in her present action.

The plaintiff's action is for partition by metes and bounds of certain specified portions of the estate of the late John Arivanandam Pillai set forth in the plaint schedule, she having purchased the one-third share of Sara Ammal in each of those portions of the property. All the property, however, of the deceased John Arivanandam Pillai became vested in his administrator under the Succession Act and remained in him until he distributed the estate, and the widow had no saleable interest in any part of the estate until, in the course of the administration thereof, her share was determined and became allotted to her. Until that happened (and it has not yet been done) the only process by which the plaintiff could legally obtain the widow's interest in the estate is by a suit for the administration of the estate of John Arivanandam Pillai, and to such suit the widow, if alive, must be made a party. If she is not alive, letters of administration to her estate must first be taken out and the administrator must be made a party. The plaintiff, in her evidence, says that she saw Sara Ammal a week before she was examined at the house of her pleader. If so, she was alive at the commencement of this suit and even if it were possible to treat this suit as an administration suit (though it clearly is not possible so to treat it) it would necessarily have to be dismissed for want of parties as she is not joined as a party.

The suit is wholly misconceived and should for this reason be dismissed. . . . . . .*

(1) 3 C.W.N. 660. (2) 3 C.W.N. 670. (3) [1898] 2 Q.B. 36.

* [The following is the last portion of the judgment in the case reported in 23 M. 216. Though omitted in the I.L.R., yet it is given here for facility of reference. ED.]

As, however, the litigation has been so prolonged and has been and is being conducted in a way which leaves no doubt in our minds that a conspiracy exists and is being carried out with a view to decevie the Courts, we have thought it right to consider the case of fraud set up by the defendants and to express our view upon the decree in C.S. No. 2 of 1885. That the same fraudulent conduct is continuing is obvious from the attempt to compromise these appeals and we have little doubt that the plaintiff has succeeded in inducing the 1st and 4th defendant to join with her in her attempt to get a decree in this Court by fraudulent means.

It is clear to us that, if Sara Ammal is alive, she is, and has been for many years past, under the protection and in the hands of the plaintiff, who is and has been making use of her as her tool for the purpose of her proceedings. If Sara Ammal is not alive, we are satisfied that, from the time of her death, she has been personated by or at the instance of the plaintiff with the same view. The evidence shows that in 1884 Sara Ammal was given to intemperance and was under the influence of the plaintiff who was even then supplying her with drink, and we believe that from the time of her disappearance—so opportune so far as the plaintiff's designs were concerned—until her

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JULY 12.

APPELLATE CRIMINAL.

23 M. 220 = 1 Weir 649.

23 M. 220 = 1 Weir 649.

[220] APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice).

QUEEN-EMPRESS *v.* VENKATASAMI NAIDU.*
[12th July, 1899.]

Abkari Act (Madras)—Act I of 1886, *Section* 56 (*b*)—*License to keep toddy shop—Failure to keep shop open—Omission not constituting an act.*

By Section 56 (*b*) of the Abkari Act (Madras,) 1886, whoever, being the holder of a license or permit granted under the Act, "does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act" may be punished with fine or imprisonment or with both. The holder of a license to keep a shop for the sale of toddy having been convicted for failing to keep his shop open, in breach of one of the conditions of the license:

Held, that even if the licensee was under an obligation to keep open his shop (which did not appear to be the case), an omission to do so did not amount to an act in breach of the conditions of the license; and that the conviction must in consequence be set aside.

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure. The holder of a license to keep a shop for the sale of toddy was convicted by a second-class Magistrate under Section 56 (*b*) of the Abkari Act I of 1886 (Madras), for having failed to keep his shop open, in breach of one of the conditions of the license granted to him. The Acting District Magistrate being of opinion that the conviction was against the ruling in *Queen-Empress* v. *Karuppan* (1) referred the case to [221] the High Court. Under Section 56 (*b*) whoever, being

death, if she is dead, or, if not, until the present time, she is and has been a mere tool in the hands of the plaintiff, ignorantly signing what she was told to sign and unconscious of what was going on.

For these reasons we think the decree of the District Judge was right that the decree in C.S. No. 2 of 1885 was obtained by fraud and we dismiss this appeal with costs of 7th, 8th and 9th respondents.

The 8th respondent's claim was admitted in the Court below and he has been unnecessarily made a respondent in this appeal. The plaintiff must pay his costs of the appael.

* Criminal Revision Case No. 220 of 1899, referred for the orders of the High Court under Criminal Procedure Code, Section 438, by C. H. Mounsey, Acting District Magistrate of Coimbatore, in letter dated 27th May 1899.

23 M. 220-N = 1 Weir 649.

(1) Criminal revision case No. 382 of 1895 (unreported). [=(1, Weir 649).—ED.] Case referred for the orders of the High Court, under Section 438 of the Code of Criminal Procedure, by the Acting District Magistrate of Malabar. By Section 26 (*a*) of the Abkari Act I of 1886 (Madras), a Collector is empowered to cancel or suspend any license or permit granted under it "if any fee or duty payable by the holder thereof be not duly paid." By section 56 (*b*), whoever, being a holder of a license or permit granted under the Act, "does any act in breach of any of the conditions of his license or permit not otherwise provided for in the Act, may be punished, on conviction, with fine or imprisonment or with both." A second-class Magistrate convicted the holder of a license to keep a toddy shop on the ground that he had failed to pay the kist for five months on the dates prescribed by the license for such payments. The conviction purported to be under Section 56 (*b*) of the Abkari Act I of 1886 (Madras). The from of license granted to the licensee contained provisions for the punctual payment of fees and for the [221] procedure to be followed in case of default, and by it the Collector was further empowered in case of breach of any of the conditions of the license either to impose a fine or to cancel the license. The Court (SHEPHARD J.) delivered the following judgment on 27th August 1895:—"There was an omission or default on the "part of the license-holder, but there was no act done by him in breach of the con-"ditions of his license. The prosecution was a most improper one. The conviction "is set aside and the fine, if paid, must be refunded." [R., 23 M. 220 = 1 Weir 649; D., 1 Weir 650.]

the holder of a license or permit granted under the Act, " does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act," may be punished with fine or imprisonment or with both.

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APPELLATE CRIMINAL.

23 M. 220 = 1 Weir 649.

The parties were not represented.

JUDGMENT.

There is nothing, so far as I can see, to show, that the licensee was bound to keep a shop. Further, even if he was bound to keep one, an omission to do so does not amount to an act in breach of the conditions of the license. The conviction is therefore set aside. The fine levied should be refunded to the accused.

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23 M. 221.

APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

RAGHAVA REDDI AND OTHERS (*Plaintiffs*), *Appellants* v. KANNI GRAMANI (*Defendant*), *Respondent*.*
[14th August, 1899.]

Rent Recovery Act (Madras)—Act VIII of 1865—*Regulation XXV of* 1802, *Section* 8—*Non-registration of landholder—Subsequent registration of undivided brother of landholder—Maintainability of suit.*

Suits for exchange of patta and muchalka for Fasli 1306 ending June 30th, 1897, were dismissed in the Sub-Collector's Court in August 1897 on the ground that the plaintiffs were not the registered landholders. Patta had been tendered in June 1897. Plaintiffs appealed. Subsequent to the filing of such appeals, namely, in December 1897, the Collector registered the undivided brother of the plaintiffs (who had died in April 1897) and it was contended at the hearing of the appeals that such registration covered all the undivided members of the family :

[222] *Held*, that in the absence of registration under Section 8 of Regulation XXV of 1802, the landholder was not entitled to enforce acceptance of patta under the provisions of the Rent Recovery Act, and that there was no cause of action under that Act.—The original defect of title was not cured by the subsequent registration of the landholder in the name of the plaintiffs' undivided brother.

[N.F., 26 M. 589 (F.B.).]

SUITS for exchange of patta and muchalka for Fasli 1306 ending 30th June 1897. The pattas were tendered in June 1897. The suits were dismissed in the Sub-Collector's Court in August 1897 on the ground that the plaintiffs were not the registered zemindars. Appeals were filed in September 1897. In December 1897, the Collector registered the undivided brother of plaintiffs (who had died in April 1897) and on the appeals coming on for hearing before the District Court in January 1898, it was contended that such registration covered all the undivided members of the family. There had been no registration in the plaintiffs' names, nor had the tenants attorned to them or accepted pattas from them in previous faslis. The District Judge, following *Ayyappa* v. *Venkatakrishnamarazu* (1), held that the only zemindar was the registered zemindar and that

* Second Appeals, Nos. 989 to 1011, &c., of 1898, against the decrees of J. Hewetson, District Judge of Chingleput, in appeal suits Nos. 591 to 597, &c., of 1897, affirming the decisions of J. H. Robertson, Acting Sub-Collector of Chingleput, in summary suits Nos. 373 to 376, &c., of 1897.

(1) 15 M. 484.

1899 AUG. 14. — APPELLATE CIVIL. — 23 M. 221.

the plaintiffs for want of such registration were not landholders when they tendered the pattas; and he dismissed the appeals.

Plaintiffs preferred these second appeals.

Seshagiri Ayyar, for appellants.

Mr. *N. Subrahmanyam*, for respondents.

JUDGMENT.

It was decided so far back as 1882 (see *Valamarama* v. *Virappa* (1)) that a purchaser of a portion of a zemindari who had not obtained registration under Section 8, Act XXV of 1802, was not entitled to enforce the acceptance of a patta under the provisions of the Rent Recovery Act. This decision has been followed in *Ayyappa* v. *Venkatakrishnamarazu* (2). We are not prepared to dissent from these decisions. The District Judge was right in holding that the plaintiffs had no cause of action under the Rent Recovery Act. We do not think that the subsequent registry of the zemindari in the name of the plaintiffs' undivided brother cured the original defect of title. There has been admittedly no registration in the plaintiffs' names, nor have the tenants attorned to them or accepted patta from them in previous faslis. We dismiss the second appeals Nos. 989 to 1011, &c., with costs.

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23 M. 223 = 1 Weir 152.

[223] APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS *v.* VENKATARAMANNA.*
[31st August and 1st September, 1899.]

Criminal Procedure Code—Act V of 1898, *Sections* 195, 476—*Penal Code—Act XLV of* 1860, *Section* 193—*Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate.*

At a preliminary enquiry held by a Sub-divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution under Section 193 of the Indian Penal Code:

Held, that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of Section 193 of the Indian Penal Code, and the witness could not be convicted under that section.

[Appr., 13 Cr. L.J. 209 (213) = 14 Ind. Cas. 305 = 22 M.L.J. 419 = 11 M.L.T. 367 = (1912) M.W.N. 499; R., 12 Cr. L.J. 323 = 10 Ind. Cas. 619 = 21 M.L.J. 795 = 10 M.L.T. 47 = (1911) M.W.N. 9.]

PETITION to revise an order of the Sub-divisional Magistrate of Chittoor sanctioning the prosecution of the petitioner for making a false statement before the said Magistrate. A preliminary enquiry was held by the said Sub-divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint of bribery which had been brought against an Inspector of Police and a Village Magistrate. At that enquiry petitioner was examined as a witness and made statements on oath on

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* Criminal Miscellaneous Petition No. 81 of 1899, under Criminal Procedure Code, Sections 435 and 439, praying the High Court to set aside the order of T. Rama Rao, Sub-divisional Magistrate of Chittoor, dated 12th June 1899.

(1) 5 M. 145. (2) 15 M. 484.

matters connected with the complaint. The said statements being contradictory, petitioner was called upon to explain them, when he said he had not spoken the truth at first, for reasons that he proceeded to give. Notice was then issued to petitioner to show cause why sanction for his prosecution should not be granted for having made on oath the aforesaid contradictory statements at the said enquiry. On cause being shown it was argued on petitioner's behalf that no sanction should be accorded, inasmuch as the enquiry was merely a departmental one, and was not a judicial proceeding within the meaning [224] of Section 193 of the Indian Penal Code. The Sub-divisional Magistrate said :—"I was enquiring into the truth or otherwise of a criminal complaint under the directions of the District Magistrate, with a view to ascertain whether there was a *prima facie* case, so that if there was one, the District Magistrate might sanction the Police Inspector's prosecution. The witness was bound to state the truth . . . . My opinion is that the statements he made are false. According to his own showing he made false statements touching serious matters. I sanction his prosecution for an offence under Section 193 of the Indian Penal Code and resolve to send up the case to the District Magistrate under Section 476 of the Code of Criminal Procedure."

1899 SEP. 1. — APPELLATE CRIMINAL. — 23 M. 223 = 1 Weir 152.

The witness preferred this petition.

Mr. *C. Krishnan*, for the petitioner.

Mr. *N. Subrahmanyam*, for the Crown.

JUDGMENT.

The petitioner made a false statement on oath before the Deputy Magistrate during an enquiry he had been ordered to make for the purpose of ascertaining whether the District Magistrate should grant sanction under Section 197, Criminal Procedure Code, and thereupon the Deputy Magistrate sent him before the District Magistrate under Section 476, Criminal Procedure Code, for committing an offence under Section 193, Indian Penal Code. The present petition is to set aside this order on the ground that the enquiry in the course of which the false statement was made was not a "judicial proceeding," but was merely a departmental enquiry in which there was no authority to administer an oath.

Under Section 197, Criminal Procedure Code, the Government or some officer empowered in that behalf by the Government can alone grant the sanction required thereby and for that purpose the Government or the officer to whom the power is delegated must in some way inform his mind as to whether or not he ought to grant sanction, but there is no provision in the Criminal Procedure Code or Indian Penal Code indicating how he is to do so. Unless he is authorised by some provision of law to inform his mind by holding a judicial enquiry himself or by another there is no authority in him or the person acting for him to administer an oath and the enquiry is merely a departmental enquiry. There is no such provision of law, and therefore the enquiry before the Deputy Magistrate in the course of which the alleged offence was committed [225] was not a judicial proceeding within Section 193, Indian Penal Code, and the petitioner cannot be convicted under that Section. Whether he has been guilty of an offence under any other Section is not a question which we should go into upon this enquiry and we therefore confine ourselves to saying that we think the order complained of is wrong and must be set aside.

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APPELLATE CRIMINAL.
23 M. 225=2 Weir 543.

23 M. 225=2 Weir 543.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS *v.* HANUMANTHA REDDI AND OTHERS.*
[30th August, 1899.]

Criminal Procedure Code—Act V of 1898, *Section* 436—*Fresh inquiry after improper discharge of accused persons—Jurisdiction of Sessions Judge after acquittal.*

Charges under Sections 304 and 147 of the Indian Penal Code were brought by the police against certain accused in the Court of a Deputy Magistrate, who took all the evidence for the prosecution but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence insufficient to support the charges, altered them to charges under Sections 325 and 147 of the Indian Penal Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge considering the alteration in the charges improper at such a stage ordered a fresh inquiry into the offence:

Held, that the Sessions Judge had exercised a jurisdiction not conferred upon him by law and that his order for a fresh inquiry must be set aside.

[Diss., 24 M. 136=2 Weir 544.]

SEVEN persons having been charged by the police at the Court of a Deputy Magistrate with culpable homicide and rioting under Sections 304 and 147 of the Indian Penal Code, 1860, all the evidence in support of the prosecution was taken. The Deputy Magistrate then went on furlough without passing any order as to committal of the accused or otherwise. On the case being taken up by his successor the accused did not require the prosecution witnesses to be recalled. The charges were then altered to those [226] of grievous hurt and rioting under Sections 325 and 147 respectively, on the ground that the evidence was insufficient to support charges under the two first-mentioned sections. Witnesses for the defence were then examined and judgment pronounced, in which the case was held to be extremely suspicious and doubtful, and the accused were acquitted. On the case coming before the Sessions Court in revision, the Judge said:—"This was originally register No. 4 of 1898 on the file of the Deputy Magistrate, the police having charged the accused under Section 304 of the Indian Penal Code. All the evidence for the prosecution had been heard, and the case was ready for committal. But the Magistrate went on furlough without passing orders and his successor, evidently at the instance of the accused, changed the charges to Sections 325 and 147 of the Indian Penal Code. This was improper at such a stage on his part, and the reasons he gives for the change are very flimsy." The Sessions Judge then dealt with the facts, and concluded by ordering, under Section 436, proviso (*b*), of the Criminal Procedure Code, that the Magistrate should hold a fresh inquiry regarding the offence, and that the District Magistrate be asked to transfer the case from the file of the Deputy Magistrate who had decided it, to some other Magistrate—to whom he gave directions as to further evidence that ought to be taken.

The accused preferred this criminal revision petition.

Mr. *R. F. Grant*, for petitioners.

The Crown was not represented.

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* Criminal Revision Case No. 157 of 1899, under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the proceedings of W. M. Thorburn, Acting Sessions Judge of Bellary, in Criminal Revision Case No.5 of 1899, passed in Calendar Case No. 44 of 1898 on the file of the Deputy Magistrate of Adoni.

JUDGMENT.

1899 AUG. 30. — APPELLATE CRIMINAL. — 23 M. 225 = 2 Weir 543.

The jurisdiction exercised by the Sessions Judge is a jurisdiction not conferred upon him by law.

The accused had not been discharged when the Sessions Judge interfered and under Section 436, Criminal Procedure Code, it is only in such an event that he has jurisdiction to interfere. This has been decided in *Baijanath Pandey* v. *Gauri Kanta Mandal* (1) with which we agree.

We must therefore allow this criminal revision petition and set aside the order of the Sessions Judge.

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23 M. 227 (P.C.) = 2 Bom. L.R. 640 = 4 C.W.N. 228 = 27 I.A. 17 = 10 M.L.J. 1 = 7 Sar. P.C.J. 661.

[227] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Morris, Davey and Robertson and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

MAHOMED MIRA RAVUTHAR AND OTHERS (*Representatives of Counter-petitioner and Plaintiff*), *Appellants* v. SAVVASI VIJAYA RAGHUNADHA GOPALAR (*Petitioner and Defendant*), *Respondent.* [17th and 22nd November and 9th December, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section.* 311—*Petition to have set aside a sale in execution—Position of decree-holder who has obtained leave to bid—Dissuasion of persons from bidding.*

A decree-holder who has obtained leave to bid at a judicial sale is, in regard to restrictions upon him, in the same position as any other purchaser.

A charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him.

The judgment of the High Court in *Woopendro Nath Sircar* v. *Brojendronath Mundul*, (1881) I.L.R., 7 Calc., 346), though a correct decision on the case, was too broadly expressed in comprehending any dissuasion by a bidder at a judicial sale of other persons from bidding, as a ground for setting aside the sale.

The property of a judgment-debtor was sold in execution to the decree-holder, who, having obtained leave to bid, was declared purchaser at the auction sale at a price below its value. This decree-holder had on the day when the sale commenced agreed with a third person that, after it should be over, if he, the decree-holder, should have become the purchaser, he would then sell the property to that person for a specified sum. And these two combined that intending bidders should be dissuaded.

The Judicial Committee affirmed the decision of the High Court that, on a petition for the setting aside of the judicial sale under Section 311 of the Code of Civil Procedure, neither the fact of the above agreement, nor the dissuasion of bidders, afforded sufficient ground for making the order.

But the High Court had decided, in favour of the petitioner, another point:—that there had been material irregularity, within that section, in an omission on

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(1) 20 C. 633.

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23 M. 227
(P.C.)=
2 Bom. L.R.
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27 I.A. 17=
10 M.L.J. 1=
7 Sar. P.C.J.
661.

the part of the decree-holding purchaser when he had applied for leave to bid. This had been that he had withheld information of the agreement from the Court, which had granted the leave to bid not having been made aware of the arrangement. The omission to disclose this fact had, in the opinion of the High Court, amounted to a fraud upon the Court executing the decree, and entitled the petitioner to have the sale set aside on the ground that in point of law no leave to bid had been granted :

[228] *Held*, by the Judicial Committee, that this ground had not been established by evidence on an issue between the parties, having been taken for the first time in the Court of appeal, with a change of the matter in controversy ; and that the fraud on which alone the High Court's order could be sustained had neither been alleged nor proved.

[F., 4 Ind. Cas. 1006 (1012) = 151 P.L.R. 1909 = 150 P.W.R. 1909 = 9 Ind. Cas. 816 (817) = 102 P.L.R. 1911 ; R., 36 C. 226 = 9 C.L.J. 244 = 13 C.W.N. 18 = 4 M.L.T. 421 ; 25 M. 244 (F.B.) ; 32 M. 242 = 5 M.L.T. 248 ; 35 M. 35 (38) = 21 M.L.J. 756 = 8 M.L.T. 381 ; 1 C.L.J. 85 ; 3 C.L.J. 240 = 10 C.W.N. 209 ; 132 P.R. 1906 = 11 P.L.R. 1907 ; Expl., 6 C.L.J. 111 ; D., 14 C.P.L.R. 42.]

APPEAL from an order (1) (1st April 1896) of the High Court, affirming an order (15th March 1895) of the Subordinate Judge of Tanjore.

The appellants were the representatives of the counter-petitioner Jainilabdin Ravuthar deceased, who was the purchaser of eight villages part of the respondent's estate at a judicial sale held on the 6th April 1892, and five following days. The respondent, zemindar of Singavanam, the son of Machalar Gopalar, the judgment-debtor, who died before 1891, was then a minor, and the estate was in charge of the Court of Wards. The sale was in execution of two decrees charging the land. One of them for more than Rs. 42,400 had been obtained by Jainilabdin in 1882, and the other decree, of 1883, for over Rs. 17,000, was held by another plaintiff. With interest calculated down to the time of the sale, more than Rs. 77,000 in the aggregate were due on them. The amount realized was Rs. 78,000, at the sale.

The respondent having attained majority in 1894 petitioned on the 15th May in that year to have the sale set aside under Section 311 of the Code of Civil Procedure. His grounds appear in the report of *Jainilabdin Ravuttan* v. *Vijaia Ragunadha Ayyarappa Maikan Gopalar* (1), the only one new material being, that "as the counter-petitioner and the zemindar "of Papanad had entered into an agreement and prevented those that came "to bid from making bids, the properties were sold for a very low amount." The counter-petitioner denied the fact. The Subordinate Judge found that an agreement was entered into on the 6th April 1892 between those parties that the decree-holder, if he became the purchaser, should sell to the zemindar for Rs. 85,000 ; that they had combined that bidders should be dissuaded ; that the value of the villages was one and-a-quarter lakhs, at the least ; and that the lower price only which had been obtained was due to that arrangement. The sale was set aside.

[229] The High Court, on appeal, affirmed this order, but not on the ground taken in the Court below. They held that the dissuasion of intending bidders had not been a sufficient reason for setting aside the sale within Section 311. No suggestion of misrepresentation at the auction, or of any such attempts to deter, had been made. On the other hand, the omission to disclose the agreement amounted, in their opinion, to a

(1) 19 M. 315.

fraud upon the Court, and entitled the petitioner to take the objection that, in point of law, no leave to bid was granted.

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The reasons for the order of the High Court, and their order are given at length in I.L.R., 19 Mad., 319 at page 324.

The counter-petitioner obtained leave to appeal.

Mr. *J. D. Mayne*, for the appellants, argued that the order of the High Court was erroneous. A decree-holder having obtained leave to bid was in a position in no way different from that of any other bidder. Section 311 required material irregularity with its resulting loss to be shown for setting aside his purchase, just as in the case of any other purchaser. On the distinction between a cause of nullity and mere irregularity, reference was made to *Tassaduk Rasul Khan* v. *Ahmad Husain* (1). Here, in the first place, there had been no sufficient inquiry, and no evidence, that the alleged agreement of the 6th April 1892 had been entered into before the leave was applied for and granted. Secondly, even if it had been entered into before the application for leave to bid there had been no obligation binding upon Jainilabdin to disclose the agreement to the Court. Thirdly, it could not be rightly laid down that the leave obtained was rendered, by the non-disclosure of the agreement, no leave at all. Moreover it was to be observed that this ground of illegality in the obtaining of the leave to bid was not taken as an objection in the petition. It could not have been taken under Section 311, for the omission was not an irregularity in the publishing, or the conducting, the sale. The objection on which the High Court had based their order was taken for the first time in appeal to them, and there had been no issue or inquiry directed as to the fact. [Lord DAVEY referred to *Coaks* v. *Boswell* (2).] That case would support the appellant, showing that when he had obtained leave to bid he was not in a position different **[230]** from that of any other purchaser. Section 294 of the Code of Civil Procedure met the case of a decree-holder's purchasing without leave, but that section was not applicable to the case presented in the petition. Neither the grant of the leave to bid, nor the sale to the decree-holder, could be treated as void from the beginning. It had not been established that the leave to bid had been obtained by the suppression of an agreement which the decree-holder was bound to state; and the contention was that the sale, having been confirmed by order of Court under Section 312 of the Code of Civil Procedure, could only be set aside by regular suit, in which alone the fraud could have been alleged and tried upon an issue as to whether it had been practised. The proceedings taken while the estate was under the Court of Wards could not be set aside without establishing that the minors' interests had not been duly protected, and of this there had been no sufficient evidence.

Mr. *J. H. A. Branson*, for the respondent, argued that the judgment of the High Court was right. The evidence had established the fact of the agreement between the counter-petitioner and the Papanad zemindar, and the fact of the omission to disclose its existence to the Court, which, on being made aware of it, would not have granted the leave to bid. The result had been a fraud upon the Court; and the leave was as if it had not been granted. The obligation upon the decree-holder who obtained leave to bid was to exercise his right in a completely fair manner. Reference

(1) 20 I.A. 176 = 21 C. 66.

(2) (1886) L. R. 11 App. Cas. 232.

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was made to *Woopendro Nath Sircar* v. *Brojendronath Mundul* (1), *Doorga Singh* v. *Sheo Pershad Singh* (2), *Sheonath Doss* v. *Janki Prosad Singh* (3), *Saadatmand Khan* v. *Phul Kuar* (4), *Rukhinee Bullubh* v. *Brojonath Sircar* (5). The setting aside the sale, as the consequence of a decree-holder's purchasing without having obtained permission, was expressly prescribed as the remedy in Section 294 of the Code of Civil Procedure. To bring forward by petition such a case as the present, where there, in effect, had been no permission, a petition under Section 311 was not inappropriate. It was competent to the petitioner to take objection under the latter section in the High Court for the first time. [231] The withholding the information affected the legality of the sale; and in *Nawab Khaja Ahsanulla Khan Bahadoor* v. *Hurri Churn Mozoomdar* (6), an objection taken before the High Court to a sale upon defective notice was held not to have been taken too late.

Mr. *J. D. Mayne* in reply.

Afterwards, on the 9th December, their Lordships' judgment was delivered by LORD HOBHOUSE :—

JUDGMENT.

The suit in which this appeal is presented was commenced in the year 1882. The appellants whose names are now on the record were substituted for the original appellant, the plaintiff in the suit and appellant below, on his death; but there has been no change of interest, and it will be convenient to use the name of appellant for all. The appellant sought to enforce a charge on the zemindari estate of Singavanam against the then owners, the present respondent who was a minor, and his father, who has since died. Another suit was brought by another person for the same purpose in the year 1883. Both plaintiffs obtained decrees. When the respondent's father died the estate passed into the management of the Court of Wards. In March 1891 the appellant obtained an order in execution of his decree for sale of eight villages parts of the estate. They were sold, apparently in execution of both decrees, in the month of April 1891. There was then due in the suit of 1882 upwards of Rs. 60,000, and in the suit of 1883 upwards of Rs. 17,000. The appellant who held the decree in the suit of 1882 obtained leave to bid at the sale, and he was declared to be the purchaser. He took possession, and was in possession when the present proceedings commenced.

In April 1894 the respondent came of age and the Court of Wards handed over the Singavanam estate to him. On the 15th May 1894 he presented a petition under Section 311 of the Code of Civil Procedure for the purpose of annulling the sale of 1891. That is the section which empowers persons whose property has been sold to set the sale aside on the ground of material irregularity in publishing or conducting it. In his petition the respondent alleged a number of irregularities, but as to all except one the Courts below have found either that the allegation was erroneous or that the irregularity had not caused substantial injury.

[232] The remaining charge was thus stated :—"That on the date "of sale an agreement was entered into between Papanad zemindar and

(1) 7 C. 346. (2) 16 C. 194. (3) 16 C. 132.
(4) 25 I.A. 146 = 20 A. 412. (5) 5 C. 308. (6) 19 I.A. 191 = 20 C. 86.

"Jainilabdin in consequence of which intending purchasers were dissuaded "from bidding at auction." 1899 DEC. 9.

The Subordinate Judge treats this charge as raising the following points for decision:—"(1) Whether there was any agreement between the "Papanad zemindar and the counter-petitioner on the date of sale, 6th "April 1891, and (2) whether in consequence thereof, intending purchasers "were prevented from bidding at auction." PRIVY COUNCIL. 23 M. 227 (P.C.) =

There was clearly a written agreement between the Papanad zemindar and the appellant, dated 6th April 1891* by which the appellant agreed that if he should purchase the villages he would resell them to Papanad for Rs. 85,000. The Subordinate Judge found that there was a further verbal agreement between the two to the effect that they would dissuade persons from bidding, and that some persons were so dissuaded. The villages were knocked down to the appellant at the price of Rs. 78,000, and the Subordinate Judge found that with some outgoings he paid Rs. 83,000. 2 Bom. L R. 640 = 4 C.W.N. 228 = 27 I.A. 17 = 10 M.L.J. 1 = 7 Sar. P.C.J. 661.

Of the value of the property he says "The highest value may be "between $1\frac{1}{4}$ and $1\frac{1}{2}$ lac roughly taken." He arrived at the conclusion that owing to the dissuasion of bidders the villages were undersold, causing substantial injury to the respondent, and that he was bound to set aside the sale under Sections 311, 312 of the Code.

The Subordinate Judge proceeds on the ground that when a decree-holder obtains leave to bid, he is placed in a position of exceptional delicacy, and becomes subject to restrictions not applying to other people. He quotes a passage from a judgment of the High Court of Calcutta (*Woopendro Nath Sircar* v. *Brojendronath Mundul* (1):—"We think that when liberty is given to a decree-holder to bid at the sale of the judgment-"debtor's property, he is bound to exercise the most scrupulous fairness "in purchasing that property; and if he or his agent dissuades others from "purchasing at the sale, that of itself is a sufficient ground why the pur-"chase should be set aside."

With the decision of that case no fault is to be found. The decree-holder there was acting in concert with, and partially for [233] the benefit of, one who stood in a fiduciary relation to the infant debtor; and there was clearly a conflict between their duty and their interest. The passage extracted from the judgment was not necessary for the decision, and in their Lordships' opinion it is too sweeping in its terms. In *Mahabir Pershad Singh* v. *Macnaghten* (2) it is laid down that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any other purchaser. All purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders. But nothing of that sort is alleged in the present case.

On appeal, the High Court were in substantial agreement with the Subordinate Judge on the facts of the case. But they do not accept his conclusions of law. They say:—"The order is made under Section 311 "of the Code, and it is based on the ground of irregularity in the conduct "of the sale. In our opinion, there has been no irregularity within the "meaning of the section. No charge is made against the person conducting "the sale. The charge is made against the respondent and those who "acted in concert with him, and it amounts to this: that they acted in

* [Record p. 18.—ED.]

(1) 7 C. 346. (2) 16 I.A. 107 (114) = 16 C. 682.

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"such a way as to prevent the best price being obtained and thus caused "loss to the judgment-debtor. So far as this particular charge is con-"cerned we are further of opinion that it does not amount to a charge of "fraud. Putting aside for the present the fact that the purchaser was "the decree-holder and confining our attention only to the agreement "made before and the conduct of the parties at the sale, we do not think "that any fraud was established."

They then go on to show by reference to English authorities that an agreement between persons not to bid is no ground for setting aside the sale, or even for opening the biddings. And they conclude thus :—"The "means by which competition was discouraged at the auction were clearly "of an innocent character. In employing them, as in making the agree-"ment with the zemindar, the purchaser did not go beyond the limit of "what he was entitled to do in order to make a good bargain."

The learned Judges do not comment on the dictum of the Calcutta High Court, but it is clear that their view of the rule of [234] law is in accord with that which has been pronounced by this Board.

Their Lordships agree in these conclusions. The logical result of them is that the High Court, finding that the matters alleged by the respondent did not amount to irregularity within the meaning of Section 311 under which the petition was presented, and were of innocent character so as not to afford ground for setting aside the sale, should have dismissed the petition.

They go on however to take a point which, so far as the record shows, and for anything that Counsel can point out to the contrary, is raised for the first time on their judgment. It is certainly not mentioned in the respondent's petition, and certainly was not in the mind of the Subordinate Judge as one of the issues to be tried. The respondent alleged in his petition that the appellant had never obtained leave to bid at all, an assertion which was found to be erroneous. The appellant was not confronted with the assertion that having obtained leave to bid, he had done so by committing a fraud upon the Court.

The learned Judges held that, inasmuch as the appellant got leave to bid, his omission "to disclose the agreement to the Court amounted to a "fraud upon the Court entitling the judgment-debtor to say that, in "point of law, no leave to bid was granted." They then lay down that "there was a duty incumbent on the appellant to disclose all the circum-"stances within his knowledge bearing on the question of the expediency "of his being allowed to bid. Without such disclosure it is impossible "for the Court to exercise its discretion. The withholding of informa-"tion is, in our judgment, no less a ground for cancelling a sale than "actual misrepresentation on the part of the applicant who becomes the "purchaser." On these grounds they set aside the sale.

It seems to their Lordships that the positions taken by the learned Judges raise serious questions relating to the procedure of the Courts. It is very important that one who seeks to set aside a purchase completed under the sanction of the Court should state the grounds on which he claims to impeach it, and should not be allowed after trial of the case to rely on other grounds which have not been the subject of trial or adjudication in the Court which takes the evidence. It is not easy to formulate a rule which will fit every case, but the principle is clear enough, that a party shall [235] not be condemned in Court on allegations which turn on evidence, and which he has not been led to rebut by evidence. Whether fresh

issues may be introduced, and how, without injustice, is a question of detail in each case; but their Lordships are led to think that in this case the essential principle has not been kept in sight.

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It has been shown that the Subordinate Judge's view of the mortgagee's position is the view expressed in the dictum of the Calcutta High Court above quoted, and it is one which does not require the petitioner to allege or the Court to decide that leave was improperly obtained. Therefore no attention was paid to that question, which is wholly distinct from the questions of irregularity, and from the question, whether the conduct of the appellant at the time of sale had the effect of lowering the purchase money.

The High Court however saw that the Subordinate Judge was wrong in law, and that the sale could not be impeached without getting rid of the leave to bid. They did not remand the case for a new issue, but they decided for themselves that the order was obtained by a fraud upon the Court, and therefore the position of the parties was the same as if no leave had been granted at all. The only foundation assigned for this decision that the appellant had committed a fraud not laid to his charge, is a passage to this effect:—"It is admitted that nothing was said about it (*viz.*, "the agreement) when application for leave was granted. That the "agreement was in existence at that time there is no manner of doubt."

Their Lordships must say that it is very embarrassing to find the case decided in appeal on a new charge which, considered in its bearing in law or on character, is of greater gravity and importance than all the other charges put together, without any reduction to writing of the terms of the admission, which is used to support it, or any record of the mode in which it was made, or any reason assigned why a new issue should not be tried; indeed without any recognition that it is a new issue. As the statement stands it is uncertain what is meant by "the agreement."

There are two agreements; one written and one verbal. The written one was with a nominee of Papanad, who says that it was for the benefit of the respondent, his brother-in-law. What that means is not clear, and though the agreement was re-affirmed six months after the sale, it has not been acted on by either party. [236] Its effect would, as the High Court observes, be to take away from the appellant himself any motive for bidding above Rs. 85,000 on his own behalf; but the creditor as such never has any motive for bidding higher than to secure his own debt, which is equally for the advantage of himself and his debtor. Why such an agreement should prohibit any other bidder in any but some indirect way it is difficult to see.

The verbal agreement to dissuade bidders is another matter. But if that is the agreement of which the High Court is speaking, it is impossible to say that there is no manner of doubt that it was in existence when the appellant's application was made, or even when the leave was given. On the contrary the evidence relating to this agreement, which indeed is extremely vague on every point, does not state when it was made. Consistently with the record it may have been made at any time during the six days over which the sale extended. There are no findings as to the material dates, and they cannot be collected from the evidence in the record. There is no reason why there should be such findings or evidence because, though very material to the new issue, they are not material to the issues raised by the petition.

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The learned Judges below lay down that "there was a duty incumbent on the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid." There is nothing to show that the position of this appellant differed from that of other judgment-creditors, and taking the remark as a general one it requires qualification. In *Coaks* v. *Boswell* (1) the Court of appeal stated the rule to be that a person whose position precluded him from purchasing (it was a solicitor in that case) must, when he applied for leave to purchase, either abstain from laying any information before the Court or must lay before it all the material information he possesses. That rule is considerably narrower than the rule laid down by the High Court, and yet it seemed to the House of Lords to be too broadly stated. Lord Selborne held that it is not the duty of the applicant to give information which is not requested, and concerning which there is no implied representation positive or negative, direct or indirect, in what is actually stated. Lord FitzGerald states the rule with nearly equal caution though in an **[237]** affirmative instead of a negative form :—"If he professes to give "the Court information on any particular subject with a view to guide "its discretion and obtain its approval of the proposed sale, he is bound "to lay before the Court all the material information he possesses on that "particular subject."

In order to judge whether an applicant has misled the Court, all material circumstances attending the application should be known. It is material to know whether the application was made *ex parte* or on notice. Their Lordships attach great importance to the obligation which rests on all persons seeking *ex parte* orders to be thoroughly open with the Court. But was this order made *ex parte*? When this question was asked during the argument no certain answer could be given. Mr. Branson thought it a matter of general practice to make such orders *ex parte*, and Mr. Mayne thought otherwise. From the observations of the High Court their Lordships infer that the order was made on notice to and with the approval of the Court of Wards, which, if true, is a very important circumstance.

Had the issue of fraud been raised, inquiry must have been made of the officer of the Court of Wards as to the communications made to him, and as to the line which he took about the sale in the Civil Court. He may have known of the written agreement with Papanad. On what grounds did the guardians rest their approval of the plan of which the High Court speak, and in what form was it given? All these matters are left in the dark so completely that we cannot be certain even whether the order was or was not made *ex parte*.

Another case was referred to (*Sheonath Doss* v. *Janki Prosad Singh* (2)). It has only an indirect bearing on the obligations of a decree-holder who asks leave to bid ; but it opened another discussion on procedure in an important matter. In this case the Calcutta High Court dwelt on the necessity of great caution in granting leave to bid ; indeed it laid down such conditions as would make the granting of leave a very rare thing instead of being, as their Lordships believe it is, a very common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are **[238]** applicable to a system under which the decree-holder has the conduct of the sale.

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(1) (1886) L.R. 11 App. Cas. 232. (2) 16 C 132.

Doubtless the conduct of the sale gives opportunities for influencing its course one way or another, which do not follow on the mere leave to bid. The Civil Procedure Code clearly throws on the Court the whole responsibility of conducting the sale. From the observations of the High Court, their Lordships infer that this sale was conducted as the law directs; but nothing express is said about it, and the respondent's counsel contended that the ordinary practice is to allow the decree-holder to conduct the sale; and suggested it as probable that in this instance the appellant conducted the sale.

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It is always unsatisfactory to reverse a decree for the reason that the ground on which it rests was not that on which the parties came to issue. But it is obvious that great injustice may be done by shifting the issue in the Court of Appeal, and so deciding without due investigation. There has in this case been a departure from a recognised principle, which is calculated to lead to injustice; and though their Lordships cannot say, the case not being tried, that it has led to injustice, they are far from clear that it has not. A controversy raised about the propriety of proceedings during a sale has been treated as if it were a question whether a fraud was committed on the Court prior to the sale. For the decision of that question it is important to know every incident bearing on the application to the Court; the precise dates of the application, of the order, and of the agreements alleged to have been concealed; the proceedings in Court; the parties present; the state of their knowledge, and so forth. None of these things has been sifted nor, so far as appears, has the appellant had any reason for sifting them till the High Court came to decide the case in appeal. Their judgment is founded on an admission very vaguely stated and on a view of the obligations attaching generally to applicants for leave to bid which are unduly onerous at least to decree-holders at arms' length with their debtors. It is of course conceivable that if all relevant matters were ascertained the present appellant would be found to have fallen short of his duty; but in the present state of the case all their Lordships can say is that the respondent has neither alleged nor proved the fraud on which alone he can sustain the present order. Their Lordships will humbly advise Her Majesty to discharge the [239] order and to dismiss the petition with costs in both Courts. The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Lawford, Waterhouse and Lawford.*

Solicitor for the respondent: Mr. *R. T. Tasker.*

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar, Mr. Justice Boddam and Mr. Justice O'Farrell.

PADMANABHA CHETTIAR (*Defendant No.* 6), *Appellant v.* WILLIAMS AND OTHERS (*Plaintiffs Nos.* 1 *and* 2 *and Defendants Nos.* 1 *to* 4 *and Representative of Plaintiff No.* 1), *Respondents.** [29th August, and 19th and 23rd October, 1899.]

Trusts Act—Act II of 1882, *Section* 56—*Suit by two out of eleven beneficiaries for possession of trust property—Maintainability of suit—Succession Act—Act X of* 1865, *Section* 271.

Two daughters of a testator sued defendants Nos. 1 and 2, the testator's sons and his administrators with the will annexed, and other defendants, for a declaration that certain properties devised by the testator to be held in trust and the rents divided among his eleven children were trust properties, and to recover possession thereof. A decree had been obtained against plaintiff No. 2 and her right, title and interest in the trust property brought to sale. Defendants Nos. 1 and 2 had filed a suit to set aside the sale but afterwards compromised it on the terms that the sale should be cancelled on payment of a certain sum by defendant No. 1, but that in default of such payment the decree should take effect. Default having been made the property was sold:

Held (by the whole Court), that the decree of the Court below awarding the plaintiffs possession of the whole property on behalf of themselves and the other beneficiaries must be reversed.

Per BODDAM, J.—That the alienations made in pursuance of the compromise entered into by the administrators were binding upon the plaintiffs and that therefore neither of them had any cause of action.

Per O'FARRELL, J.—That under all the circumstances the suit could not be treated as a suit to recover the plaintiffs' shares of the trust property.

[240] *Per* SUBRAMANIA AYYAR, J., (*dissentiente*).—The fact that the plaintiffs had asked for a larger relief than they were entitled to did not warrant the dismissal of the suit altogether; and that the suit fell within the class of cases in which the relief against a third party is such as a Court of Equity will administer, and a *cestui que trust* may be entitled to sue the trustees and the third party jointly, but in which he will be bound to confine his suit to that specific matter in respect of which alone the third party is liable, and not to make it part of a suit for the general administration of the trust: and that plaintiff No. 1 was not precluded from recovering her eleventh share.

[R., 35 M. 1 (5) = 8 Ind. Cas. 340 = 8 M.L.T. 453; 6 M.L.T. 143 (152).]

SUIT for a declaration and for possession of certain property. By his will bearing date the 6th of January 1864, Thomas Edmonds provided, *inter alia*, that certain houses should be kept in trust and the rents realised therefrom divided equally among his eleven children and their heirs, respectively, for their support and maintenance. The testator died in 1866. Of the houses so devised, only one, referred to as item No. 2, was in dispute in this appeal. No trustees were named in the will, but probate was taken out by the executors, who were the husbands of the two plaintiffs. One executor having died, and the other having been convicted for some offence, three of the testator's children were, in 1877, granted letters of administration to the estate, namely, defendants Nos. 1 and 2, and Caroline Edmonds. In 1880, defendant No. 5 obtained a decree against

* Appeal No. 200 of 1898, against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in original suit No. 7 of 1898.

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another daughter, plaintiff No. 2, and brought to sale her right, title and interest in the property. In 1889, defendant No. 1, one of the administrators, brought a suit against defendant No. 5, to set aside this sale, which suit was compromised, defendant No. 1 agreeing to pay Rs. 600 to defendant No. 5, and defendant No. 5 agreeing to cancel the sale. In the event of the sum of Rs. 600 not being paid, it was agreed that defendant No. 5 should execute the decree against the houses. The money was not in fact paid, and item No. 2 was brought to sale and purchased by defendant No. 6, the present appellant. Plaintiffs Nos. 1 and 2, daughters of the deceased, alleged that the deceased had left eleven children; that they, the two plaintiffs, were his sole surviving children, and that two of his children, who were dead, had left one child each, who were impleaded as defendants, but whose whereabouts were unknown. They sued for a declaration that the properties were trust properties and for recovery of possession on the ground that the compromise and the sales thereunder were illegal and improper, being contrary to the directions of the will and the trust and therefore [241] not binding on the plaintiffs. Defendants Nos. 1 and 2 were children of the deceased and administrators of the estate; defendants Nos. 3 and 4 were grand-children of the deceased; defendant No. 5 was the decree-holder in the suit already referred to; and defendants Nos. 6 and 7 were purchasers of different portions of the trust property, in the execution of that decree. The District Judge decreed in plaintiffs' favour as prayed.

Defendant No. 6 preferred this appeal.

V. Krishnasami Ayyar, for appellant.—Plaintiffs cannot succeed because of non-joinder, only two out of eleven children having sued: and they can, at the most, be only entitled to two-elevenths of the property sued for. If all the members of a family must be joined even when the suit is brought by the managing member (see *Alagappa Chetti* v. *Vellian Chetti* (1)) the necessity for all to join must be greater in the case of a family in which no joint interest arises and each is entitled only to his or her share. Another ground is that the beneficiaries in this case are not entitled to sue, under the Trusts Act, Section 56; (see also Lewin on Trusts, 9th Edition, page 774). Plaintiffs should have sued for the removal of the administrators—for the appointment of others. See the judgment of James, L. J. as to a suit by beneficiaries, in *Sharpe* v. *San Panlo Railway Company* (2); also *Ex-parte Kearsley* (3), where, Cave, J., said that the creditors should apply to the Court to obtain leave to use the name of the trustee. See also *Kamaraju* v. *Asanalı Sheriff* (4). This being a suit for possession of property and not for the execution of a trust, Section 59 of the Trusts Act does not apply. Assuming the trust to be a valid one and not offending against the rule against perpetuities, the plaintiffs, being tenants-in-common, can each sue only for his share and no more: See *Mahabala Bhatta* v. *Kunhanna Bhatta* (5). [He referred to Section 159 of the Succession Act, and to *Mannox* v. *Greener* (6), *Shookmoy Chunder Dass* v. *Monohari Dassi* (7), affirmed by Privy Council in *Sookhmoy Chunder Dass* v. *Srimati Monohurri Dasi* (8).] The suit is not maintainable at all, being not for administration but for the recovery of property. [242] In any case the share of the second plaintiff has been sold and only the first plaintiff can claim. [He also referred to *Chandu*

(1) 18 M. 33.
(2) L.R. 8 Ch. App. 597 at p. 609.
(3) L.R. 17 Q.B.D. 1 at p. 3.
(4) 23 M. 99.
(5) 21 M. 373 (380).
(6) L.R. 14 Eq. 456.
(7) 7 C. 269.
(8) 12 I.A. 103=11 C. 684.

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v. *Kombi* (1) as showing that a suit in ejectment cannot be converted into a suit for redemption.]

Seshagiri Ayyar, with him *Natesa Ayyar*, for respondent No. 2.—The sale under the compromise is invalid and the former sale stands. Beneficiaries, when of one mind, may, under Section 56 of the Trusts Act, require a transfer of the trust property. Under Section 63, trust property may be followed in the hands of third persons. [He referred to Lewin on Trusts, 8th Edition, page 258; and to *Ex-parte Griffin* (2) and asked the Court to administer the trust.]

The appeal came on again for hearing in the presence of BODDAM, J., in consequence of a difference of opinion between their Lordships (SUBRAHMANIA AYYAR, OFFG. C.J., and O'FARRELL, J.), and the Court, as above constituted, upon hearing the arguments, (which were substantially the same), delivered the following

JUDGMENTS.

SUBRAHMANIA AYYAR, J.—Under the will of the late Thomas Edmonds, the house—plaint item No. 2—which is the only property in dispute in this appeal, should be taken to have been devised by the testator to his children, eleven in number. The plaintiffs, who are two of the eleven children, became, therefore, on their father's death, entitled each to her share. Assuming for the present that the transactions, under which the sixth defendant (the appellant) claims the property in question, are, as contended on behalf of the plaintiffs, not binding on any of the devisees, the plaintiffs cannot get relief beyond the extent of their interest. They have certainly no right to ask for possession of more than their shares, should they seek any possession. It is clear, therefore, that the decree of the Lower Court, which awards possession of the whole property to the plaintiffs on behalf of themselves and the other devisees, cannot, as it stands, be sustained.

The question for consideration is whether the plaintiffs cannot recover even their shares. Before proceeding to consider this question, it should be stated that it was assumed in the Lower Court that the first defendant, though appointed only as an administrator, had by his conduct constituted himself a trustee. The learned [243] vakil for the sixth defendant urged here strongly that even on that assumption the frame of the plaint was quite wrong and the proper course for the plaintiffs was to bring a general administration suit.

Now, in the first place, it is scarcely necessary to say that the plaintiffs' asking for larger relief than they are entitled to does not warrant the dismissal of the suit altogether. The wishes of the parties must not be confounded with their rights, and because they fail to prove all they wish there seems no reason for denying them the rights which they establish (per Fulton, J., in *Mohidin* v. *Shivlingappa* (3)), and in the second place it is difficult to see why the plaintiff should be confined to that form of suit. This view is supported by law as laid down in *Lund* v. *Blanshard* (4), which, in principle, is equally applicable to this country. The observations of the Vice-Chancellor, Sir James Wigram, bearing on the point under consideration, are as follows:—" It is difficult to lay down any general rule " as to the frame of a suit by a *cestui que trust* in respect of claims against " strangers, as debtors, or liable to the trust, by reason of the misconduct of

(1) 9 M. 208.
(2) 2 G. & J. 116.
(3) 23 B. 666 (670).
(4) 4 Hare. 9 at p. 28.

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"the trustees, or parties to whom the stranger is primarily liable. There "are apparently three forms of suit applicable to such cases, according to "circumstances. First, the *cestui que trust* may not be entitled, or at "least, not able usefully to do more than compel his trustees to allow "him to sue the third party at law, as in the case of a claim for unliquidated damages, and no collusion between the debtor and the trustee. "Secondly, the relief against the third party may be such as a Court of "Equity will administer, and the *cestui que trust* may be entitled to sue "the trustees and the third party jointly, but be bound to confine his suit "to that specific matter in respect of which alone the third party is liable "and not at liberty to make it part of a suit for the general administration "of the trust, as in *Salvidge* v. *Hyde* (1) and *Pearse* v. *Hewitt* (2). Thirdly, "there are cases in which the third party, against whom a limited demand "is made, may properly be made a party to a suit for the general "administration of a trust, with which, except in respect of that limited "demand, he has no concern: *Attorney-General* v. *Cradock* (3)." It will be seen that the present case falls within the second class of forms mentioned in the above extract. And in such a form of suit there does not seem **[244]** to be anything to prevent the plaintiffs from suing for possession of their respective shares alone, or the Court from granting a decree for such shares even though they have asked for more, provided their right to relief against the defendant is established and their shares ascertained and complete relief can be given to them without prejudice to the rights of others.

In this view it is necessary, first, to determine whether the first plaintiff is in any way precluded from receiving her share, which must be taken to be one-eleventh, as there is nothing to show that, owing to anything that occurred subsequent to her father's death, she has a right to more. Now, if the decree passed on the compromise, which was entered into in December 1890 in original suit No. 21 of 1899 between the first and the fifth defendants in the present suit, and the sale held in execution of that decree were, as urged for the sixth defendant, binding on the first plaintiff, this suit must fail even in regard to her share. But, in the first place, she was not impleaded in the said suit and she had no hand in the compromise. She is, therefore, not affected thereby as a direct party thereto would be. Was she, however, bound in the sense that the charge, which was created by the compromise and on account of which the property was sold, was a charge that the first defendant could make even as an administrator? Of course, an administrator could not bind parties interested in the estate by a charge if the party taking it has notice that it is for a purpose unconnected with the performance of the duties of administrator —Williams on Executors and Administrators, 9th edition, 803, note. How does the matter stand on the facts here? The creditor of the second plaintiff who, in original suit No. 204 of 1880 in the Trichinopoly District Munsif's Court, caused that plaintiff's interest in the property in question to be sold for a debt due by her, was undoubtedly entitled to do so. None of the ten devisees other than the said plaintiff or the first defendant as an administrator being responsible for the above-mentioned debt, the sale on account of it did not, in the slightest degree, touch any right in the property possessed by those devisees or the first defendant as an administrator. The first defendant, in the last-mentioned capacity, had thus absolutely no business to take proceedings to set aside the sale

(1) Jac. 151. (2) 7 Sim. 471. (3) 3 Myl. & Cr. 85.

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of the second plaintiff's interest, and the charge created by the compromise entered into in proceedings taken for that purpose and [245] in consideration of the sale being set aside must be held to be a charge, to the knowledge of the fifth defendant, foreign to the purposes of the administration and, consequently, not binding on the first plaintiff. Nor can the sixth defendant support the sale, made in pursuance of the compromise, on the ground that he is a *bona fide* purchaser. For he was not such a purchaser, having had clear notice of the facts which show that the charge was not created for the purpose of administration. With reference to the mortgage of 1891 set up by the sixth defendant, it is not necessary to consider whether the first plaintiff was bound thereby, inasmuch as, assuming that she was, the whole of the principal and the interest payable under the mortgage have been liquidated by the usufruct received by the mortgagee as found by the District Judge, the correctness of whose finding on the point there is no reason to doubt. It is scarcely necessary to say that any enquiry as to the *bona fides* of the plaintiffs is quite immaterial as was pointed out in *Dance* v. *Goldingham* (1) by James, L. J., who observed thus:—"The plaintiff is entitled to have her rights and "equities enforced in this Court, and what may have been the motives "inducing the plaintiff to put the Court in motion we cannot inquire into. "We have only to inquire, in the administration of justice in this Court, "whether the plaintiff has the right claimed, and whether the defendants "are under the liability which is alleged." In other words, in granting or refusing relief to a plaintiff what the Court has to consider is:—(i) Has the plaintiff an interest in the subject matter of the suit? (ii) Has he a title to sue in respect of it ? (iii) Has he a right to call upon the defendants to answer his claim? (iv) Can complete relief be given without prejudice to the rights of others ? As will be seen from what has been said, all these conditions are satisfied in the present instance. It follows, therefore, that the first plaintiff is not precluded from recovering her eleventh share.

Turning next to the second plaintiff's case it must be held to be different. For her interest was long ago sold in execution of the decree against her and so far as she is concerned the sale was never set aside. It is true that, as between the first defendant and the fifth defendant, it was by the compromise agreed that the sale was to be treated as set aside. But since the second plaintiff was not a party to the compromise, I cannot see how she is [246] entitled to claim any benefit thereunder. If this opinion is correct, it does not at all follow, as urged on behalf of this plaintiff that the fact that the fifth defendant has not appealed against the District Judge's decree in the present case gives her a right to her share. For, at the date of the institution of this suit in 1897, the said defendant did not possess any interest whatever in the disputed property so as to be bound by the decree therein, inasmuch as, at the sale held in 1890, the property passed as against the fifth defendant to the sixth defendant. The latter was thus the only party against whom a decree in respect of this property could be legally passed in this suit, and therefore the only party who was entitled to appeal about it and who could be affected by failing to do so. But supposing for argument that the second plaintiff is entitled to rely on the compromise as setting aside the sale of her interest, as the District Judge thought she was, she cannot certainly be allowed to take advantage of the arrangement only so far as it related to the renunciation by the fifth defendant of his right under the Court sale which validly transferred to him all

(1) L. R. 8 Ch.App. 902 at p. 912.

her interest in the property but repudiate the remainder of the arrangement which was the consideration for such renunciation. If she can rely on the compromise at all she must take it as a whole and then it must be held that she is bound by the sale which was made in accordance with the terms of the compromise.

In my opinion, possession of one-eleventh share in item No. 2 and in the sum of Rs. 518 should be awarded to the first plaintiff, the first plaintiff receiving from the sixth defendant costs throughout in so far as she has succeeded, she as well as the second plaintiff paying the said defendant costs throughout in so far as he has succeeded, and both the plaintiffs and the property decreed to the first plaintiff being liable for the whole of the Court fees due to the government. I would modify the Lower Court's decree accordingly.

O'FARRELL, J.—The two plaintiffs who bring this suit *in forma pauperis* are daughters of one Thomas Edmonds who died in 1866. He left a will (Exhibit A) dated 6th January 1864. One of the provisions of the will directed that his three houses in the Military Cantonment of Trichinopoly and other specified house property "be kept in trust and "the rents realized therefrom be divided equally among the whole of my "children and their heirs [247] respectively for their support and main-"tenance." One of these houses is item No. 2, which is alone in dispute in this appeal. The fifth defendant brought a suit against the second plaintiff, got a decree, and brought to sale her right, title and interest in the property. The first defendant (who with the second defendant it must be taken had succeeded to the position of the original executors under the will) filed a suit against the fifth defendant to set aside the sale. It ended in a compromise, evidenced by Exhibit III, whereby the first defendant (who was also a beneficiary under the will) agreed to pay Rs. 600 and the fifth defendant to cancel the sale. In the event of the Rs. 600 not being paid it was agreed that the fifth defendant should execute the decree against "the plaint-mentioned property" which appears to mean the houses themselves. The money was not paid and item No. 2 (*inter alia*) was brought to sale and purchased by the sixth defendant, who is the appellant in the present appeal. The sale appears to have taken place about 1890.

The present suit was brought by the two plaintiffs for a declaration that the properties are trust properties and for recovery of possession on the ground that the compromise and the sales thereunder are "illegal and "improper, being contrary to the directions of the will and the trust and "therefore not binding on the plaintiffs." (See paragraph 11 of the plaint.) It will be noted here that these plaintiffs do not say that the compromise was effected without their knowledge or consent or that of the other beneficiaries, nor is there any evidence that it was so. They seek to succeed on the bare allegation that the compromise was contrary to the directions of the will and the nature of the trust. The plaintiffs further allege that of the other beneficiaries who seem to have been originally nine in number (though even here there is a doubt whether on the true construction of the will, one of the sons was not entirely disinherited) the whereabouts of one is not known, and the rest have refused to join in the suit, and have therefore been made defendants.

The District Judge has given the plaintiffs a decree as prayed and the sixth defendant appeals. Before entering into the questions arising in the appeal I may briefly dispose of one point. In the Court below a

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contention was raised by the sixth defendant that the trust was invalid as offending against the law of perpetuities. The District Judge decided against this contention on the [248] ground that under the principle embodied in Section 84, Succession Act, the provision in the will amounted to an absolute bequest of the *corpus* in favour of the children. Neither party—for obvious reasons—now desire to contest this view and it may be adopted for the purposes of this appeal. I may also in passing mention that though the Succession Act does not apply to the present case (the will having been executed in 1864) yet reference has been made to that Act and the Trusts Act as embodying general principles in force prior to the passing of those enactments. It is in this sense that any reference to the acts in this judgment must be understood.

The first question that arises in the appeal is whether the suit, so far as it is a suit for possession of the trust properties and not of the plaintiffs' share therein will lie at all. It is contended, and I think rightly, that the property itself is vested, in the trustees who alone can sue for its recovery. The right of the beneficiaries is to have the trust administered and the trustees, if necessary, removed and fresh trustees appointed. The District Judge's view appears to be that the first defendant committed a breach of trust; that the sixth and seventh defendants purchased the property knowing of that breach ; and that, therefore, they became trustees themselves. Even if so, that will not give the first and second plaintiffs a right to sue for possession of all the property on behalf of themselves and the other legatees. The District Judge refers to Section 56 of the Trusts Act where numerous beneficiaries if all of one mind may require the trustees to transfer the trust property to them. That provision is clearly inapplicable here. The beneficiaries are not all of one mind, and they have not required the defendants to make over the property to them. At the most the beneficiaries other than the plaintiffs and the first defendant are indifferent. Why should the plaintiffs benefit by such indifference rather than the purchasers? The plaintiffs may be entitled to sue for possession of their shares of the property. I do not think they are entitled to that relief in this suit (even if the second plaintiff be not bound by the sale, a point I shall afterwards consider). In *Lund* v. *Blanshard*(1), the Vice-Chancellor no doubt observed that *cestui que trust* may be entitled to sue the trustees and the third party jointly ; but he added—what is in point here—[249] that he was bound to confine his suit to the specific matter in respect of which the third party was liable—liable, I take it, to the plaintiff. He would scarcely be competent to sue in respect of the shares of other *cestuis que trustent* who did not desire to join. Much less would he be entitled to sue on behalf of a trustee who also a *cestui que trust* (as is the first defendant here) and was a party to the alleged breach of trust on which the suit was founded. See *Parnell* v. *Hingston*(2.) To put it shortly, no relief is sought in the present suit against the first defendant; on the contrary, it is sought to recover the whole property on his behalf as well as on behalf of the other beneficiaries; the case is therefore not within the observations in *Lund* v. *Blanshard* (1). I do not see how the present suit can be treated now as a suit to recover the plaintiffs' share of the property—whatever that may be—from the defendants including the first defendant. That, it appears to me, is to change the character of the suit altogether. The plaintiffs have not asked for any such relief nor can their vakil tell us what share they are entitled to. It

(1) 4 Hare. 9. (2) 3 Sm. & G. 337 at p. 341.

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was perhaps originally, according to the allegations in the plaint, two-elevenths, but at the present day may be more. Another reason why they are not entitled to any indulgence is that, if (as I shall afterwards show) the second plaintiff has no right to object to the compromise, the suit when confined to the first plaintiff's one-eleventh (or even one-tenth) share would be within the cognizance of a District Munsif. Again, it is suggested by the respondent's vakil that this suit may be treated as an administration suit and the plaintiffs themselves or any persons whom the Court thinks fit appointed as trustees. I do not think this would be a proper course. There is no prayer for the removal of the first defendant and he is, I think, evidently colluding with the plaintiffs. Nor would the plaintiffs themselves, being paupers, be proper persons to be appointed trustees.

Again, I am by no means satisfied that the compromise was either illegal or a breach of trust. The first defendant was entitled to act independently of the second (see Section 271, Succession Act, 1 Williams on Duty of Executors, 9th edition, p. 816) and one objection taken to the compromise therefore fails. Next, I think it clear that the second plaintiff cannot dispute the validity of the [250] compromise. Although she was no party to the suit (nor could she be, as the administrator alone was entitled to sue) she could hardly have been unaware of it. She has carefully abstained from alleging that she was not aware of her brother's acts. Nor has the first defendant alleged it either in his written statement or in his evidence as plaintiffs' second witness. All this is very significant. The second plaintiff has been benefited by the compromise, the decree against her having become inoperative. I do not think it lies in her mouth now to repudiate the acts of the first defendant. Her share, at any rate, is clearly bound. As for the other beneficiaries the case is not so clear. But if they were competent to sanction the compromise and did agree to it or subsequently ratify it there would be no breach of trust at all. There is no direct evidence, but it is significant that none of them except the plaintiffs have thought fit to raise any objections to the sales. The plaintiffs' suit was only brought eight years after the sales and there is no explanation for the delay. This apparent acquiescence for so long a period might fairly raise a presumption (which is not in any way rebutted) that the beneficiaries were all assenting parties to the acts of the first defendant. There is nothing to show that the debt on which the second defendant was sued was not contracted for the benefit of the family. If it were for her sole benefit, why did the first defendant agree that his share of the property should be bound ? We know nothing of these transactions. It has not been either alleged or proved—as I have before pointed out—that the first defendant effected the compromise behind the back of the beneficiaries. Why should we, when so little is known of the transactions and where the *malà fides* of the suit is manifest, go out of our way to presume a breach of trust, and grant the first plaintiff relief that she has not asked for and the exact extent of which she cannot even now define. If she had gone into the witness-box and sworn that the first defendant defrauded her, it might be a different matter. In the absence of positive evidence of this character, fraud should not, I think, be presumed, especially where there is so much apparent acquiescence on the part of those alleged to have been defrauded. I have already indicated my opinion that the first defendant is colluding with the plaintiffs ; and that is the reason why no exception is made by the latter which would be prejudicial to his interests, and why no evidence is forthcoming as to the nature of

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the transactions which resulted in the [251] compromised decree. Bad faith is, of course, no reason why a plaintiff should be deprived of any right he may be entitled to claim in a suit properly instituted—but it is I think an element in determining whether he shall be allowed (if that can be done) to alter the character of his suit, or be awarded reliefs he has not merely not claimed but—as it appears to me—designedly abstained from claiming.

I would, therefore, hold that the suit in its present form is unsustainable, the plaintiffs not being entitled to possession of the entire property, or to a mere declaration when they can get no substantial relief. The second plaintiff, in my opinion, is absolutely estopped from questioning the validity of the sales. The first plaintiff may possibly be entitled to relief as regards her share, in a suit properly framed for the purpose, if she can explain her long inaction and show that she did not assent to the compromise entered into by the first defendant. In the view I take, it is not necessary to consider the question arising as to the mortgage. I would allow the appeal and dismiss the plaintiffs' suit with costs throughout so far as regards the sixth defendant, and item No. 2 in the plaint.

BODDAM, J.—I am of opinion that this appeal should be allowed.

In 1866, one Thomas Edmonds died leaving by his will certain properties in trust for his eleven children. No trustees were named in the will but probate was taken out by the executors appointed by the will. The executors were the husbands of the two plaintiffs. Of the executors one died and the other was convicted and sent to jail for some offence. Afterwards in 1877, the first and second defendants and Caroline Edmonds, three of the Children of Thomas Edmonds deceased, were granted letters of administration to the estate of Thomas Edmonds deceased with the will annexed. In 1880 a suit was brought by the fifth defendant against the second plaintiff and a money decree obtained against her in original suit No. 204 of 1880 on the file of the District Munsif of Trichinopoly. In execution of that decree, either the trust property, or the interest of second defendant in the trust property, was sold; and the fifth defendant became the purchaser and interfered with the trust property. In 1889 the first defendant (who was apparently the only administrator who acted) brought a suit against the fifth defendant and the second plaintiff to establish his right as administrator to the plaint-mentioned property (apparently [252] the whole of the trust property) and to set aside the auction sale thereof; and on the 8th December 1890 a decree was passed in pursuance of a razinamah entered into between the first defendant and the fifth defendant, the second plaintiff's name being struck out of the suit at the request of the first defendant. The razinamah decree provided that the first defendant should pay the fifth defendant Rs. 600 through the Court within the 31st March 1891 and in default the fifth defendant should be at liberty to execute the decree against the plaint-mentioned property and collect the said sum of Rs. 600 with interest at half per cent. per mensem, and that all the rights that had accrued to the fifth defendant by virtue of the execution proceedings and the sale held in original suit No. 204 of 1880 on the file of the Trichinopoly District Munsif should thereby be cancelled.

The first defendant made default in payment of the Rs. 600 and the fifth defendant in execution of the decree brought the whole of the trust property to sale. Part of it was purchased by the sixth defendant and the rest by the seventh defendant. As, however, the sixth defendant is

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the only appellant we have only to consider the rights of the parties with respect to the part purchased by him, *viz.*, item No. 2 in the plaint schedule. In 1897 the two plaintiffs brought this suit against two of the administrators, sons of Thomas Edmonds deceased (the third apparently being dead though nothing is said about her in the plaint), two grandchildren of Thomas Edmonds deceased, the fifth defendant (who was plaintiff in original suit No. 204 of 1880 on the file of the Trichinopoly District Munsif and defendant in original suit No. 21 of 1889 and who in execution of the decree therein brought to sale the trust property) and against the sixth and seventh defendants who were purchasers of the trust property in execution of that suit. They claim a declaration that the plaint property is trust property and that the alienations are not valid and binding upon the plaintiffs and asked for a decree for possession on behalf of themselves and other legatees. They alleged in their plaint that Thomas Edmonds left eleven children: that they (the two plaintiffs) and the first and second defendants are his sole surviving children and that two of his children who are dead left one child each respectively whose names are put in as defendants but of whom they say their whereabouts are unknown. They say nothing about any other children of Thomas Edmonds. They make no [253] allegation of breach of trust by the defendants Nos. 1 and 2 and make no claim for their discharge from the trust or for the appointment of any trustees, and beyond the general statement in the plaint as to the surviving children and the fact that two deceased children left each a child, make no attempt to trace or join the representatives of any of the remaining children of Thomas Edmonds.

Now, the first question I have thought it proper to consider is one that goes to the root of the case, apart from any question of the form of action, *viz.*, whether the alienations are binding upon the plaintiffs, and I am of opinion that they are binding and therefore that neither of the plaintiffs has any cause of action.

Whatever may have been the exact legal rights obtained by the fifth defendant in execution of his decree in original suit No. 204 of 1880 on the file of the Trichinopoly District Munsif's Court, it is not disputed that the first and second defendants (and possibly Catherine Caroline Edmonds if she was then alive—though it is probable that she was not then alive) as administrators, were the trustees and as such the trust property was vested in them alone (see paragraph 6 of the plaint. They, therefore, were the proper persons to take legal steps against any one who interfered with the execution of the trusts or with the trust property. The second defendant was, as he says in his written statement, a young man and engaged elsewhere and did not interfere in the management of the trust estate but left it to the first defendant, and, as I have said above, Catherine Caroline Edmonds was apparently dead. The first defendant therefore was—both in law (Section 271, Succession Act, and 1 Williams on Executors, 816) and with the sanction, tacit it may be, but nevertheless with the sanction of the other trustee or trustees as well as of the *custui que trustents*, one of whom was made a party defendant and raised no objection on the score of parties—not only justified but legally bound in pursuance of his duty as trustee to sue the fifth defendant when the right of the trustees to administer the trust property was called into question. His action, therefore, original suit No. 21 of 1889, cannot be impugned, for it is obvious that the trust properties were the "plaint-mentioned properties" as the right to execution under the decree was

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confined to the "plaint-mentioned properties" and it is not suggested that execution of that decree went against any **[254]** properties other than the plaint-mentioned properties, with the result that the sixth and seventh defendants became purchasers of the whole of the trust property.

It appears clear, therefore, to me that rightly or wrongly the fifth defendant had obtained possession of the whole of the trust properties and that the action of the first defendant in suing him in original suit No. 21 of 1889 was proper and bound all the *cestui que trustents* who were interested as legatees in that property and not only the second plaintiff who was a party to it.

Again, just as a trustee can sue for the trust property so also he has power to compromise his suit and thereby bind the *cestui que trustents* provided that he does not thereby become a party to a fraud but acts for the interests of the beneficiaries. Nothing of the kind is suggested here; but on the other hand, having regard to the fact that the second plaintiff was obviously a consenting party to the decree (as evidenced by her consenting without complaint to having her name removed from the suit at the time the compromise was entered into) and is now a co-plaintiff, ten years afterwards with the only other surviving child of the testator except the trustees, defendants Nos. 1 and 2, and that the plaintiffs do not complain of any breach of trust or devastavit by the trustees, it must be assumed that at that time it was considered by all that the compromise was for the benefit of the trust estate. That being so, the alienations that have taken place under the decree, passed in pursuance of that compromise, are binding upon the estate and upon all the beneficiaries, though it may be that the beneficiaries might perhaps in certain events have a cause of action against the trustee first defendant for not paying the Rs. 600. That, however, is not the case of the plaintiffs. The plaintiffs are not entitled, therefore, in my opinion to the declaration they seek, much less to the remedy they ask for.

I am, moreover, of opinion that the suit in its present form cannot be sustained. The plaintiffs are two out of eleven beneficiaries. They are not entitled to possession either of the whole or of any part of the property unless all the beneficiaries are before the Court and are of one mind. They can only be entitled to have the trusts carried out and this the suit does not ask for: and moreover, in such a suit all the beneficiaries must be before the Court in order that the shares of each may be determined. Until the trustees are removed the property vests in them and **[255]** they alone are entitled to possession on behalf of the beneficiaries unless all the beneficiaries are of one mind and present before the Court. It cannot be assumed that all the beneficiaries are before the Court when the plaintiffs allege that they were eleven in number and the representatives of five of those eleven are not even named and it is not asserted that the two grand-children who are before the Court are the sole legal personal representatives of their parents. In my opinion the District Judge, in paragraph 11 of his judgment, has misunderstood the contention. The plaintiffs in their plaint say that Thomas Edmonds left eleven children and it lies upon the plaintiffs to show that all the parties are before the Court, particularly where the question is whether the suit can be considered to be a suit of a nature different to that which it bears upon the face of it. The property is vested in the trustees until they are removed and there is a proper suit by all the beneficiaries for possession to be transferred to them. In the absence of any of the beneficiaries or in the absence of proof that they are

all of one mind the suit cannot be successful. Moreover, the plaintiffs' allegations in paragraph 14 of the plaint show that the beneficiaries are not all of one mind.

I am therefore of opinion that the suit in its present form is unsustainable. I would therefore allow the appeal of the sixth defendant with costs throughout. The plaintiffs must pay the institution fee in respect of item No. 2 in the plaint schedule and the property in this appeal throughout.

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23 M. 256.

[256] APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice and Mr. Justice O'Farrell.

PERIYA AYAL ((*Plaintiff*), *Appellant* v. NARAYANA PADAYACHI AND OTHERS (*Defendants Nos.* 1 *to* 7, *Representative of Defendant No.* 8, *Defendants Nos.* 9 *to* 11 *and Representative of Defendant No.* 5), *Respondents*.* [16th October, 1899.]

Hindu Law — Will — Construction — Devise of lands to brother to be enjoyed jointly with the testator's widow—Power of alienation during widow's lifetime.

A testator, by his will, directed that his lands should be enjoyed by his brother from generation to generation and for ever, with power to alienate the same by sale, gift or otherwise, but that he should enjoy them jointly with the testator's wife. Upon its being contended that the provision in favour of the wife merely conferred upon her, or recognised, a right to maintenance and that the power of the brother to alienate was as extensive during the life of the widow as after her death:

Held, that on the true construction of the will the testator did not intend the brother to have any power of alienation during the widow's lifetime.

DORAIKANNU PADAYACHI died in 1891, having first executed a will which contained the following clause amongst others :—" These lands . . . . shall be enjoyed by my senior younger brother Narayanasami Padayachi from generation to generation and for ever with power to alienate the same by sale, gift or otherwise, but he should enjoy the same jointly with my wife Periya Ayal, paying away at the same time the debts that are due by me to those individuals whom I have described here below. Further he (my senior younger brother— Narayanasami Padayachi), besides performing the obsequies for me, shall also perform the obsequies for my wife the aforementioned Periya Ayal when she shall have departed this world.

The said senior younger brother, Narayanasami Padayachi, having alienated the lands and thereby deprived the widow Periya [257] Ayal from jointly enjoying them during her lifetime the said widow brought this suit against him and others to recover the lands, with mesne profits. The District Munsif tried, as issues, whether, by the terms of the will, the testator had given away all his property to defendant No. 1 with a direction to maintain the plaintiff; or whether the property was bequeathed to plaintiff for her life, with remainder over to defendant No. 1, after plaintiff's death. He found that plaintiff was

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* Second Appeal No. 1426 of 1898 against the decree of W. F. Grahame, District Judge of South Arcot, in appeal suit No. 156 of 1896, modifying the decree of S. Mahadeva Sastri, District Munsif of Chidambaram, in original suit No. 385 of 1895.

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given a life interest in the property; and that the provision relating to joint enjoyment had been inserted by mistake. He gave plaintiff possession with mesne profits, as prayed. Defendants Nos. 3 to 12 claimed to be entitled as *bona fide* purchasers, from defendant No. 1 through defendant No. 2; and nine of them appealed to the District Court.

The District Judge said:—"Plaintiff has come into Court claiming the whole of her deceased husband's property and Rs. 651 mesne profits, on the ground that it was her husband's intention to leave the property exclusively to her during her lifetime, and claims that the terms of the will are not unambiguous, either from the ignorance of those who drew up the will or because of fraud on the part of first defendant and his friend. She contended also that at the date of her husband's death there was money enough belonging to him to discharge his debts and that there was no necessity to alienate any of the property to discharge debts. First defendant contended that the will gave the property of the deceased exclusively to first defendant, who, being pressed by creditors alienated it to second defendant for Rs. 3,000, which is all it is worth. Defendants Nos. 2, 4, 9, 10 and 11 contended that by the will the property became exclusively the property of first defendant, that plaintiff has exaggerated the value of the property and mesne profits and that if she has any interest in the property she is entitled only to hold it jointly with defendants. Defendants Nos. 3, 5, 6, 7, 8 and 12 added that Doraikannu Padayachi owed more than was stated in the will. From the contentions of the defendants, it is clear that they contend that the property was sold partly to clear off debts due by Doraikannu Padayachi. In paragraph 7 of his judgment, the District Munsif found that none of the debts due by Doraikannu Padayachi were paid off and that there was no consideration for any of the sale deeds under which the various alienations were made. On the evidence I am led to agree with the District Munsif that not one of the debts [258] which may have been due by Doraikannu Padayachi was paid either by first defendant or by second defendant or by any other defendant. I am not however prepared on that finding to say that the alienation by first defendant is, therefore, absolutely invalid and void as the District Munsif has found . . . . The view that I take of the will is that it gives joint management and ownership to first defendant and to plaintiff during plaintiff's lifetime and that after plaintiff's death, first defendant is to become absolute owner of the property. As to plaintiff's contention that Doraikannu Padayachi intended to give to plaintiff exclusive ownership during her lifetime, it cannot be acceded to. It has been ruled by authority that the intentions of a testator are to be gathered from the language in which he may see fit to set them forth. The language of this will is clear and unambiguous, and it gives a joint ownership. That being so, it follows that if first defendant chooses to alienate his own share of such ownership, he is at liberty to do so, but he cannot by any means alienate the share which belongs to plaintiff. Therefore, first defendant had the power and right to alienate his joint ownership and managership if he should see fit to do so. He did see fit, and he has done so. The result is that persons other than first defendant became joint owners with plaintiff. I am, therefore, constrained to modify the decree of the Lower Court and to decree that plaintiff is entitled to joint possession of the plaint property with the various alienees, and she is entitled to half the mesne profits on the plaint property to be ascertained in execution. Plaintiff and the defendants Nos. 2 to 12 will receive and pay proportional costs on what is decreed and on what is disallowed."

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23 M. 256.

Plaintiff preferred this second appeal.

Ranga Ramanujachariar, for appellant.

Mr. *N. Subramaniam*, for respondents.

JUDGMENT.

We overrule the stamp objection (referred to in the fourth ground of appeal) which has been raised in this case. The objection was not taken in the Court below and consequently it is not open to the appellant to take it before us.

In the view we take as to the construction of the will it is not necessary for us to deal with the point raised by the appellant that the eighth defendant did not appeal to the lower Appellate Court.

The case turns entirely upon what is the construction of the will. It is not easy to say with certainty what were really the [259] intentions of the testator. His predominant motive would seem to have been a desire to benefit the first defendant. He describes the disposition of his property which he intended to effect by the will as "arrangements in favour of" the first defendant. He then proceeds to specify his property and to direct that it shall be enjoyed by the first defendant for ever with power of alienation. This provision, if it stood alone, would of course constitute the first defendant absolute owner. But the will goes on to provide that the first defendant is to enjoy the same, *i.e.*, the properties which the testator intended to dispose of, jointly with the testator's widow. It has been argued on behalf of the respondents that this provision in favour of the wife merely conferred upon her or recognised, a right to maintenance and that the power of the first defendant to alienate was as extensive during the plaintiff's lifetime as after her death. We think that such construction would nullify the words "he should enjoy the same with my wife," and was not in accordance with the intention of the testator. In our judgment the testator did not intend the first defendant to have any power of alienation during the widow's lifetime, and we are consequently unable to adopt the view taken by the District Judge.

We set aside the decree of the District Judge and decree that the plaintiff is entitled to joint possession of the plaint properties together with the first defendant. The respondents must pay the appellant's costs in this Court and in the Court below.

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APPELLATE CIVIL.

23 M. 260.

23 M. 260.

[260] APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice O'Farrell.

CAUSSANEL (*Plaintiff*), *Appellant v.* SOURES AND OTHERS (*Defendants and Legal Representatives of Defendant No.* 3), *Respondents.** [16th October, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 108, 540—*Decree passed* ex parte *through non-attendance of defendants—Appeal—Order for re-trial* de novo *on ground that defendants had insufficient opportunity for being heard—Illegality of such order.*

The defendants in a suit for possession of property and an injunction filed written statements but failed to appear, either in person or by pleader, when the suit came on for hearing in the District Munsif's Court. Evidence adduced by the plaintiff was taken and a decree passed in plaintiff's favour as prayed. Some of the defendants applied to the District Munsif for an order to set aside the *ex-parte* decree, which application was refused; and the defendants then appealed against the original *ex-parte* decree, when the Subordinate Judge reversed the said decree and remanded the suit for re-trial *de novo* on the ground that the defendants had not had a proper opportunity for being heard:

Held, that it was not competent for the Subordinate Judge to pass such an order; that he could only deal with the case on the materials on the record; and that the decree of the District Munsif must be restored.

[**Diss.**, 30 M. 54 (**F.B.**) = 16 M.L.J. 479 = 1 M.L.T. 268; **R.**, 23 M. 494; 34 M. 228 (230) = 6 Ind. Cas. 239 = 20 M.L.J. 805 = 8 M.L.T. 72 = (1910) M.W.N. 226; **D.**, 9 C.L.J. 367 = 13 C.W.N. 493 = 5 M.L.T. 360.]

SUIT to recover possession of a chapel and appurtenances belonging thereto, of which plaintiff claimed to have been wrongfully dispossessed by the defendants, and for an injunction. The defendants filed written statements, but when the suit was called on for hearing did not appear either by themselves or by pleader. The District Munsif heard the evidence of plaintiff and his witnesses and decreed in his favour, as prayed. Defendants Nos. 2 and 7 applied to the District Munsif under Section 108 of the Code of Civil Procedure for an order to set aside the *ex-parte* decree, which application was refused. All the defendants then appealed, and the Subordinate Judge called for a report from the District Munsif as to the reasons for the non-appearance of the [261] defendants or their pleader; and this report was duly presented, the explanation, apparently, being, that defendant No. 1 had omitted to give the pleader his address. The Subordinate Judge held that the pleader was unaware of the date fixed by the District Munsif's Court for the examination of witnesses, and that under the circumstances defendants must be given an opportunity for having the case enquired into in their presence. He set aside the decree of the District Munsif and remanded the case for trial *de novo*.

The plaintiff preferred this second appeal.

Rangachariar, for appellant.

Mr. *Joseph Satya Nadar*, for respondents.

JUDGMENT.

In our judgment the order passed by the Subordinate Judge cannot be supported. At the trial, none of the defendants appeared. The District

* Second Appeal No. 1459 of 1898, against the decree of K. Krishna Rao, Acting Subordinate Judge of Tinnevelly, in appeal suit No. 246 of 1897, reversing the decree of V. Malhari Rao, District Munsif of Tuticorin, in original suit No. 657 of 1896.

Munsif being satisfied that the requirements of Section 100, Civil Procedure Code, had been complied with, proceeded *ex parte* and passed a decree in favour of the plaintiff. Thereupon the defendants Nos. 2 to 7 applied on their own behalf to the District Munsif under Section 108 of the Civil Procedure Code for an order to set aside the *ex parte* decree. This application was refused. The defendants Nos. 2 to 7 could have appealed from the order refusing to set aside the *ex parte* decree under Section 588 (9) of the Civil Procedure Code, but they did not think fit to do so. Any order made in an appeal under Section 588 (9) would have been final.

The course which all the defendants then adopted was to appeal against the original decree passed *ex parte* under the power of appeal given by Section 540 of the Civil Procedure Code. On the hearing of this appeal the Subordinate Judge reversed the District Munsif's decision and passed an order remanding the case for re-trial on the ground that the defendants had not had a proper opportunity of being heard. It was not competent for the Subordinate Judge to pass this order.

All that he could do was to deal with the case on the merits on the materials on the record. This being the only point argued before the Lower Court, on appeal, the order of the Subordinate Judge must be set aside and that of the District Munsif restored, and the respondents in this Court must pay the costs of this appeal and the costs in the Court below.

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23 M. 262.

[262] APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

NARASAYYA AND OTHERS (*Defendants Nos.* 1 *to* 3, 5 *to* 15, 22 *to* 34, 36 *to* 41, 43 *to* 47, 49 *to* 51, 53 *to* 55, *and* 57 *to* 70), *Appellants v.* VENKATAGIRI RAJAH (*Plaintiff*), *Respondent.**
[12th, 13th and 26th September, 1899.]

Ejectment suit—Lands held on amaram tenure resumable at will on reasonable notice—What amounts to reasonable notice considered.

A village and its hamlets had been given by a plaintiff's ancestors to the ancestors of the defendants on amaram service. Plaintiff now required the defendants to hand over the land, and had served two notices on them to that effect. The first of such notices had been served less than three months before the end of a fasli; in the second, suit was threatened in default of reply within ten days:

Held, that lands held on amaram tenure are resumable, and that the defendants had no permanent right of tenure.

Held further, that before such resumption of lands can take place reasonable notice must be given: and that the notices which had been served were insufficient.

[R., 26 M. 403 (408).]

SUIT to recover possession of a village and its hamlets with profits. Plaintiff alleged that the village in question had been given by plaintiff's ancestors to the defendants' ancestors on amaram service, that among other services defendants collected revenue, guarded the treasury and kept

* Appeal No. 169 of 1898 against the decree of U. Achutan Nayar, Acting Subordinate Judge of Nellore, in Original Suit No. 45 of 1897.

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tannahs, or formed watch parties on ghauts. Plaintiff being unwilling now to receive such services from defendants, had required them to hand over the village, which demand had been refused. Plaintiff claimed the right to take back the village at his option. Defendants contended that the suit was not sustainable; that the said villages had been given to their ancestors as inam many centuries ago and had since been in their enjoyment. They denied the alleged grant under amaram tenure, and claimed that the villages had been given for services rendered in times of war with other nations, and that after [263] the advent of the East India Company plaintiff's ancestors had been relieved from lending sepoys, and had thereupon fixed a permanent jodi on the villages and parted with the latter and had no right to recover possession of them now. The Subordinate Judge ordered the village and its hamlets to be surrendered, with profits, to plaintiff, on payment by the latter of compensation for improvements. On the first issue,—as to whether plaintiff was entitled to recover the land, he held as follows:—"From the evidence above set forth I come to the conclusion that the village is held on condition of ordinary amaram service and is resumable at the will of plaintiff. There is no evidence that the defendants or their ancestors did any particular service; and the only document on the point is Exhibit BBB which is a takeed by the Rajah to his Tahsildar to tell the Mukku people that they were liable to render service. It was on the supposition that amaram grants are resumable that the income enjoyed by the amaramdars was considered as part of the zamindar's actual resources. The decision of the Privy Council in *Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo* (1) is a distinct authority for the proposition that amarams are resumable in Madras (*vide Sitaramarazu* v. *Ramachendrarazu* (2) and *Puran Mal* v. *Padma*(3)). The defendants' pleader relied on *Maharajah Nilmoney Singh Deo* v. *Sheo Tewary*(4), *Chunder Nath Roy* v. *Bheem Sirdar*(5), *Rajah Nilmoney Singh Deo* v. *The Government*(6), *Baboo Koolodup Narain Singh* v. *Mahadeo Singh* (7), and *Forbes* v. *Meer Mahomed Tuquee*(8). These cases do not refer to amarams and show that a grant made for service cannot be resumed when services are dispensed with or when there is no occasion for the service. The first issue is found for plaintiff." The second and third issues related to whether notice was necessary, and, if so, whether the notice which had been given was sufficient. The Subordinate Judge held that notice was not necessary; but agreed that if notice was necessary, insufficient notice had been given. One notice issued in 1883, (filed as Exhibit C), had been served less than three months before the end of the fasli. A second notice, (Exhibit YY), served in 1893, threatened suit in default of reply within ten days.

[264] The defendants preferred this appeal.

Seshagiri Ayyar, for appellants.

The Acting Advocate-General (Hon. *v. Bhashyam Ayyangar*), with him *S. Subrahmania Ayyar*, for respondent.

JUDGMENT.

The defendants (appellants) and their ancestors have, it is shown, been in enjoyment as middlemen since about the year 1750 of the lands from which it is now sought to oust them. They appear to have in the

(1) 7 M.I.A. 128. (2) 3 M. 367. (3) 2 A. 732.
(4) (1864) W.R. (C.R.) 324. (5) (1864) W.R. (Act X, Rul.) 37.
(6) 6 W.R. (C.R.) 121. (7) 6 W.R. (C.R.) 199. (8) 13 M.I.A. 438.

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first instance held under certain persons who are said to have been members of the Bathsali family and it is shown that the rights of this family were transferred to the ancestors of the plaintiff (the present Rajah of Venkatagiri) towards the close of the last century and that the defendants and their ancestors have, since then, been middlemen under the Rajah of Venkatagiri, paying jodi at varying rates till now. The Subordinate Judge has found (paragraph 18) that the ancestors of the defendants held the lands from about 1753 to 1777 on kattubadi right and that in the latter year the village enjoyed by them was granted to them on amaram service. We cannot find on the record sufficient evidence to justify the finding that any actual change in the nature of the tenure took place at the period mentioned, but we do not attach much importance to this point as Mr. Stratton's report of 1800 (Exhibit KKK) shows that there is not in reality any very clearly defined difference between kattubadi and amaram tenure. Far too much importance has, in our opinion, been attached by the Subordinate Judge to the fact that in various documents executed at different times the ancestors of the defendants have been described as holding on amaram tenure. It is quite clear that this term is used very loosely and that different significations are attached to it in the several papers, &c., on the record in which it is to be found. What is plainly shown is that towards the close of the last century the ancestors of the defendants held the lands with respect to which the present suit has been brought on payment of a favourable rate of jodi, reduced from the full rate because the holders were under the obligation of supplying a certain number of peons for military and other similar purposes for the use of the Rajah. In 1802, however, Lord Clive, who was then Governor of Madras, in a letter addressed to the Rajah informed him that it had been decided that he should for the future be relieved from the obligation of supplying peons, &c., for military service, and that in consequence [265] of the relief which his "finances would derive from the disbandment of his military peons" the peishcush payable by him would be increased from 21,673 to 1,11,858 star pagodas. Lord Clive went on to inform the Rajah that as he has been relieved from the obligation to render any military service for the future, it was unnecessary that the lands which had been granted for the support of the amaram and kattubadi peons should any longer be held on military tenure and the Rajah was accordingly directed to release the peons "from that condition." There can be no reasonable doubt that on the receipt of these instructions the ancestors of the defendants, together with the other amaram and kattubadi peons holding lands as middlemen on favourable rates of jodi, were relieved from the obligation of military service and that the jodi payable by them was at once increased. In the case of the lands to which the present suit relates it would appear that the increase was from about 90 or 100 to about 170 pagodas. From that time forward the middlemen were no doubt frequently described as holding on amaram tenure, but it is perfectly clear that they ceased to be men holding on a favourable rate of jodi on the understanding that they performed military duties and that therefore the nature of their tenure ceased to be amaram in the proper meaning of the term. The defendants in their written statement (paragraphs 3 and 4) assert that their lands were originally given to them as poligar inams (whatever that may mean) on a small fixed jodi but that when the plaintiff's ancestors were informed in 1802 by the officers of the East India Company that they were relieved from the obligation of lending sepoys for the service of the Company they were also told that they were in consequence at liberty

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to enhance the rate of jodi payable to them on these inam lands. They then add as follows :—"The plaintiff's ancestors thereupon fixed a permanent jodi of Rs. 840 on the suit villages and arranged with the defendants' ancestors to be in possession of the said villages with powers of alienation by sale, gift or otherwise." Of the existence of this alleged agreement there is not a particle of evidence on the record and we have no hesitation in holding that no such agreement was ever entered into. On the other hand what is shown is that the defendants and their ancestors have never had any fixity of tenure, that no grant acknowledging any such right has ever been conferred on them by the plaintiff or his predecessors, and that the jodi payable by them has been varied **[266]** from time to time and has been raised from 179½ pagodas payable up to 1815 (*vide* Exhibit M) to about 211 pagodas (paragraph 17 of Subordinate Judge's judgment).

As regards the first issue, the case would, therefore, appear to stand as follows :—The lands were at the close of the last century held on amaram tenure by the ancestors of the defendants. The decision of the Privy Council (*Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo* (1)) is distinct authority for the proposition that lands held on such tenure are resumable. In 1802 the nature of the tenure was altered, its military character was taken away and the jodi was greatly increased. The defendants' contention that an agreement was then entered into between their predecessors and the ancestors of the Rajah by which they were granted the right of holding the lands permanently has not been established, but on the contrary it has been shown that no grant of any description was ever made in their favour and that they have, ever since they ceased to perform military service, held their villages on a precarious tenure, paying a jodi that has been gradually increased.

On behalf of the appellants our attention has been drawn to the decision of the Judicial Committee of the Privy Council (*Forbes* v. *Meer Mahommed Tuquee* (2)), but a reference to that judgment shows that there is no analogy between the case of the defendants there and the present appellant as the former were holding their lands under sannads granted to them by the zamindar, and as the decision of their Lordships that they were not liable to be ejected is mainly based on a consideration of the terms of those sannads.

For the foregoing reasons, we uphold the finding of the Subordinate Judge on the first issue.

The second and third issues are as to whether the respondent (plaintiff) can recover possession of the lands sued for without giving notice to the defendants, and if not whether he has given proper notice. The Subordinate Judge has held (paragraphs 24 and 25) that notice was not necessary and also that there was no sufficient notice. As to this latter question, we have no hesitation in holding that Exhibits C and YY were not sufficient notices, and Mr. Bhashyam Ayyangar who appears for the respondent (plaintiff), has stated at the hearing that he is not prepared to **[267]** contend that there was proper notice. We cannot, however, uphold the finding of the Subordinate Judge that notice was unnecessary. In a case very similar to this, to which allusion has already been made, their Lordships of the Privy Council have held that before resumption of the lands can take place there must be reasonable notice (*Unide Rajaha Raju Bommarauze Bahadur* v. *Pemmasamy Venkatadri Naidu* (1)); *vide* also *Radha Pershad Singh* v. *Budhu Dashad* (3). Mr. Bhashyam Ayyangar

(1) 7 M. I. A. 128. (2) 13 M.I.A. 438. (3) 22 C. 938 (942).

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urges however, on the part of the respondent that even if it be held that his client is not entitled in the present suit to get a decree for ejectment on the ground that there has not been sufficient notice to the appellants yet that he is entitled to a declaration to the effect that the tenure under which the defendants are holding is not of a permanent character; and he draws attention to the fact that in *Radha Pershad Singh* v. *Budhu Dashad* (1), which is in many respects similar to the present suit, such a declaration was granted. On referring, however, to the plaint we find that it contains no prayer for a declaration and we are not prepared to give the plaintiff a relief not asked for.

To sum up briefly we hold that the appellants have no permanent right of tenure of the lands sued for, but that they cannot be ejected from these lands without sufficient notice, and that, therefore, as there has been no such notice, appeal suit No. 169 of 1898 must be allowed with costs, the decision of the Subordinate Judge reversed and the plaintiff's suit dismissed with all costs throughout.

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[268] APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

BHUPATIRAZU (*Plaintiff*), *Appellant v.* RAMASAMI (*Defendant*), *Respondent.** [3rd October, 1899.]

Local Boards Act (Madras) Act V of 1884, *Sections* 64, 73, 155— *Tax payable on land—Favourable tenure—Claim by landholder of more than one-half of the tax from tenant—Invalidity of custom for tenant to pay whole tax.*

A tenant paid an annual rent of Rs. 64 to the landholder, the tenure being of a nature dealt with by sub-Section (iii) of Section 64 of the Local Boards Act (Madras), 1884. The landholder distrained on the tenant's property in respect of the whole amount of local cess payable in respect of the land, contending that it should be calculated on the rent value, which was admittedly Rs. 710. It was found that under a custom subsisting in the district the whole amount of the local cess was payable by the tenant:

Held, that having regard to Section 73 of the said Act, such a custom must be unreasonable and invalid. The words 'favourable rent' in Section 64, sub-Section (iii) of the Act, mean rent which at the time of the assessment being fixed is favourable as compared with the ordinary rent of similar lands in the vicinity, and has nothing to do with the question whether the rent, as fixed at the time when the lease was granted, was favourable or unfavourable.

[R., 31 M. 22=17 M.L.J. 479=3 M.L.T. 29.]

PLAINTIFF held certain land as tenant of defendant, the tenure being of a nature dealt with by sub-Section (iii) of Section 64 of Madras Act V of 1884. The annual rent paid by plaintiff was Rs. 64, which the Acting Sub-Collector found to be a favourable tenure. Defendant collected local cess, plaintiff paying him on this account a sum of Rs. 4. Defendant, however claimed Rs. 44-6-0 and distrained for the balance, contending that the local cess should be calculated on the rent value, which was admitted to be Rs. 710. The Acting Sub-Collector held that the amount of local cess due was only Rs. 4, and ordered the defendant to deliver up the property

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* Second Appeal No. 1360 of 1898, against the decree of M. D. Bell, District Judge of Godavari, reversing the decision of W. W. Phillips, Acting Sub-Collector of Godavari, in Summary Suit No. 17 of 1896.

(1) 22 C. 938 (942).

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which had been distrained for the balance. On appeal, the District Judge said :—"The question at issue is how the amount of local cess payable is to be calculated. The land is one which was granted on favourable terms and clearly falls under the last part of Clause (iii), Section 64 of the Madras [269] Local Boards Act V of 1884. The cess must be calculated on the rent value of lands of similar quality in the neighbourhood. The suit is remanded to the Sub-Collector for a finding to be returned within six weeks on the following issue:—'What is the rent ordinarily payable to the landholder for lands of similar quality leased out by him in the neighbourhood?'"

A finding was returned to the effect that the rent ordinarily payable on such land was Rs. 710 and the local cess Rs. 44-6-0, and (in pursuance of a further order) that notwithstanding Section 73 of Local Boards Act (Madras), 1884, the whole amount of local cess was payable by the tenant. On these findings the District Judge reversed the decision and dismissed the plaintiff's suit.

Plaintiffs preferred this second appeal.

Venkataramayya Chetti and *Sundara Ayyar*, for appellant.

Seshagiri Ayyar, for respondent.

JUDGMENT.

The plaintiff (appellant in second appeal) is the tenant of the defendant. The latter is a landholder whose tenure, it is admitted, falls neither under sub-Section (i) or (ii) of Section 64, Act V of 1884. It is therefore within sub-Section (iii). The land is held by the plaintiff from defendant at an annual rent of Rs. 64, but the Collector held that the proper rent for the purposes of Section 64 of the Act was Rs. 710 and assessed the defendant at Rs. 44-6-0 on that amount under the last clause of sub-Section (iii) which provides that where land is held by any person free of rent or at a favourable rent, the rent ordinarily payable for lands of similar quality in the neighbourhood is to be taken as the basis for assessment.

It is not disputed that the defendant has been assessed at Rs. 44-6-0 and that this is the amount (less perhaps remission to which he is entitled under Section 75) payable by him as tax on the rent value of the land. Under Section 73 of the Act the landholder may recover one-half of the amount payable by him (including remission granted under Section 75) from the tenant, who is in this case the plaintiff.

He has, however, distrained and recovered the whole; and one question in this appeal is whether he was entitled to do so. The District Judge has found that he was apparently relying on an alleged custom or implied agreement prevailing in the zamindari. The words of Section 73 are, however, plain, and any agreement to pay more than is required by law would be without consideration [270] and void; or if regarded as based on custom, unreasonable and invalid. On this point we are clearly of opinion that the plaintiff must succeed.

The only other point is whether he is entitled to question the correctness of the assessment made by the Collector.

Section 155 (2) of the Act provides that "no action shall be maintained in any Court to recover money paid in respect of any tax, toll or "fee assessed or levied or any sum collected under this Act, or to recover "money or damages by reason of any assessment made, tax, toll or fee

"levied or any payment under this Act. Provided that the provisions "of this Act relating to the assessment and levy of taxes, tolls and fees "and to the collection of payments shall have been in substance "complied with."

It is not contended that the provisions of the Act have not been in substance complied with and the section quoted would appear to bar the suit so far as the one-half of the tax levied for plaintiff is concerned. If, however, the plaintiff were at liberty to question the correctness of the assessment made by the Collector, we should still have to hold that that assessment was correct. The obvious meaning of the words 'favourable rent' in Section 64 (iii) is rent which, at the time of the assessment being fixed, is favourable as compared with the ordinary rent of similar lands in the vicinity. It has nothing to do with the question whether the rent, as fixed at the time when the lease was granted (in this case so far back as 1839), was favourable or unfavourable.

We think the adjudication made by the Collector would in any case be at least *prima facie* evidence that the land was held at a favourable rent; but there is also a finding of fact, which is not open to question in second appeal that the rent of neighbouring lands of similar quality is not less than Rs. 3 per acre, and that the estimate of Rs. 710 for the whole 385 acres, which also appears to have been admitted before the Sub-Collector as the rent which plaintiff got for the land, is therefore well within the mark. As the rent paid by the plaintiff to the defendant is only Rs. 64, it is quite clear that the land was held by him at a favourable rent.

We must therefore hold that the distraint was lawful to the extent of Rs. 22-3-0, and we modify the decrees of the Courts below in accordance with this view. Each party will bear his own costs throughout.

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[271] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Morris, Davey, and Robertson, and Sir. Richard Couch.
[*On appeal from the High Court at Madras.*]

GNANASAMBANDA PANDARA SANNADHI (*Defendant No.* 1), *Appellant* v. VELU PANDARAM AND ANOTHER (*Plaintiff and Defendant No.* 2), *Respondents.*
[22nd and 29th November and 19th December, 1899.]

Religious foundation—Endowed property—Hereditary Managers—Void alienation—adverse possession—Limitation Act—Act XV of 1877, *Section* 28, *Schedule II, Articles* 124, 144.

The hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution, the first defendant's predecessor:

Held, that there not being any custom of the foundation allowing such an assignment, it was beyond their legal competence, conveying no title; *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*, (1876) L. R. 4 I.A. 76 = I.L.R. 1 M. 235) referred to and followed.

The possession delivered to the purchaser was adverse to the vendors. After the twelve years' period of limitation, which expired in the lifetime of the

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vendor, whose son now sued to recover the hereditary managership and possession of the lands of the endowment, the suit was barred under Limitation Act XV of 1877:

Held, that there was no distinction between the claim to the office and the claim for the property, in regard to the application of Article 124 of Schedule II of the Act, and of Section 28. If there were, Article 144 would apply to the claim for the property.

In order to fix the starting point for limitation at a date later than that of the transfer, it was contended that the office and title were held in successive life estates. If that contention had been right, the period of limitation would have commenced at the death of the plaintiff's father.

The Judicial Committee were of opinion that it must be assumed that the origin of the endowment was by gift from the founder and that, in accordance with the ruling in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872) L.R., I.A., Sup. Vol., 47 = 9 Beng. L.R., 377), heritable estates could not be created to take effect as successive life estates, and inconsistently with the general law. This applied to both the office and the property:

Held, that the law of inheritance did not permit the creation of successive life estates in this endowment; the above ruling being also contrary to the judgment in *Trimbak Bawa* v. *Narayan Bawa* ((1882) I.L.R 7 B., 188); and that [272] the plaintiff could not claim to have been entitled otherwise than as heir to, and from, and through his father, in whose lifetime the title had been extinguished by lapse of time and adverse possession of the defendant.

[**F.**, 13 C.L.J. 277 = 9 Ind.Cas. 377; 16 Ind.Cas. 53 = 23 M.L.J. 260 = 12 M L T. 218 = (1912) M.W.N. 870; 15 Ind. Cas. 365 = 22 M.L.J. 404 = 11 M.L.T. 198 = (1912) M.W.N. 383; **R.**, 27 B. 500 (511) = 5 Bom.L.R. 303 (308); 28 B. 215 (223); 31 C. 166 = 8 C.W.N. 273; 33 C. 507 (510); 33 C. 511 = 3 C.L J. 306 (311) = 10 C.W.N. 738; 35 C. 691 = 7 C.L J. 514 (519) = 12 C.W.N. 550; 37 C. 885 (**P.C.**) = 7 A.L.J. 791 = 12 Bom.L R. 632 = 12 C.L.J 110 = 14 C.W.N 889 = 7 Ind.Cas. 240 = 20 M.L.J. 624 = 8 M.L.T. 145 = (1910) M.W.N. 303; 36 C. 887 = 14 Ind. Cas. 142; 27 M. 435 (462) = 14 M.L J. 105 (131); 28 M. 197; 29 M. 390 = 16 M.L.J. 307 = 1 M.L T. 183; 30 M. 393 (395) = 17 M L.J. 220; 35 M. 92 = 8 Ind. Cas. 760 = 9 M.L.T. 105 = (1910) M.W.N. 735; 4 C.L.J. 442 (456); 8 C.L.J. 369 (401); 8 C.L.J. 494 (503); 11 C.L J. 304 (314) = 3 Ind.Cas. 419; 13 C.L.J. 277 = 9 Ind.Cas. 377; 17 C.L.J. 233 (236); 12 C.W.N. 98 (102); 8 Ind.Cas. 998 = 20 M.L J. 781 = 9 M.L.T. 73; 10 Ind. Cas. 573; 13 Ind. Cas. 599 = 21 M.L J. 630 = (1912) M W.N. 152; 21 M.L.J. 1041 = 10 M.L.T. 418 = (1911) 1 M.W.N. 450; 11 M.L.T. 355 (360) = (1912) M.W.N. 445; 127 P.R. 1908 = 123 P.W.R. 1908 (**F.B.**); **D.**, 27 B. 363; 15 Bom.L.R. 266; 3 C.L.J. 606 = 30 P.R. 1908 = 102 P.L.R. 1908 = 35 P.W.R. 1908.]

APPEAL from a decree (1) (22nd October 1895) of the High Court, modifying a decree (30th October 1893) of the Subordinate Judge of Kumbakonam.

The plaintiff, now the first respondent, was a mirasidar in the Mayavaram taluk in Kumbakonam. There was at Thirukkadaiyur a temple to which were originally attached the lands and property of the endowment, now in dispute, founded by the ancestors of the plaintiff and of the second defendant, to descend as a family inheritance. The first defendant was Gnanasambanda Pandara Sannadhi who represented the adhinam of Dharmapuram, another institution.

The general history of the foundation, so far as it is known, appears in the report of the appeal to the High Court in I.L.R., 19 Mad., 243, and in their Lordships' judgment.

From 1857 the management and possession were in the hands of Velu Pandaram with whom was associated his nephew Kuppa Pandaram. They were the uralans. Before then the temple property had been under charge of the District officers who, by the order of Government, made it over to those representatives of the family of the founder. Afterwards

(1) 19 M. 243.

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was passed Act XX of 1863, the "Native Religious Endowments Act." In 1868 both those persons were dead. Velu had adopted a son, Nataraja, father of the present plaintiff, and Kuppa had left a minor son Chockalinga, the second defendant, then under the guardianship of his mother Visalakshi between whom and Nataraja the possession of the property was shared. Chockalinga attained full age in 1880. Nataraja's son Velu, the plaintiff, attained majority in February 1891, and brought this suit on the 17th August 1892.

By registered deed of sale, dated the 17th September 1868, Visalakshi purported to convey the minor's half share in the joint management and in the property of the endowment to the then Pandara Sannadhi of the Dharmapuram mutt, predecessor of the defendant. This was followed by a similar conveyance executed to the latter on the 13th February 1869 by Nataraja, the plaintiff's father, assigning his share. Chockalinga, the second defendant, was [273] then living. The plaintiff was born four or five years after, about 1873 or 1874. The representative of the Dharmapuram institution obtained possession.

The plaint alleged a provision by the founder that only members of the family should hold the management and the property, charged with the expense of the worship, charities, and other matters connected with the temple: that the transfers of 1868 and 1869 were void and inoperative: that the cause of action arose at the death of Nataraja in August 1884. A declaration was asked that the plaintiff was entitled to be sole manager with possession, and mesne profits; and there was an alternative claim that the second defendant, if the Court should decide that his right had not been lost to him by his non-claim, should be declared entitled to share with the plaintiff in the managership and possession.

There were originally several grounds of defence, and six issues were framed, of which the last raised the question of the second defendant's right. But the only question now material was the question of limitation barring the suit under Act XV of 1877.

The Subordinate Judge decreed the plaintiff entitled to the management and possession jointly with the second defendant, but confined the property to that inherited from Velu, without that which Visalakshi had transferred. He was of opinion that the plaintiff's right to sue had accrued not earlier than the death of Nataraja, his father, in 1884, and that the suit for that part of the property and the management of it was within time. As to the share transferred by the mother of the second defendant, the Judge decided that the right to question that transfer had been barred by lapse of time before the death of Nataraja, and that consequently his son could not claim that share any more than his father could have claimed it. Both parties appealed from this decree, the plaintiff claiming to be entitled to the management and possession of the whole, and the first defendant contending that the plaintiff was out of time in regard to both the shares conveyed by the deeds of 1868 and 1869. The original hereditary right of the plaintiff's family in the property was not contested.

The High Court maintained in part the decree of the Court below, and altered it in part, decreeing the whole claim. They decided that the right of the plaintiff to sue did not accrue till the [274] death of his father in 1884. Then it was, according to the High Court, that he succeeded to the inheritance which had descended in the form of a series of life estates, as created by the trust. The suit had been brought within

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eight years from the time when limitation began to run. The cases cited in support of this opinion are mentioned in the judgment of the High Court which is reported at length in the I.L.R., 19 Mad., 246. The following was their reason for awarding the whole property claimed: the fact that the second defendant had lost his right to recover, not having sued within time, did not, in their opinion, preclude the plaintiff from claiming the whole of the trust property. As against a third party, a stranger, either of the uralans had a right to sue for the whole, though as between themselves they each were entitled only to the share of each.

On this appeal by the first defendant, Mr. *J. D. Mayne*, for the appellant, argued that there was error in the judgment of the High Court, and in that of the first Court. The plaintiff's suit for a declaration of his title as manager, and for possession, was barred by limitation. There was no doubt but that the office with the lands attached, which were subject to a trust for religious and charitable purposes, were property extra commercium, and that the transfers of 1868 and 1869 were void. The word "trust" had been applied in India to endowments out of which the managers were not precluded from deriving profits for themselves, as they would be if they held the property in trust under other conditions. The assignments were however void, not having been authorized by the custom of the institution, by the common law of the Hindus as shown by *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1). But the purchaser had held exclusive and adverse possession for more than twelve years and the plaintiff's title had been extinguished in the lifetime of his predecessor, his father (Act XV of 1877, Schedule II, Articles 124, 142 and 144, and Section 28). The property in the first defendant's possession, to whose predecessor it had been conveyed, giving him no title, was, with the managership, till then held in the plaintiff's family, with a charge for the benefit, and purposes, of the foundation. The whole had devolved by inheritance. Velu and Kuppu had received it as the members then representing the family entitled to property by [275] inheritance. As to the descent of such family property, reference was made to *Rajah of Cherakal Kovilagom* v. *Mootha Rajah* (2), *Gossamee Sree Greedharreejjee* v. *Rumanlolljee Gossamee* (3). This suit was not, with reference to limitation, in the same position as a suit brought under Section 14 of Act XX of 1863, on behalf of a trust, to recover property wrongly withheld, nor was it a suit to which Section 10 of Act XV of 1877 would be applicable. Reference was made, in regard to the acquirement of title by lapse of time, to the *President and Governors of Magdalen Hospital* v. *Knotts* (4), and to *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube* (5). The office of trust now claimed was not one filled by election or selection, among the members of a religious foundation, but the office devolved by the law of inheritance upon the members of the founder's family. The limitation for claims for such an hereditary office was provided in Article 124 of Schedule II. *Kannan* v. *Nilakandan* (6) was an instance of the application of Article 144 to a claim for the property of a foundation. Reference was also made to *Mahomed* v. *Ganapati* (7) and to *Karimshah* v. *Nattan* (8). The High Court had decided that the claim by the plaintiff as son of Nataraja had a fresh starting point for limitation when he succeeded to title on the death of his father. By this, if it were right, the bar would be avoided. But it was error. For it would be in contravention of the Hindu Law of

(1) 4 I. A. 76 = 1 M. 235. (2) 7 M.H.C.R. 210. (3) 16 I. A. 137 = 17 C. 3.
(4) (1879) L.R. 4 App. Cas. 324. (5) 10 I.A. 90 = 6 A. 1.
(6) 7 M. 337. (7) 13 M. 277. (8) 7 M. 417.

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Inheritance to hold, as the High Court had held, that an endowment of a heritable character should be held in a series of successive life estates by the heritors. The plaintiff could only take by inheritance as the son of his father. The judgment in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1) showed that heritable estates could not be created to be held in a succession of gifts for life, such a perpetual series of life estates being inconsistent with the Hindu Law of Inheritance. In *Trimbak Bawa* v. *Narayan Bawa* (2), it was said in the judgment that the founders of some institutions had vested their management in members of the family, so that each member succeeded according to the form of the gift, and for life only. [276] It was questionable whether that would accord with the law of inheritance.

The result was that limitation in the present case having not only commenced to run in the lifetime of Nataraja, son of Velu, but the period of twelve years of adverse possession having expired in his lifetime, the plaintiff's right to sue for the office and the land had been extinguished when his father's right and title had been extinguished. That was in 1881. There were many instances of the operation of the law of limitation barring the claim of a reversioner when the period of twelve years had expired during the life of the representative of the estate of inheritance, in the person of a widow, or female holding for her limited interest. Among these were *Aumirtolall Bose* v. *Rajoneekant Mitter* (3), *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami* (4), *Mussummat Lachhan Kunwar* v. *Anant Singh* (5).

Mr. *J. H. A. Branson*, for the first respondent, Velu Pandaram, contended that the suit for the office of manager and the property of the foundation was not barred by time. The right to sue had first accrued to the plaintiff on the death of his father Nataraja. The right to sue was to recover for the purposes of the trust possession of the whole endowment from the defendant, whose predecessor had illegally acquired the possession from the plaintiff's predecessor, and acquired it with knowledge of the breach of trust by him. The judgment of the High Court had been right in result, the claim being one to which Article 124, giving a title after twelve years' adverse possession, did not apply. Reference was made to *Vane* v. *Vane* (6). It was true that the case there was that of a purchaser, differing from that of an inheritor. Here the plaintiff had no complete title to sue for the management, and the property, until he had succeeded his predecessor according to the rules of the foundation. Till then he had no right to the possession; a right derived from his belonging to the family, and taking an inheritance transmitted to him on the death of his father. *Mahomed* v. *Ganapati* (7) was a case where limitation commenced, not from the date of a disposition made by a predecessor in title, but from the time when the successor first became [277] entitled to the possession. The judgment in *Trimbak Bawa* v. *Narayan Bawa* (2) proceeded on the principle that, in regard to endowments, resembling the one in the present case, of the nature where the founder has vested in a certain family the right of management, each member succeeded to the management "according to the form of the gift." In that case the manager who succeeded took independently of the estate of the predecessor to an extent so complete that the estate of the one was not

(1) I.A. Sup. Vol. 47=9 B.L.R. 377.
(2) 7 B. 188.
(3) 2 I.A. 113=15 B.L.R. 10.
(4) 20 I.A. 183=21 C. 8.
(5) 22 I.A. 25=22 C. 445.
(6) (1872) L.R. 8 Ch. 383.
(7) 13 M. 277.

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affected by the proceedings taken against it during the time of the other. Reference was also made to *Jamal Saheb* v. *Murgaya Swami* (1), *Modho Kooery* v. *Tekait Ram Chunder Singh* (2), *Papaya* v. *Ramana* (3), *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* (4), *Mohunt Burm Sarup Das* v. *Kashe Jha* (5), *Vedapuratti* v. *Vallabha* (6), *Babaji* v. *Nana* (7), *Kuria bin Hanmin* v. *Gururav* (8), *Kannan* v. *Nilakandan* (9), *Karimshah* v. *Nattan* (10), the last showing that the right was a personal one to succeed as manager in that case.

Mr. *J. D. Mayne* in reply.

On the 19th December 1899 their Lordships' judgment was delivered by SIR RICHARD COUCH:

JUDGMENT.

The suit in this case was brought by the respondent Velu Pandaram to establish his right to the management of an endowment connected with a temple in the province of Madras and to the possession of the lands forming the endowment either absolutely or solely with the second respondent Chockalinga; and the only question in this appeal is whether the suit is barred by the law of limitation.

The earliest document relating to the endowment is dated 19th December 1850, at which time the superintendence of it was vested in the Government. It is an agreement executed by Velu Pandaram, the grandfather of the respondent Velu, who is described as claimant to the endowment in question. It is addressed to the East India Company's Government, and states that in accordance with certain Government orders the lands attached to [278] the endowment—which are specified —"having been delivered to my possession by Government and taken "charge of by me I shall conduct the cultivation and other affairs of the "said lands from Fasli 1260 and use the income derived therefrom solely "for the said temple."

On the 18th August 1857 another agreement was executed by the same Velu Pandaram by which he bound himself and his successors in the management of the endowment to act according to the conditions stated in it, and said that in default of his doing so the Government might remove him.

In 1863 the Government, then the Queen's, was engaged in divesting itself of direct responsibility for the superintendence of these religious institutions, and on the 31st October 1863 an agreement was executed by the same Velu Pandaram and by Kuppa Pandaram, described as son of his elder brother, in which, after saying they are the claimants to the endowment and stating some assessments of lands belonging to it, it continues:—"We shall from the current Fasli 1873 conduct properly the "pooja (worship), naivethiam (offerings), &c., and of the temple with the "said assessment amount and also keep in the temple under our signatures "a detail account of receipt and disbursements in respect of it and pay in "full the kaval revenue of the said lands to the Circar in every fasli." The former agreements were executed by Velu only, but it would appear from this last that the endowment had been held by the brothers as a joint family and that Kuppa had succeeded as heir to his father's interest in it.

(1) 10 B. 34. (2) 9 C. 411. (3) 7 M. 85. (4) 2 M.I.A. 390. (5) 20 W.R. 471. (6) 13 M. 402. (7) 1 B. 535, Note. (8) 9 B.H.C.R. 282. (9) 7 M. 337. (10) 7 M. 417.

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Velu died at some time, not stated, prior to 1868, leaving an adopted son Nataraja, who died in 1884 leaving the respondent Velu his son, and heir who attained majority in February 1891. Kuppa died in 1866 leaving a widow Visalakshi and a son, the respondent Chockalinga, who attained majority in 1880.

On the 17th September 1868 Visalakshi executed a deed of sale to the manager of another temple who was predecessor in title to it to the appellant. She is described in the deed as mother and guardian of Chockalinga and of another boy since dead, sons of the late Kuppa Pandaram, one of the two hereditary trustees. The operative part of the deed is "I have "conveyed to you by absolute sale my hereditary right and interest appertaining to the half-share of the hereditary right of management of the "charity termed (describing this endowment) enjoyed by my husband until "[279] his death and afterwards by me for discharging the debts of the "family incurred by my husband and myself in the management of the "said endowment and for the maintenance present and future of myself "and my little children for Rs. 2,000, the price settled therefor by "mutual consent."

On the 13th February 1869 a similar conveyance was executed by Nataraja of the half-share which he possessed of the hereditary right to the endowment for a like sum of Rs 2,000 for the purpose of discharging the debts incurred in the management of the endowment.

In *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1) this committee held that an assignment by the uralans (managers) of a pagoda of the right of management thereof was beyond their legal competence under the common law of India and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in Chockalinga and Nataraja and the possession which was taken by the purchaser was adverse to them.

The law of limitation applicable to the case is Article 124 of the second schedule to the Act XV of 1877 which says that in a suit for possession of an hereditary office the period of limitation is twelve years which begins to run when the defendant takes possession of the office adversely to the plaintiff or any person from or through whom he derives his right to sue. Chockalinga attained majority in 1880 and had by Article 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so and by Section 28 of the Limitation Act his right became extinguished. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, Article 144 of the same schedule is applicable to the property. That bars the suit after twelve years' adverse possession.

Nataraja also was barred and his right was extinguished. The respondent Velu Pandaram is his son and the suit was brought by him against the appellant and Chockalinga who apparently had refused to be a plaintiff. The plaint states that the endowment [280] was founded by the ancestors of Velu and Chockalinga, and it was arranged by them that only the members of their family should hereditarily hold the properties which were their family property, and from the income thereof conduct the worship and charities connected with the temple, and prayed that

(1) 4 I.A. 76 = 1 M. 235.

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his right might be declared to the sole management of the temple, or if he was held not to be entitled to the sole management that he might be held entitled to it jointly with the appellant. The Subordinate Judge held him to be entitled jointly with the appellant; the High Court has held him to be entitled to the sole right of management.

The contention on behalf of Velu before their Lordships has been that he does not derive his right to sue from or through Nataraja; that on his death in 1884 a fresh right accrued to Velu, and the period of limitation then began. Of the many cases cited by Mr. Branson in his agrument one only *Trimbak Bawa* v. *Narayan Bawa* (1) is applicable to this contention. In that case a grant for some religious purposes had been made to one Balobha and his descendants. His estate including this grant became divisible among his sons, and the share of Vithoba one of them was taken in execution in 1870 and illegally sold. The sons of another son of Balobha by some process became possessed of this share. Vithoba died in 1876 never having taken any steps to recover the property and in 1879 his son sued the other descendants of Balobha for one-third share of the management. The defence set up was that by Article 12 of the same schedule of the Limitation Act a suit to set aside an execution sale must be brought within a year from the conclusion of the sale. The Court held that where the founder of an endowment has vested in a certain family the management of it "each member of such family succeeds to the management, to use technical language *per formam doni* and that therefore on Vithoba's death the plaintiff's right to succeed to the management in this case was quite unaffected by any proceedings against Vithoba during his life."

There is no evidence of the origin of the endowment in this suit. It must be assumed that it was by a gift from the founder. The Government appears to have considered it to be hereditary in the family by admitting Kuppa in the agreement in 1863 to share [281] in it with his uncle. In *Juttendromohun Tagore* v. *Ganendromohun Tagore* (2) it was held by this committee that all estates of inheritance created by gift or will so far as they are inconsistent with the general law of inheritance are void as such and that by Hindu Law no person can succeed thereunder as heir to estates described in the terms which in English Law would designate estates tail. The Hindu Law of Inheritance did not permit the creation of successive life estates in this endowment and this ruling is decisive against the contention on behalf of Velu and is contrary to the judgment in the Bombay case.

The respondent Velu can only be entitled as heir to his father Nataraja and from and through him and consequently his suit is barred by Article 124. In their Lordships' opinion the ruling in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (2) is applicable to an hereditary office and endowment as well as to other immoveable property.

The Subordinate Judge following the decision of the Bombay High Court made a decree declaring the plaintiff entitled to joint management with the appellant and ordering delivery of joint possession of the lands to him. From this decree both the plaintiff and the appellant appealed to the High Court. The appellant's appeal was dismissed on the ground that the plaintiff's right accrued on Nataraja's death. On the plaintiff's appeal the High Court varied the decree below and declared the

(1) 7 B. 188. (2) I.A. Sup. Vol. 47 (66) = 9 B.L.R. 377.

plaintiff entitled to the sole right of management and ordered that the possession of the properties attached to the endowment should be delivered to him. It has been shown that both decrees are erroneous, and their Lordships will humbly advise Her Majesty to reverse them and to order the suit to be dismissed with costs in both Courts. The respondent Velu Pandaram will pay the costs of this appeal.

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Appeal allowed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitors for the respondent (Velu Pandaram): Messrs. *Burton, Yeates & Hart.*

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[282] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

RAMANARASU (*Defendant*), *Appellant* v. BUCHAMMA (*Plaintiff*), *Respondent.** [13th and 28th November, 1899.]

Hindu Law—Maintenance—Right of discarded concubine to claim.]

A woman who has been kept by a man as his concubine for a number of years continuously and then discarded is not entitled under the Hindu Law to claim maintenance from him.

[R., 26 B. 163 = 3 Bom. L.R. 647.]

SUIT for maintenance. Plaintiff had lived with defendant as his concubine for a period of nine years continuously. Defendant then discarded plaintiff who now claimed that by the Hindu Law she was entitled to maintenance from him. The District Munsif held, citing Mayne's 'Hindu Law,' Chapter on "Maintenance," that the temporary connection between defendant and plaintiff gave the latter no right to claim maintenance from the former, and dismissed the suit. The District Judge, on appeal, held it to be just and in accordance with Hindu Law that defendant should pay the maintenance; and, reversing the decree of the Court below, made an order for payment of Rs. 4 per month.

The defendant preferred this second appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Gopalasami Ayyangar*, for appellant:—Such a claim as this is unprecedented under the Hindu Law. No doubt, in administering the estate of a Hindu, the Hindu Law is humane in providing for women in the family, including concubines. But this is an entirely different case. This claim is put forward in a manner analogous to a claim by a wife for maintenance against her husband personally. The fact that a woman has been kept as a concubine cannot confer upon her the rights of a wife. Under the Hindu Law, two classes of persons are entitled to maintenance—one because of relationship, and the other because there is property of a deceased upon which they have claims. The [283] latter claim is analogous to that of a creditor of a deceased person. The first class comprises a wife who remains chaste, aged parents and infant children; and liability to maintain them is independent of the possession of property; and arises by virtue of their relationship alone. The

* Second Appeal, No. 1604 of 1898, against the decree of F. Murray, District Judge of Ganjam, in appeal suit No. 262 of 1897, reversing the decree of N. Lakshmana Rao, District Munsif of Chicacole, in original suit No. 32 of 1896.

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plaintiff's case is that she should be included in this class; that in fact, she should be elevated to the position of a wife. Strange's 'Manual of Hindu Law,' Chapter VIII, page 54, Article 209, mentions, under the first head, only the three classes of persons referred to, and does not include the concubine. Under the second class, it mentions the widows of deceased members of an undivided Hindu family. A mother is also entitled to be maintained after the death of the father as a person coming under this head, which also includes a step-mother. The sons, as such, are not bound to maintain her; but on the death of the father, the surviving step-mother is entitled to be maintained if the step-son has inherited property from his father or possesses joint family property. The daughter-in-law also comes in this class. When a son dies leaving a widow, and the father dies afterwards leaving his self-acquisition in the hands of his widow, the daughter-in-law is entitled to be maintained by the mother-in-law possessing the husband's estates, *Rangammal* v. *Echammal* (1). Though the father-in-law himself is only under a moral and not a legal obligation to maintain the daughter-in-law, that moral obligation becomes a legal obligation in the hands of his widow, because of the possession of assets in her hands. The decision referred to is based on a text which lays down that all the women of the family should be maintained.

In *Yamunabai* v. *Manubai* (2), it was held that the widow of a predeceased son, who lived with the father-in-law, is legally entitled to claim maintenance from the mother-in law, in possession of the self-acquired property of the father-in-law, because the property becomes ancestral in her hands. But the Allahabad High Court in *Janki* v. *Nand Ram* (3) rested its judgment on the principle that she took the property for his spiritual benefit. The text of Sankha is cited in *Yamunabai* v. *Manubai* (2), and in paragraph 409, Mayne's 'Hindu Law.' The text of Manu on which the Hindu Law of Maintenance is based is quoted in Colebrooke's [284] 'Digest of Hindu Law,' Volume II, page 538. That text is to the effect that 'aged parents, a virtuous wife and an infant son must be maintained even though by doing a hundred times that which ought not to be done." See Volume XXV, 'Sacred Books of the East, Manu,' Chapter VIII, page 321, sloka 389. The obligation is imperative only in the case of aged parents, minor sons and a virtuous wife. 'Smriti Chandrika,' Chapter XI, Section I, verse 34, also explains that in regard to other persons the obligation to maintain widows is on the persons who take possession of the property of the deceased. In paragraph 408, Mr. Mayne refers to illegitimate sons, and says that concubines are also entitled to maintenance even though the connection is adulterous, but this liability exists only when the connection is permanent. The wording of the authorities quoted by Mr. Mayne clearly shows that the claim is only as against the paramour—See also 'Mitakshara,' Part II, Chapter II, Section 1. In paragraph 6 of the latter, it is stated that it is only in a divided family that the widows inherit the husband's estate contrary to Jimutavahana. In undivided families, a sonless widow is entitled to maintenance. He says this at paragraph 7 commenting on the text of Narada. He adds the condition "provided they keep unsullied the bed of their lord." Should the woman not remain chaste they (the undivided coparceners) should cut off the allowance; and there is authority to say that the word "woman" means "wedded wife"—'Mitakshara,' Part II, Chapter II, Section 1, slokas 12 and 20,

(1) 22 M. 305. (2) 23 B. 608 (613). (3) 11 A. 194.

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where the texts of Narada are quoted and explained. Heirless property is said to go to the king, deducting the charges of the obsequies and leaving sufficient property for the maintenance of the woman of the family. 'Mitakshara,' Part II, Chapter II, Section I, slokas 12 and 29, says that "woman" means "concubine." Mr. Mayne at paragraph 408 relies on this. Texts of Hindu Law containing similar provisions all relate to property escheated to Government. Jimutavahana also agrees. In passages relating to succession, the word "wife" is mentioned. In passages relating to maintenance, the word woman "Stri" or "spouse" is used—See Stokes' 'Hindu Law Books,' page 435, verses 25 and 28. Stokes' 'Hindu Law Books,' page 85, verse 5, commenting on the text: an heirless property goes to king, deducting subsistence to females, &c., provided these preserve the bed of their lord. 'Smriti Chandrika,' Chapter XI, Section I, verse 48, has the same text, with the proviso. So in Strange's **[285]** 'Hindu Law,' volume I, page 174, quoted by Mr. Mayne:—"The providence of law, not content with providing for the mothers of illegitimate sons among Sudras, in ordinary cases provides for them in case of succession of the crown to heirless property." W. H. Macnaghten's 'Hindu Law,' volume II, page 119, (quoted by Mr. Mayne) only shows that on the death of a person provision should be made for the woman. West and Buhler, on 'Hindu Law,' at page 164, dealing with burdens on inheritance, say that a reasonable charge exists to provide for the maintenance even of a concubine. And so again at page 415, that a concubine has no right to inheritance but only to maintenance on the property. So also at page 582. *Khemkor* v. *Umiashankar*(1) rules that a widow who has remarried in the lifetime of her first husband, without his consent, is not the legal wife of the second husband, but is entitled to maintenance as a concubine (the parties there being Sompura Brahmans). In *Vrandavandas Ramdas* v. *Yamunabai*(2), there was an undivided Hindu family and a gift of a share to a concubine. It was held that the gift was invalid. *Sikki* v. *Vencatasamy Gounden* (3) was a suit for maintenance against a paramour in his life-time and was dismissed. It is submitted that that ruling is conclusive. A suit will not lie for continuance of concubinage; so also when the intercourse is incestuous. The woman must depend upon the man's favour, and if he allows her to remain with him till his death it will be incumbent on those that inherit his property to give her maintenance. Her claim, if so recognized, rests on an intelligent footing; a concubine who has lived with her paramour for a few years cannot have a claim for maintenance. The question is: Was she living with him for his life? If the Courts apply the principle of the case of a wife and give the concubine rights against her paramour where is the relief so given to stop? What length of intercourse is to be held sufficient to entitle the woman to such relief? The effect of such a ruling would be that such concubinage would be regarded as a legal relation, entitling the woman to maintenance, though the man would have no right whatever to compel her to continue as his concubine. The text of Katyayana provides for maintenance in the case of a sudra concubine if she remains with the man till his **[286]** death; but that has nothing to do with the present case. In this case the concubinage has lasted from 1883 to 1893. The subject of maintenance is fully discussed in *Savitribai* v. *Luxmibai* (4) where the Full Bench lays down the distinction between a virtuous wife and females

(1) 10 B. H. C. R. 381.
(2) 12 B. H. C. R. 229 (231).
(3) 8 M. H. C. R. 144.
(4) 2 B. 573 (597).

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of the family. The obligation in the case of the former is mandatory; in the case of the latter, it is directory.

Sundara Ayyar, for respondent. A concubine's position is similar to that of the wife. Just as the wife has a right against a husband during his lifetime, and, after his death, against persons who have inherited his property, so the concubine has rights against her paramour during his life and after his death against property of the paramour in the hands of others. There are no express provisions by the commentaries for the maintenance of a wife by her husband. The original text writers provide for it. 'Mitakshara,' Part II, Chapter II, Section 1, treats of the right of the widow to inherit the estate of one who leaves no male issue. The word there used for wife is "Patni." The condition for maintenance is "that the woman leads a virtuous life." The text of Narada is the one relied on by all in support of the proposition that women of the family should be included. I submit that concubines are also included. All females, whether wife or concubine, are treated by the same text. The word "Bharya" though used colloquially for "wife" is explained by Jimutavahana to be a term having a wider meaning. The word "Yoshit" in Narada is explained by Vijnaneswara as including "all women." [SUBRAHMANIA AYYAR, J.—Does he include wife?] Yes. [SUBRAHMANIA AYYAR, J.—I think he rejects the text of Narada as referring exclusively to the maintenance of women.] He says that here is a text which gives maintenance to all yoshits. Vijnaneswara commenting on Katyayana's text says that when it is said that the king is to take heirless property after giving maintenance to the women of the family, it does not mean that if there is a wife she is not entitled to inherit. The term used is "Yoshit." It includes "wife" and "concubine." The same term is also used in Narada. Manu's text relates only to the maintenance of the wife of a living person. The word occurring there is "Stri." The words "Stri" and "Bharya" have been interpreted by commentators and those [287] interpretations have not been disapproved of by judicial decisions. It is open to the other side to show that the word "Stri" in Manu means something else. The drift of the argument in the Mitakshara is this: The text is understood as assigning maintenance both to the wife and to the other women of the family. There is a text which says Patni is entitled to maintenance. Patni means only "wife." But the text of Narada gives maintenance to "woman." This includes "wife" also. [SUBRAMANIA AYYAR, J.—That is so in the case of an undivided family.] The other text of Katyayana also speaks of maintenance to the "women." Mitakshara says that it does not affect the rights of the "wife" to inheritance. Dayabhaga says that the text applies to "women" and not to "wife." In passages relating to inheritance, the texts use the word "Patni." In passages relating to maintenance, the general words "Stri," "Bharya" "Nari" are used. We have thus the explanation of the terms by one commentator at least. Inasmuch as the wife is allowed by some texts to claim maintenance during the life-time of the husband, the concubine must also be entitled to maintenance during the lifetime of the paramour. It would be inconsistent if no right existed as against him during his life-time when a right of maintenance exists after his decease against persons who take his property. I submit that the reason why others are bound to maintain both wife and concubine after the man's decease is because they take his property and must maintain those whom he, in his life-time, was bound to maintain. When there is no joint property the son is entitled to maintenance only during his minority; and parents only when they have

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reached old age. It has been held that a moral obligation becomes a legal obligation in the hands of a person holding property: [SUBRAHMANIA AYYAR, J.—That is only in regard to females.] The taking of the property is the reason. The text which gives the right of maintenance to the wife and concubine is one and the same. The reason is that the woman lives under the protection of the man. Therefore a man who keeps a woman must maintain her. The reason being similar, why cannot the woman sue the paramour during his life-time: [SUBRAHMANIA AYYAR, J.—The question cannot be argued on these broad principles of morality: you must have substantial authority to support this novel proposition that a paramour is personally liable to maintain the concubine. The matter has not come before Courts till now.] The reasons **[288]** why persons who take the property of a deceased person are bound to maintain a widow apply in the case of a concubine. A concubine being entitled to support after the death of the paramour what is there wrong in principle if she is also allowed to claim maintenance during his life? [SUBRAHMANIA AYYAR, J.—The Contract Act sufficiently expresses the attitude of the Legislature.] If it could be shown that there was any text applying to a wife that did not also apply to a concubine, the matter would be different. The question is what is the attitude of Hindu Law towards these women. Regarding the texts of Manu which have been quoted, Manu, Chapter VIII, verse 389, says "neither a mother, nor a father, nor a son, nor a wife, shall be cast off, &c." Jimutavahana expressly points out that "Patni" means wife and "Stri" means not only "wife" but more: [SUBRAHMANIA AYYAR, J.—Does he say that in commenting on this text?] No, on a text of Brihaspati. [SUBRAHMANIA AYYAR, J.—The mere association of the words in the text shows that the word is used only for "wife."] The 'Smriti Chandrika,' page 175, also points out that the word "Patni" means "wife." He is referring to the text of Katyayana. The translator renders the word "Yoshit" as "widow." [SUBRAHMANIA AYYAR, J.—That cannot apply to concubines.] Brihaspati, Chapter XXV, verse 68, page 380, volume XXXIII, 'Sacred Books of the East,' is referred to by Jimutavahana. He explains the term "Yoshit" used there. Manu, Chapter XI, verse 189 (original edition) says: "Let him follow the same rule in the case of female outcasts." The term used is *Yoshitsu pathithasvapi*. This is quoted by the commentator Medhathithi in commenting upon the text "Neither a mother, nor a father, &c."—Manu, Chapter VIII, verse 389, says that Yoshit means "Bharya." [SUBRAHMANIA AYYAR, J.—Bharya means "wife": unless you show that Bharya here means more than a wife by some authority, I cannot give it an extended meaning.] Jimutavahana gives the extended meaning to the term "Bharya" though not in this connection. The word "Stri" occurs in verse 389 and "Bharya" in verse 189, and the commentator says that both are the same. All the five commentators give the term "Bharya" as a synonym for "Stri." It is significant that none of them use the word "Patni," the most common word meaning "wife." The term "Bharya" is generic. In the text giving the order of succession to a sonless Hindu, the word "Patni" is used as meaning "wife" **[289]** and not "Stri" or "Bharya," and I submit that it is a matter of consequence that in construing this text of Manu all of them use the word "Bharya" and not the term "Patni." The Mayukha also quotes the text of Narada and comments on it. The terms "Bharya," "Nari," "Stri," "Bhogastri," include concubines. [Hon. V. *Bhashyam Ayyangar*.—Bhogastri is used in

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reference to a wife other than the senior wife.] Strange's 'Manual of Hindu Law,' page 52, verse 196, says: "a man is bound to maintain his father, etc., his illegitimate children and their mothers." [Hon. *V. Bhashyam Ayyangar.*—That is the father's illegitimate children.] I submit that Mr. Strange puts in this passage the obligation to maintain a concubine on the same footing as the obligation to maintain father, mother, son, &c. (see Strange's 'Hindu Law,' volume I, page 67).—" . . . . including illegitimate offspring, adulterous wife, &c." See also Colebrooke's 'Dayabhaga of Jimutavahana', Chapter V, verse 11; and Manu, Chapter IX, verse 202. These appear to be all the original authorities. See Strange's 'Hindu Law,' volume I, page 174—In the Sudra classes the illegitimate sons inherit: "In the other classes, they are entitled to maintenance. The law extends such protection even when the property goes to the king as heirless property" [SUBRAHMANIA AYYAR, J.—He is evidently referring there to the texts of Katyayana and Brihaspati.] In Mitakshara and Jimutavahana the subject of maintenance is treated with the subject of inheritance. They say that there is a word which means only a "wife," but there are also more generic words which include a wife. There is no decision exactly in point. There are cases where illegitimate children have been given maintenance, and concubines themselves get maintenance after the death of the paramour from those who have taken his property. *Kuppa* v. *Singaravelu* (1) was a case of illegitimate children proceeding against the father himself and *Muttuswamy Jagavera Yettappa Naicker* v. *Venkateswara Yettaya* (2) was referred to. Where illegitimate sons are entitled, it is submitted that their mother should be equally entitled. In *Muttusawmy Jagavera Yettappa Naicker* v. *Vencateswara Yettaya* (2) illegitimate sons were held entitled to maintenance and in *Hargobind Kuari* v. *Dharam Singh* (3), though the intercourse was [290] adulterous, the son was held entitled to maintenance. *Viraramuthi Udayan* v. *Singaravelu* (4) was to the same effect. In *Kuppa* v. *Singaravelu* (1) the suit was against the father himself. I submit that there is no difference between the position of the wife and the concubine as regards maintenance; and the texts, so far as they go, seem to show that she is equally entitled to claim it.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), in reply.—The fact that an illegitimate son can claim maintenance does not show that his mother can also claim it. The very decisions quoted refute that contention. It is not contended that a woman having a merely adulterous connection would be entitled to maintenance even though her sons might be; so there is no analogy between the rights of the son and of the mother. In the texts of Katyayana, the word "Yoshit" was interpreted to include "concubines." The recent cases (in Madras and Bombay) have no bearing on the point, dealing as they do with cases of women and not males.

JUDGMENT.

The question in this second appeal is whether a woman who has been kept by a man as his concubine for nine years continuously and then discarded is entitled, under the Hindu Law, to claim maintenance from her paramour. The District Munsif decided in the negative, but the District Judge on appeal reversed the finding and decreed for plaintiff. Against this decree the defendant appeals.

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(1) 8 M. 325.
(2) 12 M.I.A. 203 (220).
(3) 6 A. 329.
(4) 1 M. 306.

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The question has been argued before us very fully on both sides and our attention has been drawn to all the authorities which have or may be supposed to have any bearing on the question. We do not propose to consider these authorities in detail, as almost without exception they refer to the right of a concubine to claim maintenance out of the estate of her deceased paramour. On the authority of certain texts of Hindu Law, the Courts have no doubt allowed this claim in the case of concubines continuously kept by the deceased up to the time of his death. Whether the foundation of this rule was the notion that the man was under a moral obligation to take care that his concubine should not be left destitute after his death and therefore saddled the succession to his property with the liability to maintain her, or whether it was with [291] reference to his probable wishes and intention with regard to her, it is not necessary to determine. It is, however, we think, certain that it was not because the law regarded the man as under any legal obligation to provide for his concubine during his life-time; if it were otherwise we should, without doubt, find some traces of the obligation in the texts or commentaries; but we are not aware that any exist. We do not regard the texts in Manu, Chapter VIII, verse 389, and Chapter XI, verse 189, as opposed to this view. In the former the term "Stri" has been uniformly understood by the commentators to refer to a wife, and the context which enumerates the near relatives who are not to be abandoned renders it unlikely that concubines were intended to be included with the lawful wife. All that the second passage seems to imply is that a female member of the family entitled to maintenance is not to be deprived of it altogether on the ground that she has been put out of caste.

Moreover, it is clear that the case of a wife and of a concubine are not placed on the same footing in regard to maintenance during the life-time of the man, for there are distinct texts recognizing the right of the wife, such as that quoted in Section 209 of Strange's 'Manual of Hindu Law' as follows:—"Where there may be no property but what has been "self-acquired, the only parties whose maintenance out of such property "is imperative are aged parents, wife and minor children." If any such right as that now claimed really existed, or could have been plausibly supported by the authority of the Hindu texts, it is impossible to suppose that it would not up to this time have been claimed in the Courts. The only reported case, so far as we are aware, in which the claim was made was decided against the concubine and in no way supports the plaintiff's case (*Sikki* v. *Vencatasamy Gounden*(1)). In this state of the authorities it is impossible for us to hold that the alleged right exists, and the more so when we bear in mind that the Hindu Law has made provision for the maintenance of concubines in the case already referred to after the paramour's death.

We, therefore, reverse the decree of the District Judge and restore that of the District Munsif. Appellant must have his costs in this and in the Lower Appellate Court. Respondent must pay the Court fee due to Government in the Lower Appellate Court.

(1) 8 M.H.C.R. 144.

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[292] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Boddam, Mr. Justice O'Farrell, and Mr. Justice Michell.

MALLESAM NAIDU AND OTHERS (*Defendants Nos.* 3 *to* 5), *Appellants v.* JUGALA PANDA AND OTHERS (*Plaintiffs Nos.* 1 *to* 3 *and Defendants Nos.* 1 *and* 2), *Respondents.** [26th July and 21st and 22nd November, 1898, and 9th and 17th October and 4th December, 1899.]

Limitation—Decree against father for money due, the sons not being joined as defendants—Death of father after original debt barred by limitation, the decree subsisting—Suit against the sons on the decree—Period of limitation how calculated—One cause of action.

Certain creditors having, in 1882, obtained a decree, kept alive that decree until 1893, when the judgment-debtor died. They then sought to make liable the property of the deceased in the hands of the defendants his sons and representatives, stating the cause of action against the said defendants as having arisen in 1893, the date of their father's death. The sons pleaded limitation, and the question was whether the period of limitation against the sons began to run from the date of death of their father or from the date at which the debt originally became due. On a reference being made to a Full Bench as to "whether a creditor in the position of the plaintiff has a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt :"

Held, that in such a case there are not two causes of action, and such a creditor has not a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt, and that, in consequence, the suit was barred by limitation.

Arunachala v. *Zemindar of Sivagiri*, (7 M. 328), *Natasayyan* v. *Ponnusami*, (16 M. 99), and *Ramayya* v. *Venkataratnam*, (17 M. 122), considered.

[F., 11 O.C. 334; R., 23 A. 206 (208); 27 M. 243=14 M.L.J. 84 (F.B.).]

SUIT for the recovery of a sum of money. Plaintiffs sought to make liable the property of the deceased elder brother of defendants Nos. 1 and 2, and of the deceased father of defendants Nos. 3 to 5, under a decree obtained against those deceased persons in 1882, which decree had (as was subsequently found) been duly kept alive until the death of the latter, which occurred in 1893. Plaintiffs alleged that they had obtained the decree in respect of money borrowed by the deceased persons for family expenses; **[293]** that the defendants were their sole heirs and enjoying all their property; that though execution had been taken out, nothing had been realised and that the suit was brought to recover the amount by the sale of property belonging to the deceased persons now in possession of the defendants. The cause of action was stated as having arisen at the date of the deaths of the deceased respectively, both of which occurred in 1893. All the defendants set up, among other defences, the plea of limitation, and the first issue was framed on that question. The District Judge held that the suit was not barred by limitation, and decreed in plaintiff's favour.

The defendants appealed, the present case having to do with the appeal of defendants Nos. 3 to 5.

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* Appeal No. 178 of 1896, against the decree of J. P. Fiddian, District Judge of Ganjam, in original suit No. 8 of 1895.

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The case, coming on for hearing in the first instance before DAVIES and MOORE, JJ., was referred to the District Judge for a finding as to whether the decree debt sued upon was subsisting in 1893 at the time of the death of the father of the defendants Nos. 3 to 5.

In accordance with the above order the District Judge submitted a finding to the effect that the decree still subsisted.

The case next came before SUBRAHMANIA AYYAR and DAVIES, JJ., who, after accepting the above finding, made the following

ORDER OF REFERENCE TO FULL BENCH.

"A third point now raised is whether the present suit is barred by limitation, inasmuch as the cause of action against the sons, defendants Nos. 3 to 5, arose at the date of the debt becoming due by the father, and not at the date of the death of the father. It would be unnecessary to decide this question if the suit could be rightly treated as one brought upon the judgment against the father assuming that a suit upon a civil judgment could be brought in this country and as governed by Article 122 of the second schedule of the Limitation Act, because under that article the suit was just within time. But we are unable to hold that the sons could be sued upon a judgment obtained against their father in respect of a previous debt, for the reason that they were not parties to the judgment and it was therefore not binding on them. Article 122 is therefore inapplicable to this case. Hence the right of suit here against the sons must depend upon their obligation under Hindu Law to pay their father's debts. According to the recent Full Bench decision, that obligation arises in the life-time of the father, and the sons may be sued before his **[294]** death. It would, therefore, seem to follow that limitation against the sons should begin to run from the date of the debt becoming due by the father, as it is on that date that the son's liability to pay becomes enforceable. This is inconsistent with the views held in *Natasayyan* v. *Ponnusami* (1) and *Ramayya* v. *Venkataratnam*(2), which had to be considered in the Full Bench case. It was decided in those cases that a right to sue the sons accrued on the father's death presumably apart from any right of suit against them in the father's life-time, and those cases are not expressly overruled by the Full Bench decision. We therefore refer the following point for decision by a Full Bench, namely, whether a creditor in the position of the plaintiff has a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt."

The appeal was in due course argued before a Full Bench constituted as above.

V. Krishnasami Ayyar and *Raghava Ayyangar*, for appellants (defendants Nos. 3 to 5):—It is submitted that there is only one cause of action. *Natasayyan* v. *Ponnusami* (1) and *Ramayya* v. *Venkataratnam* (2) must be considered as overruled by the Full Bench decision in *Ramasami Nadan* v. *Ulaganatha Goundan* (3), and the latter case is conclusive. [He was stopped.]

Appu Nedungadi, for respondents:—The question is what is the nature of the suit that should be brought against the sons of the deceased. If a father sells property to pay a debt or if a decree is passed against him, his son cannot set up his rights acquired by birth in opposition to the

(1) 16 M. 99. (2) 17 M. 122. (3) 22 M. 49.

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father's action. There is a distinction between events happening in the life-time of the father and afterwards. During his life-time his sons, being coparceners, are entitled to be made parties, as persons interested; and if so joined, cannot afterwards raise questions as to the legality of the debt or proceedings. [He referred to *Ramasami Nadan* v. *Ulaganatha Goundan* (1).] In the case of proceedings in the father's life-time, a creditor cannot proceed against the son in respect of property, already alienated; whereas, after the father's death, if the son alienates property for his own purposes he can be made liable to the extent of the alienations. That shows that a larger liability arises [295] after the father's death. [He referred to *Krishnasami Konan* v. *Ramaswami Ayyar* (2), *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3), and Section 234 of the Code of Civil Procedure.] The cases are summarised in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(4) and it is recognised in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(5), that the decisions are not in harmony. See *Arunachala* v. *Zamindar of Sivagiri*(6). [MICHELL, J.—That case was cited to the Full Bench and must be taken to have been dissented from.] Also *Kunhali Beari* v. *Keshava Shambaga*(7).

JUDGMENT OF THE FULL BENCH.

The question referred in this case is "whether a creditor in the position of the plaintiff has a further right to sue the son for his father's "debt on the death of the father, apart from the right to sue him in the "father's life-time for such debt."

The plaintiffs recovered a decree for moneys borrowed from them for family purposes by two persons Balakrishnama Chowdari and Appala Naidu, in an action against those two brothers and an undivided brother of Appala Naidu in 1882. Balakrishnama Chowdari and Appala Naidu, who had borrowed the money, died in 1893 and the plaintiffs, having recovered no part of their decree, in 1895 sued the present five defendants for the full amount of the decree and interest. The first two present defendants are the undivided brothers of the first defendant Balakrishnama Chowdari in the suit of 1882 and have succeeded as such to the property of Balakrishnama Chowdari by right of survivorship. The third, fourth and fifth defendants are the sons of Appala Naidu.

The defendants set up the plea of limitation. Hence this reference, which relates only to the defendants Nos. 3 to 5.

It was decided by the Full Bench in *Ramasami Nadan* v. *Ulaganatha Goundan* (1), that a plaintiff can sue the sons with the father in the father's lifetime for a debt incurred for family purposes and get a decree against them making their shares in the family property liable for the debt.

It was contended before us that there were two causes of action, one during the father's life-time and another arising on [296] the father's death, *Natasayyan* v. *Ponnusami* (8) and *Ramayya* v. *Venkataratnam* (9). The argument appears to be that though the decree would in neither case be a personal decree against the sons, whether the suit was brought in the father's life-time or after his death, there was nevertheless a difference in the relief obtainable, *viz.*, that in the former case an alienation made by the son before decree of his share or interest would not be affected by the

(1) 22 M. 49. (2) 22 M. 519. (3) 9 I.A. 128=6 M. 1 (18).
(4) 6 I.A. 88=5 C. 148. (5) 13 I.A. 1=13 C. 21 (35).
(6) 7 M. 328. (7) 11 M. 64 (75). (8) 16 M. 99.
(9) 17 M. 122.

decree, whereas in the latter case if the son alienated any part of the property after the father's death but before decree obtained against him, he would be liable to satisfy the decree to the full extent of all the property which came to him irrespective of any alienation he might have made.

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Numerous cases were cited in support of this contention (all of which, however, were cited and considered in *Ramasami Nadan* v. *Ulaganatha Goundan* (1)).

We are unable to follow the argument. The cause of action is the same and the decree recoverable is the same. Though the actual relief obtainable in the result may be different, owing to circumstances which may have occurred in the meanwhile and before decree, that alone cannot give a fresh cause of action.

We think the question referred is covered by the Full Bench ruling in *Ramasami Nadan* v. *Ulaganatha Goundan* (1). In that case two actions were brought against a father and his two sons for a debt upon a bond executed by the father for the family debt in 1893 (suit No. 160 of 1893 and No. 324 of 1893) and a decree was given against the father alone, the two sons being dismissed from the suit. In 1896 the plaintiff brought an action after the father's death against the two sons (the defendants in the suit). In making the reference to the Full Bench the Court, after stating the above facts, proceeds as follows:—"If the decision in *Natasayyan* v. *Ponnusami* (2) is right, there seems to be no doubt that the present suit is maintainable, for it was there held that the claim to enforce the obligation of sons under Hindu Law gives a cause of action arising only on the death of the father, and that case was approved, certainly not disapproved, in *Ramayya* v. *Venkataratnam* (3). It seems to us extremely doubtful whether this decision can be supported, and the point is one of general importance. . . . . . It is certainly desirable that all the [297] questions between the creditor and his debtor and the debtor's sons should be raised and determined in one suit. The precise question we wish to refer is—Whether the plaintiff could, in the suits 160 and 324 of 1893, have prosecuted the claim against the sons of Tirumalai and have obtained a decree making their shares in the family property liable for Tirumalai's debt?" This question is unanimously answered in the affirmative by the Full Bench.

It is true that the question in that case was one of *res judicata* and not limitation, but we do not see that that can make any difference. The Court decided that the cause of action arose in the father's lifetime and, if it arose then and could have been enforced by action, then unless the death of the father gives a fresh cause of action, the time for the purposes of limitation obviously begins to run in the father's lifetime at the time when it commenced to run against the father. Throughout the case, moreover, and particularly in the judgments of the Officiating Chief Justice and Subrahmania Ayyar, J., the question discussed and determined is whether the cause of action arose during the father's lifetime or after his death only, and the object of the reference was to determine whether that class of cases which held that the cause of action arose only on the death of the father could be sustained, having regard to the decisions that the son's liability existed at an earlier date, *viz.*, during the father's life-time. If there were two causes of action, one commencing during the father's life-time and another at the father's death, it would have been equally important to

(1) 22 M. 49. (2) 16 M. 99. (3) 17 M. 122.

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raise the contention in that case as in the present, but it is observable that such a contention is nowhere suggested.

We are of opinion that there are not two causes of action and therefore answer the question referred that a creditor in the position of the plaintiff has not a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's lifetime for such debt.

[This appeal coming on for final hearing after the expression of the above opinion by the Full Bench, the Court (SUBRAMANIA AYYAR and DAVIES, JJ.) delivered the following]

JUDGMENT.‡

With reference to the ruling of the Full Bench on the reference made by us, the suit must be held to be barred by limitation. The decree of the lower Court is reversed and the suit dismissed. In the circumstances, each party will bear his own costs in this and in the Lower Court.

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23 M. 298=10 M.L.J. 86.

[298] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

ELAYALWAR REDDIAR AND OTHERS (*Plaintiffs*), *Appellants v.* NAMBERUMAL CHETTIAR (*Defendant*), *Respondent.**
[18th and 19th October and 6th November, 1899.]

Religious Endowments Act—Act XX *of* 1863, *Section* 14—*Suit by persons interested for breach of trust and neglect of duty—Refusal by trustee without adequate reason to accept and utilise offerings for celebration of festivals—Misfeasance and breach of trust in Section* 14 *explained.*

In a suit against the trustee of a religious institution under Act XX of 1863 for alleged breaches of trust and neglect of duty by reason of the non-performance of ceremonies, it is not necessary, in order to give jurisdiction to Civil Courts, for the plaintiffs to show that there are any special funds constituting an endowment of the institution. If it be proved that the ceremonies in question have been conducted as a custom for a series of years and that the defendant trustee was not absolutely unable, owing to lack of funds, to carry on those ceremonial observances in the customary manner, he must be held to have been guilty of neglect of duty rendering him liable to a suit under Section 14 of the Act.

Where it has been usual for the trustee to celebrate festivals with the aid of voluntary contributions it is a breach of duty on the part of the trustee to refuse to celebrate them without adequate reasons if funds are available, and the trustee ought not, contrary to usage, to refuse to receive such offerings and perform the ceremonies for which they are tendered.

Per SUBRAHMANIA AYYAR, J.—Having regard to the fact that funds voluntarily given to public religious institutions not only enrich the institutions but promote the interests of public worship, it must be regarded as part of the proper functions of the trustee to utilise such income for the purposes of the institution whenever it is available. It is his duty to accept the money and apply it for the specified purpose unless there are proper grounds for its rejection. Though a trustee may exercise a discretion and cannot be charged with misconduct if he acts with an absence of indirect motive, with honesty of intention and as fair consideration of the subject, he may be proceeded against if, from corrupt or improper motives, he refuses to allow voluntary contributions offered for purposes

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* Appeal No. 41 of 1899 against the decree of H. H. O'Farrell, District Judge of Chingleput, in original suit No. 30 of 1897.

(‡) Final Jugdmsnt of the Division Bench.

not inconsistent with the principles, rules or usages of the institution to be applied to those purposes. The Courts are bound to restrain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. The ground upon which the Courts exercise such jurisdiction over him is that such departure on his part amounts to [299] a breach of legal duty incumbent on him. Though the Courts cannot be called upon to decide questions of ritual and worship unconnected with civil rights, it is perfectly competent for them to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights. *Syed Amin Sahib* v. *Ibram Sahib*, (4 M.H.C.R. 112) explained.

[F., 4 Ind. Cas. 684=7 M.L.T. 311; R., 30 M. 158=17 M.L.J. 1=2 M.L.T. 69; 15 M.L.J. 458; 2 M.L.T. 94.]

SUIT under Section 14 of Act XX of 1863, by persons interested in the worship of the deities in a pagoda, against the trustee, charging him with breaches of trust and neglect of duty and praying that he might be compelled to celebrate certain festivals according to usage and otherwise perform the duties connected with the trust, there being certain endowments attached to the temple. The defendant denied the usage alleged by plaintiffs, and contended that there were no funds in his hands specially dedicated to the celebrations referred to. He claimed that it was a matter of purely internal economy and management left to the discretion of the trustee to receive voluntary offerings from worshippers for the celebration of festivals. He also pleaded that the suit related purely to religious ceremonies and processions and as such was not cognizable by Civil Courts. An issue was framed on this plea, the judgment of the District Judge (so far as it is material) being as follows :—" The defendant is an hereditary trustee of the class contemplated by Section 4, Act XX of 1863, of a certain pagoda in Striperumbudur and the plaintiffs are vadagalai vaishnavas alleged to be interested in the worship of all the deities in such institution. The suit is brought under Section 14 of the Act and is based on certain acts of misfeasance alleged to have been committed by the defendant in respect of the worship of Vedanta Chari one of the aforesaid deities. Sanction to bring a suit of this nature was obtained from my predecessor under Section 18 of the Act. The principal reliefs sought are to direct specific performance of the worship in a form the details of which are minutely set forth in an elaborate schedule of 33 pages and to order the defendant to give free access to the shrine to all worshippers of the deity. The defendant admitted the right of all worshippers to free access to the shrine of Vedanta Chari, but denied that such right had been infringed or that he had committed the other acts of misfeasance alleged and set forth certain other pleas . . . . My predecessor in his order granting sanction (see paragraph 7 of his order) has already held that Act XX of 1863 confers a special jurisdiction in relation to such suits [300] which is not controlled by the Civil Courts Act or the Code of Civil Procedure. It is not, of course, contended that I am bound by this view of my predecessor, but the same view is pressed upon me now. I am of opinion that it is untenable for several reasons. The reference to the Code of Civil Procedure is to Section 12, Act XIV of 1882, and it is no doubt correct to say that that is a later Act than the Act of 1863. But Section 12 merely reproduces the provisions of previous Procedure Codes, one of which (Act VIII of 1859) was in force in 1863. Section 1 of that Act is substantially the same as Section 12 of the present Act, and if a special jurisdiction in respect of religious ceremonies was conferred by Section 14 of the Act of

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1863, I should have expected some such words as 'notwithstanding anything contained in Act VIII of 1859, Section 1' to have found a place there. The uniform course of decisions in all the High Courts appears to show that mere acts of non-performance of rites and ceremonies unconnected with the wrongful diversion of endowments, are not such acts as will amount to misfeasance under Section 14, Act XX of 1863. The Act refers back to the Regulation of 1817 which it superseded and it was observed in *Venkatesa Nayudu* v. *Shri Sadagopa Swami* (1) that the 'scope of the regulation is the prevention of the misapplication of endowments, and all its provisions are to be read with reference to that purpose.' So also in *Syed Amin Sahib* v. *Ibram Sahib* (2) it was observed by the Court:—'We think that misfeasance in this provision was simply used with reference to wilful acts of breach of trust, acts of a criminal nature.' The last words may possibly unduly narrow the scope of the section, as they might seem to exclude such a suit as that of *Dhurrum Singh* v. *Kissen Singh* (3) where the act objected to was the temporary and perfectly *bona fide* removal of part of the furniture of the temple. But that case, which is the sole authority cited for the present suit, does not in reality go the length now contended for. The act of removal, though in good faith and for the pecuniary benefit of the temple, was not justified on the ground that it formed part of a religious rite or ceremony and the remark of Maclean, J., that Section 14, Act XX of 1863, was probably now unnecessary as its object was sufficiently effected by Section 30 of the Code of Civil Procedure [301] shows that he at any rate did not consider that the suit as framed was in conflict with Section 12 of that Code. In the present case it is admitted that there are no special funds constituting an endowment of the deity Vedanta Chari and that the only sufficient source for the processional and other worship which is sought to be carried out would be derived from voluntary contributions which the defendant as a trustee is under no obligation to accept. There can therefore be no pretence of any misfeasance in connection with the application of endowments and I am of opinion that no suit will lie under Section 14 of the Act of 1863. Section 14 must, I think, probably be read in connection with Section 13 and, so read, it is in complete accordance with Section 12 of the present Code of Civil Procedure and Section 1 of Act VIII of 1859. It is quite clear on authority that irrespective of the special jurisdiction supposed to be conferred by Section 14, Act XX of 1863, no suit will lie to compel a trustee to perform worship in a particular fashion or to do other acts of a purely religious nature. The cases of which, *Vasudev* v. *Vamnaji* (4) is a good example, are quite unanimous on the point, and it is singular, if the provisions of the Code of Civil Procedure and of the Civil Courts Act would be circumvented by means of the Act of 1863, that no case can be cited, during the long period in which the latter Act has been in force, of even an attempt made in that direction. The absence of any citable authority affords a strong presumption against the maintainability of such a suit as the present, the object of which is to compel a trustee of a religious institution to have performed certain ceremonies and to conduct the temple worship in a specified manner. I hold, therefore, on the second issue that the suit is, as a whole, not cognisable by a Civil Court."

The plaintiff presented this appeal on the grounds, among others, that the Lower Court had erred in hoding that a suit to compel a trustee of a

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(1) 7 M.H.C.R. 77 (81). (2) 4 M.H.C.R. 112 (113).
(3) 7 C. 767. (4) 5 B. 80.

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temple to perform the festivals or allow them to be performed in accordance with the customs of the temple would not lie.

Sundara Ayyar and *K. Srinivasa Ayyangar*, for appellants.

Rangachariar, for respondent.

JUDGMENT.

SUBRAHMANIA AYYAR, J.—The suit, out of which this appeal arises, was brought, under Section 14 of the Religious [302] Endowments Act (XX of 1863), by certain persons interested in the shrine of Vedanta Desikar or Vedanta Chari, attached to the Vishnu temple at Striperumbudur, against the defendant who is the trustee of the shrine. So far as this appeal is concerned the plaintiffs' case appears, in substance, to be that the defendant, from the time he became trustee in 1892, has improperly and completely stopped the celebration of certain periodical festivals which ought to have been celebrated according to the usage of the institution; and the plaintiffs seek to compel the defendant to carry out the trust, in regard to the present matter duly. The defendant raised various contentions, and several issues were framed with regard to the averments of the parties.

But the second issue, which was whether the suit was cognizable by a Civil Court, was alone dealt with and the suit, in so far as we are here concerned, dismissed on the ground that it was not cognizable by the Courts.

This decision appears to rest entirely upon a statement made on behalf of the plaintiffs in the course of the argument "that there are no special funds constituting an endowment of the deity Vedanta Chari and that the only sufficient source for the processional and other worship which is sought to be carried out would be derived from voluntary contributions" (paragraph 9 of the judgment). Now, the words 'special' and 'sufficient,' which occur in the passage just quoted, would seem to imply that the learned District Judge did not, as suggested before us on behalf of the defendant, take the plaintiffs to have admitted that the shrine in question possessed no endowments whatsoever. It was, moreover, pointed out, on behalf of the plaintiffs, that, if the learned District Judge is to be supposed to have proceeded on the footing that such an admission was made by the plaintiffs, the Judge should be held to have been in error, inasmuch as the plaintiffs' contention has all along been that the shrine does possess some endowments, it being their case that part of the tastik money, paid by the Government in connection with the Vishnu temple, is applicable by the trustee towards the festivals in question, and further that the income, derived from a permanent landed endowment under the management of some of the plaintiffs, is similarly applicable.

The averments in paragraph 6 of the plaint and the fact that the third and the fourth issues, which relate to the question of [303] funds, were framed render it improbable that the plaintiffs admitted that no endowment whatever existed. The plaintiffs must have an opportunity to prove whether any endowments exist and whether, with the income thereof, the festivals used to be celebrated before the defendant became trustee, even if it were held that the absence of endowments would have by itself justified the defendant stopping the festivals, though till then they had been carried on with voluntary contributions.

Suppose, however, that no endowments exist and that it had not been the practice to celebrate the festivals before 1892 but that since then

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voluntary contributions were offered for the festivals or any other act of public worship not inconsistent with the usage of the institution, may not the plaintiffs even then contend that the defendant acted in contravention of his duty as trustee, if it be true that without sufficient grounds he refused to celebrate the festivals, though the requisite funds were forthcoming from voluntary contributions? No doubt, if, under the law, a temple trustee may accept or reject voluntary contributions according to his mere whim and fancy, then no suit would lie in respect of the non-celebration of festivals or ceremonies which depended wholly or even substantially upon his accepting the contributions. Having regard to the fact that in the case of public religious institutions like the present funds voluntarily given have often largely contributed and do still contribute not only to make the institutions richer but also to promote the interest of public worship, it must be regarded as part of the trustee's proper functions to utilize this sort of income for the purposes of the institution, whenever it is available. It is the trustee's duty to accept the money and apply it for the specified purpose, unless there are proper grounds for rejecting the offer. No doubt the trustee has some discretion in the matter. If, in the exercise of that discretion, he acts (borrowing the words employed by Muttusami Ayyar, J., with reference to an analogous matter in *Murugesa Mudaliar* v. *Nagamoney Mudaliar* (1) cited on both the sides) "with an absence of indirect "motives, with honesty of intention and with a fair consideration of the "subject," no misconduct can be imputed to the trustees so acting. But if, on the contrary, the trustee from corrupt or improper motives refuses to allow voluntary contributions offered for purposes [304] not inconsistent with the principles, rules * or usages * of the institution to be applied for those purposes, in such a case surely persons interested in the institution must be held entitled to proceed against the trustee. And this view of the law is implied by Muttusami Ayyar, J., in the case to which allusion has already been made and on which the learned vakil for the defendant laid much stress. It would follow from the above that the defendant acted contrary to his duty, should it be proved that though the funds required to carry on the festivals were forthcoming during the period in question, yet he refused to celebrate them without any adequate ground for doing so. *A fortiori* would he be guilty had it been usual to celebrate them with the aid of voluntary contributions. And of course the Courts are bound to restrain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. That such departure on the part of a trustee amounts to a breach of legal duty incumbent on him is the ground on which the Court exercises jurisdiction over him. Therefore, the decisions, cited for the defendant, dealing with the withholding of mere honours and courtesies have no application to cases like this. Still less in point are those cases which were cited and which show that Courts cannot be called upon to decide questions of ritual and worship unconected with civil rights, since it is perfectly competent to the Courts to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights.

Nor, as contended for the defendant, does the fact that the present suit is brought under the special provisions of Section 14 of the Religious

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* 5.—ED.

(1) Civil suits No. 213 of 1879 (unreported).

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Endowments Act affect the point. There is absolutely no warrant for construing the clause "any misfeasance, breach of trust, or neglect of duty in respect of the trusts vested in, or confided to," in that section otherwise than in its ordinary sense. The comprehensive language employed by the Legislature unquestionably covers every misfeasance, breach of trust or neglect of duty with reference to the trust; and the clause must be held to include the case put forward by the plaintiffs here. As to the decisions cited on behalf of the defendant, none of them seems to have any real bearing on the present question. It is unnecessary to make any comments except perhaps with reference [305] to one of them, *viz.*, *Syed Amin Sahib* v. *Ibram Sahib* (1), on which the learned vakil for the defendant repeatedly relied. The only point decided there was that as the members of a committee appointed under the Act who, in the exercise of their power of control, remove on insufficient grounds an officer or servant of a religious establishment, are not necessarily guilty of misfeasance, a person thus removed can sue the members without obtaining the sanction prescribed by the law in respect of a suit charging misfeasance. What such a ruling has to do with the present case, it is not easy to see. The remarks of the learned Judges at page 114 of the report clearly indicate that they understood the section not only to enable interested persons to sue for the protection of the property and funds of religious establishments, but also to enable them to sue the trustee in respect of mismanagement of the affairs of the establishment, even though the mismanagement is not directly connected with any property or funds in his own hands. Before concluding, it may not be superfluous to observe that, in trying the question arising in the case, it would be absolutely unnecessary for the Courts to investigate any of the matters of detail with descriptions of which the plaint schedule seems to be needlessly encumbered.

The Lower Court's decree is unsustainable and is reversed. The case will be restored to the file and proceeded with according to law. The costs will abide and follow the result.

MOORE, J.—In paragraph 9 of his judgment, the District Judge finds that there are no special funds constituting an endowment of the deity Vedanta Chari and that the only sufficient source for the processional and other worship which is sought to be carried out would be derived from voluntary contributions which the defendant as a trustee is under no obligation to accept. It does not appear to me that it is necessary for the appellants to show that there are any special funds constituting an endowment of the deity Vedanta Chari. If it is proved that ceremonies connected with Vedanta Chari have been conducted as a custom for a series of years, and that the present trustee is not absolutely unable, owing to lack of funds, to carry on these ceremonial observances in the customary manner, it appears to me that he must be held to have been guilty of neglect of duty rendering him liable to a suit [306] under Section 14, Act XX of 1863. In paragraph 6 of the plaint, it is alleged that there are certain endowments attached to the temple, and as no evidence was taken it is impossible to say if this allegation is true or not.

I further feel very doubtful if the learned District Judge is right in holding that the trustee is in all cases and under all circumstances under no obligation to accept voluntary contributions made with the view of certain ceremonies being carried out. I should be inclined to hold that, if for a number of years it has been customary for worshippers to tender

(1) 4 M.H.C.R. 112.

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such voluntary offerings to the trustee and for the latter to use them for the purpose of having certain customary ceremonials carried out, it is not open to the present trustee, contrary to usage, to refuse to receive the offerings and to carry out the ceremonies.

As to whether there is any such custom in the present case, it is, however, impossible to decide till the evidence is taken.

For these reasons, I, without giving any opinion, at present, on the other important questions discussed in the judgment of my learned colleague, agree with him in holding that the decree of the District Judge must be set aside and the suit remanded for hearing on the merits.

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23 M. 306 = 10 M.L.J. 307.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Michell.

DORASAMI AYYAR (*Petitioner and Defendant No. 2*), *Appellant* v. ANNASAMI AYYAR AND OTHERS (*Counter-petitioners and Plaintiffs*), *Respondents.** [24th October and 6th November, 1899.]

Civil Procedure Code —Act XIV of 1882, *Section* 583 *-Property taken from petitioner by process of Court under decree—Subsequent reversal of decree—Petition for restitution —Custody of third party—Principles on which restitution is ordered.*

Two trustees of a temple having been removed from office, a suit was brought against them by the newly appointed trustees and a decree obtained restraining [307] them from interfering with the affairs of the temple. In accordance with that decree property of the temple was taken from them by process of the Court and handed to the new trustees. On appeal to the High Court, however, the decree was reversed and restitution was now applied for by the survivor of the late trustees, from whom the property had been taken. In the meanwhile a third party had been appointed an additional trustee to the newly appointed trustees;

Held, that the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost; and it is the duty of the Courts to enforce that obligation, unless it be shown that restitution would be clearly contrary to the real justice of the case. That with reference to the position of innocent third parties, the rule that a plaintiff in an action to recover land cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant, does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of the Court:

Held, therefore, that the trustee who had been dispossessed must be given an opportunity to prove whether any and which of the temple properties were in his custody as alleged and whether he was deprived of such custody under the decree which was reversed, and whether the newly-appointed trustees acquired the custody of them thereunder; and that, if substantiated, the claim for restitution could not be successfully resisted.

[F., 14 Ind. Cas. 836 = (1912) M.W.N. 513; R., 32 A. 79 = 7 A.L.J. 1 = 4 Ind. Cas. 376; 33 C. 927 = 3 C.L.J. 67; 24 M. 341 (344); 13 C.W.N. 710; 17 Ind. Cas. 420 = 23 M.L.J. 513 = (1912) M.W.N. 1152.]

N.B.:—See in this connection 10 M.L.J. 307—an off-shoot from this case—*Ed.*

PETITION under Section 583 of the Code of Civil Procedure for restitution. Petitioner (appellant), and one Ramasami Ayyar, since deceased,

* Civil miscellaneous appeal No. 36 of 1899 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, on execution petition No. 302 of 1898, in the matter of original suit No. 15 of 1895.

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had been trustees of a certain temple. Counter-petitioners (respondents) had instituted a suit against them alleging that petitioner and his co-trustee had been removed from office which the counter-petitioners now held and praying that petitioner might be restrained from interfering with the affairs of the temple. A decree was passed as prayed; and in accordance therewith, the temple property was taken from petitioner by process of the Court, and handed to counter-petitioners. On appeal to the High Court, however, the said decree was reversed. Petitioner now applied for restitution of the property handed over, and for the recovery of money and costs levied from him by the counter-petitioners. A third party, one Sivasami Ayyar, had since been appointed as an additional trustee with one of the counter-petitioners. The District Judge said:—" There were two defendants in the suit with whom I am concerned; they were temple trustees dismissed by the committee, who refused to give up possession of the temple properties in their hands. This Court granted the other trustees an injunction against them and ordered them to make over the property, which was done. The High [308] Court finding the suit wrongly framed dismissed it. The effect of that dismissal, it is contended for the petitioner (who is the survivor of the two defendants referred to above), is that the parties should be remitted to the position in which they stood before this Court's decree was passed, and that he, the petitioner, should recover the temple property taken from him. The question is whether he is entitled to a benefit by way of restitution under the High Court's decree, and I am clearly of opinion that he is not. He was at the date of the suit a dismissed trustee and, as such, he was *prima facie*, wrongfully holding temple property which had ceased to vest in him. The committee has power to dismiss trustees for good cause and the dismissal order does not require confirmation by a Court of Justice. This Court's judgment declared the dismissal good, but that judgment no longer stands. The High Court did not however declare the dismissal bad, and therefore what exists now is the committee's order unreversed. The dismissed trustee has, then, no sort of right to recover temple property even though the present trustees may have recovered it in an improperly framed suit. I do not see how the petitioner can recover except by a suit to set aside the dismissal order, and even then he would have to prove himself entitled to exclusive possession as against his co-trustees. So far as the request is for restitution of temple property now in the hands of trustees appointed by committee, I must reject it altogether." He allowed petitioner half of the costs made payable by him on the original decree.

The petitioner preferred this appeal.

J. L. Rosario, for appellant.

Sundara Ayyar, for respondents Nos. 1 and 3.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The restitution proceedings to which this appeal relates arose out of a suit brought by the present respondents against one Ramasami Ayyar since deceased and the present appellant. The respondents alleged in the suit that they were the trustees of the temple of Sapta Rishiswaraswami in Lalgudi, that the said Ramasami Ayyar and the appellant, who had also been trustees of the temple, had been removed from their office for good and sufficient cause by the committee exercising control over the temple, and prayed that as

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notwithstanding their dismissal Ramasmi Ayyar and the appellant continued to interfere with the conduct of the temple affairs they both be [309] restrained from doing so. The suit ended in the Court of First Instance in favour of the respondent. But on appeal to this Court the decree of the Lower Court was reversed and the suit dismissed on the ground that Ramasami Ayyar and the appellant being admittedly in possession of the jewels and other property of the temple, a suit without a prayer for the possession of that property was unsustainable. The appellant thereupon applied to the Lower Court alleging that before the said decision in appeal was passed the property referred to had been taken under process of Court purporting to have been issued in accordance with the decree eventually reversed, out of his own possession and handed over to the respondents, and praying for the restitution of the property and the recovery of Rs. 352-5-0 stated to have been levied from him by the respondents for costs made payable to them by the original Court's decree and Rs. 191-6-0 stated to be due to him as per order of this Court on account of his costs in the Court of First Instance.

The Lower Court disallowed the appellant's application wholly in respect of the first two matters and partly in respect of the third and this appeal is in respect of so much of the order as disallow the application.

The question of restitution of the temple property is the important question for determination. The Lower Court's view was that the dismissal of the appellant by the committee should be taken to be good until it be adjudged otherwise, and that consequently the appellant had *prima facie* no right to the possession of the temple property and to the restitution thereof. But that view is obviously erroneous, as the onus is on those who rely on the dismissal to make out that it was for good and sufficient cause and to establish that the appellant's right as trustee has ceased. The conclusion of the Lower Court on the point under consideration cannot therefore be supported on the ground on which it is put.

It was however urged before us, on behalf of the respondents, so far as I was able to follow the argument, that the present case did not stand on the footing on which cases connected with the restitution of ordinary property would stand; that assuming the appellant had actual custody of the property and was deprived of such custody under colour of the subsequently reversed decree the Court is not bound to interfere in the case inasmuch as the appellant's alleged previous possession was, in law, possession on [310] behalf of the respondents also and a change in the actual custody, so long as such custody remains with a trustee or trustees is a matter of too little importance to justify the granting of redress by way of restitution. It was further urged that since the execution proceedings complained of took place, one Sivasami Ayyar having been validly appointed as an additional trustee by the committee has ever since been in possession of the property jointly with the respondents; that as under the law no restitution can be granted against a third party in the position of Sivasami Ayyar, whose title and possession were not derived from the respondents or acquired by means of any collusion between them and him, there can be no restitution against respondents also. Are these contentions supported to any and what extent by the rules governing claims for restitution preferred in consequence of the reversal of a decree?

It is not true, as was in a manner suggested on behalf of the respondents, that the granting of restitution is discretionary. The principle of

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the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost (*Bank of the United States* v. *Bank of Washington* (1)). That obligation it is the duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real justice of the case. The learned vakil for the appellant denied that even the qualification just stated was recognized by the law. But there can be no doubt that the law implies such a qualification. For the very purpose of restitution is to redress injustice. See the forms of writs of restitution which contain the clause:—"And we being willing that what is just in this behalf should be done command you." Tidd's 'Appendix, King's Bench and Common Pleas,' Fifth edition, page 648. It is true that questions as to the justice and propriety of granting restitution will not arise where the decision in consequence of which restitution is claimed determines that the right to the property is vested in the party claiming the restitution as against the party called upon to make it. But where the decision proceeds on technical grounds, leaving the merits undetermined, questions as to the justice and propriety of [311] granting restitution may well arise. Suppose, for instance, the party wanting the restitution chooses to institute a fresh suit for the purpose, as he is entitled to do in the absence of a statutory prohibition on the point, instead of pursuing the other remedy open to him, *viz.*, the less costly and more expeditious process of applying for restitution in the very suit in which the decision in consequence of which restitution is claimed was passed. Suppose in such fresh suit the defendant pleads that the right to the property claimed has been all along vested in himself and that the plaintiff never had any title to it, there is no authority, that I am aware of, for laying down that he would be estopped from raising such a plea, that he must surrender the property in that suit and then bring an action to recover it. To hold so would of course lead to unnecessary multiplicity of suits. But whether this opinion is correct or not, it must, I think, be conceded that if restitution is claimed in proceedings commenced by an application the party opposing the claim will not be entitled to the same latitude that I think is allowable to a defendant in a suit brought for restitution. A different view will scarcely be consistent with the limited scope of the proceedings which *ex hypothesi* are taken in subordination to the decision in consequence whereof the restitution is claimed and without reference to the actual rights of the parties except so far as they can be gathered from that decision itself.

Passing next to the question of restitution against innocent third parties, it is hardly necessary to say that the well recognized rule that a *bona fide* purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal, is based on public policy which has special reference to judicial sales. As regards the law applicable to the case of innocent third parties in the position analogous to that said to be occupied by Sivasami Ayyar, I have not come across any Indian or English authority dealing with the point explicitly. *Quan Wo Chung Co.* v. *Laumeister* (2), an American case, is however in point and the view therein laid down seems to be worthy of being followed, having regard to the sound reasons on which it rests. There the company resisting the claim for restitution was not a party to

(1) 6 Peters 17.

(2) 17 American State Reports, 262, 263.

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the decision in consequence of which the restitution was claimed. [312] The company's case was that it held peaceable possession under a title derived from an independent source and adverse to both the parties to the suit and that the company was not in collusion with either. It was held that the rule that a plaintiff in an action to recover land cannot, by his writ of restitution or assistance dispossess, a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of a Court. The observations of the Court on the point were as follows:—In support of this proposition (*viz.*, the company was not liable to be ejected) they cited numerous cases in which it has been held that the plaintiff in an action of ejectment or other suit to recover possession of real property cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding the premises under an independent title or claim of title and not in collusion with the defendant. But the cases have no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the Court. He does not stand in the position of the actor in a suit who seeks the aid of a Court to regain any possession lost by his own negligence or misfortune. On the contrary he is out of possession only because the Court has wrongfully put him out, and whoever is in is there only because the Court has wrongfully made room for him to get in. All that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position after his being put out by the Court than he would have been if the Court had never acted, and the Court cannot, without putting him out, undo its own wrong. If he has a superior right to the possession he can, after going out, assert it with the same effect as if he had never been in and he loses nothing but the advantage of holding the premises pending the litigation,—an advantage to which he was never entitled.

The above seem to be some of the main rules governing the subject of restitution claimed in consequence of the reversal of a decree and none of them is in any way inconsistent with the provisions of Section 583 of the Code of Civil Procedure.

[313] Turning now to the present case, it would follow from the principles stated above that if, as alleged by the appellant, he held actual custody of the property and was deprived of it under the colour of the decree which was afterwards reversed, he is entitled to regain that custody, since by doing so it cannot be said any injustice would be inflicted on the respondents, nor is actual custody, from the point of view of the appellant, a matter of small importance having regard specially to the circumstance that the respondents deny the right of the appellant to the office of trustee, while the restoration of the custody to the appellant would leave the respondents precisely in the position which they had occupied before. The objection, based on the alleged right of Sivasami Ayyar, also fails for even supposing that he himself is made a party to the present proceedings, as the respondents contended he should be, he cannot successfully resist the claim for restitution if the facts be as alleged, and the respondents are therefore not entitled to ask that he be made a party or to rely on his alleged right. The appellant is clearly entitled to have an opportunity to prove his allegations in regard to this question.

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As to the two sums of money claimed, the case may be dealt with in a few words. The finding of the Lower Court that the sum of Rs. 352-5-0 was not paid as alleged by the appellant on his behalf through the first defendant, but that the latter paid it on his own account, is perfectly well supported by the evidence. The appellant not having been in any way a party to the actual payment is not entitled to recover this item of his claim. As to the remaining item, the finding in effect is that the amount awarded is all that can be properly taxed as to the costs payable to him under the direction contained in this Court's decree in appeal, and there is nothing to show that that is wrong and the appeal in respect of these two items of costs fails.

As the District Judge has not gone into the question of fact involved in so far as the application for restitution of the temple property is concerned, I would call upon the Lower Court to submit, upon evidence to be adduced by the parties, findings upon the following issues:—(1) whether any and which of the temple properties were in the appellant's actual custody, at the time referred to by him; (2) whether he was deprived of such custody under the decree which was reversed and whether the respondents or any [314] of them acquired the custody of the same thereunder. The findings should be submitted within two months from the date on which this order reaches the Lower Court, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

MICHELL, J.—I concur.

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23 M. 314 = 10 M.L.J. 51.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

KUMARASAMI REDDIAR (*Plaintiff No.* 4), *Appellant v.* SUBBARAYA REDDIAR AND OTHERS (*Plaintiffs Nos.* 1 *to* 3 *and Defendants Nos.* 7 *to* 18 *and* 20 *to* 26), *Respondents.**
[12th and 17th October, 1899.]

Civil Courts Act—Act III of 1873, *Sections* 12, 13—*Civil Procedure Code—Act XIV of* 1882, *Section* 566—*Appeal—Transfer to Subordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal—Jurisdiction is not conferred by waiver when Court has no inherent jurisdiction.*

An appeal, having been entered in a District Court, against the decision of a District Munsif, was heard in part by the District Judge, who remanded the suit to the District Munsif for findings on fresh issues. Findings having been duly returned, the District Judge transferred the appeal to the Subordinate Judge, who heard and determined it:

Held, that the District Judge had no power to transfer to a Subordinate Judge an appeal which was part heard and pending before him. The only inherent jurisdiction that a Subordinate Judge has is in original suits under Section 12 of the Civil Courts Act. In appeals he only acquires jurisdiction under the last clause of Section 13 of the said Act, which enables a District Judge to transfer appeals to him, and unless that section is complied with the Subordinate Judge has no jurisdiction to hear or determine any appeal. Section 13 does not authorize the transfer to a Subordinate Judge of an appeal part heard and

* Second Appeal No. 1417 of 1898 against the decree of N. Sarvothama Rao, Temporary Subordinate Judge of Tinnevelly, in Appeal Suit No. 26 of 1894, reversing the decree of C. Subrahmania Ayyar, Additional District Munsif of Tinnevelly, in Original Suit No. 326 of 1892.

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pending before the District Judge. The fact that objection was not taken to the jurisdiction of the Subordinate Judge did not confer jurisdiction upon him, the Subordinate Court not having inherent jurisdiction.

[F., 10 A.L J. 89=15 Ind. Cas. 862; 8 Ind. Cas. 492=9 Ind. Cas. 479=24 M.L.J. 79=8 M.L.T. 347=(1911) 1 M.W.N. 27 (28); 11 M.L.J. 433; 12 M.L.J. 117; R., 32 C. 875=9 C.W.N. 705; 31 M. 49=17 M.L.J. 603=2 M.L.T. 519; 31 M. 277=7 Cr. L.J. 329=18 M.L.J. 89; 9 C.L.J. 572=12 C.W.N. 132-N=4 Ind. Cas. 61.]

SUIT for removal of a bund and for an injunction. The District Munsif having decreed for plaintiffs, as prayed, the defendants [315] appealed to the District Court. On the appeal coming on for hearing certain documents were filed, but the District Judge remanded the suit, under Section 566 of the Code of Civil Procedure, to the District Munsif for findings upon fresh issues, ordering that fresh evidence might be taken. The findings having been duly returned the District Judge transferred the appeal to the Subordinate Judge who, after hearing the parties, allowed the appeal and dismissed the suit.

Plaintiff No. 4 presented this second appeal, the first ground of appeal being that the Subordinate Judge had no jurisdiction to try the appeal as it had already been heard in part by the District Judge.

Sundara Ayyar and *Balasubrahmania Ayyar*, for appellant.

V. Krishnasami Ayyar and *Ramakrishna Ayyar*, for respondent No. 18.

JUDGMENT.

The only substantial objection raised in this second appeal by the appellant is that the Subordinate Judge who heard the appeal in the Court below had no jurisdiction.

The case was originally tried in the District Munsif's Court of Tinnevelly and the appeal was entered and came on for hearing before the District Judge and certain documents were put in at the appeal. The District Judge thereupon remanded the suit, under Section 566, Civil Procedure Code, to the District Munsif for findings upon fresh issues and ordered that fresh evidence might be taken and the findings returned. When the findings had been returned the District Judge transferred the appeal to the Subordinate Judge who, after hearing the parties, reversed the decree of the District Munsif and dismissed the plaintiffs' suit.

It is contended that the District Judge had no power to transfer an appeal which had been part heard by the District Judge to the Subordinate Judge under Section 13 of the Civil Courts Act (Act III of 1873), and that it is only when an appeal has been properly transferred under Section 13 of Act III of 1873 that a Subordinate Judge has any jurisdiction.

The only inherent jurisdiction that a Subordinate Judge has is in original suits under Section 12 of the Civil Courts Act (Act III of 1873). In appeals he only acquires jurisdiction under the last clause of Section 13 of that Act, which enables a District Judge to transfer appeals to him, and unless that section is legally complied with he has no jurisdiction to hear or determine any appeal. The [316] question, therefore, is whether when a case has been commenced and part heard by the District Judge he can legally transfer the further hearing of it to a Subordinate Judge.

It has been held under Section 6 of Act VIII of 1859, which is an analogous enactment, that a part heard case pending before a District

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Judge cannot be transferred—see *Moulvie Abdool Hye* v. *Macrae* (1) and *Dumree Sahoo* v. *Jugdharee* (2).

In *Kotayya* v. *Lakshmaya*(3) it was held by this Court that under Section 13 of the Civil Courts Act a District Judge, who had himself part heard an appeal, could not thereafter transfer the appeal to the Subordinate Judge and the judgment of the Subordinate Judge was set aside.

On behalf of the respondents it was argued that, at the most, the transfer of the appeal after it had been part heard by the District Judge was a mere irregularity and did not affect the jurisdiction of the Subordinate Judge and *Bandhu Naik* v. *Lakhi Kuar* (4), *Sankumani* v. *Ikoran* (5), and *Ledgard* v. *Bull* (6) were cited.

Bandhu Naik v. *Lakhi Kuar* (4) was a case under Section 25, Civil Procedure Code, which is a somewhat analogous section. There the case had been part heard by the Subordinate Judge and was then transferred by the District Judge to his own file. The Court held that, though he had power to transfer and try it, inasmuch as he had not taken the evidence he had not tried the case, and set aside his decree. This case, therefore, does not assist the respondents' contention, for it only decides at most that a District Judge has power to transfer and try under Section 25, Civil Procedure Code, a case which was pending in a Court subordinate to itself even though it might have been part heard, but it also decided that it could not act upon what had been already done in the Subordinate Court.

Sankumani v. *Ikoran* (5) was also a case under Section 25 of the Civil Procedure Code. This case had been transferred without notice having been given, as the section directed, to the defendants. The defendants did not, however, object to the want [317] of notice but appeared and submitted to the jurisdiction and even appealed without taking any objection to the jurisdiction. The Court held that as the Court had inherent jurisdiction and as notice was intended for the benefit of the parties, they could waive it and so cure any defect in the order conferring jurisdiction. They acted on the principles laid down by the Privy Council in *Ledgard* v. *Bull* (6) and in *Meenakshi Naidoo* v. *Subramaniya Sastri* (7) that where a Court has no inherent jurisdiction waiver will not confer jurisdiction, but in cases where the Court has inherent jurisdiction but there has been some irregularity in the initial proceedings upon which it exercised jurisdiction, the defect is one which can be cured by waiver.

It has already been pointed out that in appeals a Subordinate Judge has no inherent jurisdiction, so that any waiver by the parties would not confer jurisdiction upon him if the transfer was not legal.

We are of opinion that Section 13 of the Civil Courts Act does not authorise a District Judge to transfer to a Subordinate Judge an appeal which is part heard and pending before the District Judge, and it would be contrary to public policy to put such an interpretation upon the section; and that the fact that the appellants did not object to the jurisdiction does not confer jurisdiction upon the Subordinate Judge.

We must, therefore, allow the appeal and reverse the decree of the Subordinate Judge and remand the appeal to the District Judge for hearing and disposal according to law. Costs will abide the event.

(1) 23 W.R. (C. R.) 1 (4). (2) 13 W.R. (C. R.) 398.
(3) Second Appeal No. 863 of 1898 (unreported) = 9 M.L.J. 297—Ed.
(4) 7 A. 342. (5) 13 M. 211.
(6) 13 I.A. 134 = 9 A. 191 (203). (7) 14 I.A. 160 = 11 M. 26.

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[318] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subrahmania Ayyar.

CHEEKATI ZAMINDAR (*Plaintiff*), *Appellant v.* RANASOORU DHORA AND OTHERS (*Defendants*), *Respondents.**
[8th and 10th November and 5th December, 1899.]

Transfer of Property Act—Act IV of 1882, *Sections* 106, 107—*Duration of tenancy—Presumption of yearly tenancy—Evidence—Burden of proof in action of ejectment by a zemindar against tenant as to nature of tenancy.*

Suit for ejectment by a zemindar against two tenants holding under him subject to the payment of an annual cist or assessment. The zemindar was the owner of the kudivaram as well as of the melvaram right, and it was admitted that the tenants' possession was derived from him:

Held, that these facts alone were not enough to raise the presumption of a tenancy from year to year.

Per SHEPHARD, J.—It is not the general rule that the tenants in an ordinary zemindari hold their lands as yearly tenants or as tenants from year to year. Many of the occupants of zemindari lands are not tenants in the proper sense of the word and the fair presumption is that when new occupants are admitted to the enjoyment of waste or abandoned lands the intention is that they should enjoy on the same terms as those under which the prior occupants of zemindari lands held, it being open to the zemindar to rebut that presumption, either by proving that the usual condition of things does not prevail in his estate, or that a particular contract was made between him and his tenant.

Per SUBRAHMANIA AYYAR, J.—The presumption of tenancies from year to year which is well known to English law, because of the general prevalence in England of tenancies in the strict legal sense of the term, would also arise in this country if the tenancies here were proved to be similar. But inasmuch as practically the whole of the agricultural land on zemindaris is cultivated by raiyats who are generally entitled to hold them so long as they desire to do so, subject to the performance of obligations incident to the tenure, there is in sufficient foundation from which such a presumption may be raised. Nor is the fact that the zemindar is the owner of the kudivaram right as well as the melvaram right sufficient to shift on to the raiyat the burden of proving that the tenancy is not one from year to year. In order to discharge the onus which is on him in a case of ejectment the zemindar must do more than merely show that the land when it passed into the hands of the raiyat was at his disposal as relinquished or as immemorial waste land. He must show that the defendants' possession is inconsistent with the *prima facie* view that it is held under the usual and ordinary form of holding prevalent in the zemindaris.

Achayya v. *Hanumantrayudu*, (I L R. 14 M. 269), explained.

[F., 5 Ind.Cas. 972=7 M L.T. 201; 13 M.L.J. 81; R., 26 M. 252=12 M.L.J. 449; 27 M. 401; 30 M. 502; 34 M. 246=6 Ind.Cas. 711=20 M.L.J. 764=7 M.L.T. 365; 21 M.L.J. 845=10 M.L.T. 185=(1911) 2 M.W.N. 162; 24 M.L.J. 571=13 M.L.T. 450=(1913) M.W.N. 434; D., 28 M. 553; 30 M. 155=17 M.L.J. 64=2 M.L.T. 25.]

[319] SUIT for ejectment by the zemindar of Cheekati against the occupants of two jeroyati lands in the village of Sompeta. Plaintiff claimed as the owner and landholder of the lands in question, and alleged that for the past twenty-five years the brother of defendant No. 1 and the adoptive father of defendant No. 2 and after him the members of his family, had cultivated the lands, paying a yearly rent to the estate of Rs. 87; that plaintiff having in the previous year signified his intention

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* Second Appeal No. 1584 of 1898 against the decree of F. Murray, District Judge of Ganjam, in Appeal Suit No. 224 of 1897, reversing the decree of V. Krishnamurti Pantulu, District Munsif of Sompeta, in Original Suit No. 137 of 1896.

of claiming a higher rent according to the rates paid for the neighbouring lands of similar description and quality, defendants falsely set up a right of permanent occupancy, and had subsequently failed to quit the land though notice had been given to them. Defendants relied on an alleged permanent lease said to have been granted fifty-two years ago by the plaintiff's predecessor in title. An issue was framed as to whether the defendants were yearly tenants, and if not whether they were liable to be ejected; and the District Munsif held that defendants had failed to prove the alleged grants set up by them; or that plaintiff or his predecessor in title had ever treated them as permanent raiyats; or that they had rights of permanent occupancy. He held, on the evidence, that they were yearly tenants and (referring to *Achayya* v. *Hanumantrayudu* (1)) that plaintiff had a right to eject them after giving them proper notice, as he had done, and ordered plaintiff to be placed in possession of the lands as prayed. The defendants appealed to the District Court, where the Judge said:—"I cannot hold the defendants are yearly tenants. They have not proved how the tenancy originated, but they have proved possession for above thirty years. The plaintiff admits they hold resumed service inam for money rent, and their receipts show that such rent has been occasionally, at least, if not always, over a long term regarded as a 'fixed rent.' I must, I think, therefore follow the principle as laid down in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (2), and the defendants must, in their case, owing to the above facts, be regarded as raiyats in possession of the kudivaram; they are thus in as good a position as ordinary Government raiyats, and the zemindar cannot eject them as long as they pay a fixed rent." He reversed the decree and dismissed the suit.

[320] The plaintiff preferred this second appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), for appellant.

Sundara Ayyar, for respondents.

JUDGMENT.

SHEPHARD, J.—Owing apparently to a misunderstanding of the point decided in *Venkatanarasimha Naidu* v. *Dandmudi Kotayya* (2), the District Judge, while observing that the defendants have proved possession for over thirty years, does not discuss the evidence and has recorded no definite findings upon it. When the facts mentioned in the first part of the judgment in that case are taken into account, it is quite clear that the plaintiff's suit must have been dismissed. All that was proved was that the plaintiff was the holder of a permanently-settled estate, and that the lands from which he sought to eject the defendants were lands situated within that estate held subject to an annual assessment paid by the defendants to the plaintiff. On those facts the plaintiff could not succeed unless he could call in aid a presumption that every holder of lands in a zemindari is a tenant of the zemindar and that every such tenant is a tenant-at-will or, at the most, a tenant from year to year. The point decided is that, so far from any such presumption arising, the presumption is the other way; because ordinarily the melvaram right only is vested in the zemindar, and the interest of the occupant of the soil is not an interest derived from the zemindar analogous to the interest which a tenant

(1) 14 M. 269. (2) 20 M. 299.

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takes on being admitted into possession by his landlord. Accordingly when the zamindar seeks to eject a defendant who is holding land in his zamindari, it is incumbent on him to start his case by proving that the defendant was let into possession by him as a tenant or, in other words, that the kudivaram having been originally vested in the zamindar, the defendant had been holding by title derived from the zamindar. This was not laid down for the first time in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (1) as the judgment in that case itself shows (see page 303), and *Appa Rau* v. *Subbanna* (2), a case similar in its facts—*Venkataramanier* v. *Ananda Chetty* (3). In the present case on the facts admitted by the respondent's vakil a different question arises. The respondent's vakil admits that before the possession of the defendants **[321]** began the land was at the disposal of the zamindar, and that accordingly the defendants' possession was derived from the zamindar, so that the relation of landlord and tenant was created. The question is whether, on the strength of these admissions, the zamindar is without further proof entitled to eject the defendant. It is contended that at any rate in the case of tenants admitted into the occupation of zamindari lands there is no justification for any presumption that the tenant was intended to hold as a tenant from year to year, and that in point of fact it is not on such terms that agricultural tenants in this country ordinarily hold their lands. It is rightly pointed out that the legislature has been careful to save tenancies for agricultural purposes from the immediate operation of Section 106 of the Transfer of Property Act, and reliance is placed on the language used by this Court in *Venkatacharulu* v. *Kandappa* (4). The facts of that case appear to have been similar to those of the present so far as they are at present ascertained. The defendants and their father had been in occupation as tenants for about fifty years—there was no evidence that a permanent right of occupancy had been created in favour of the father, nor, on the other hand, was there any evidence in the plaintiff's favour. There was no evidence as to the terms of the tenancy one way or the other. In that state of facts this Court held that the suit for ejectment was rightly dismissed. The judgment proceeds, not on the ground that the length of the defendant's possession raised any inference favourable to him, but on the ground that the inamdar seeking to eject his tenant was bound to prove the terms of the tenancy.

I had some difficulty in reconciling this decision with *Achayya* v. *Hanumantrayudu* (5) until my attention was called by Mr. Justice Subrahmania Ayyar to the real facts in the latter case as they appear in the printed appeal paper. The question in that case arose between an agraharamdar and his tenants, and evidence had been adduced against the tenant to the effect that the Court had held with respect to other tenants in the same agraharam adversely to the claim of a permanent right of occupancy. On the evidence the claim was negatived by both the Lower Courts. The case was not one in which there was no evidence either way as to the terms of the tenancy, and therefore the point decided in **[322]** *Venkatacharlu* v. *Kandappa* (4) did not arise. In reality it was quite unnecessary to decide any question as to the burden of proof. So far, therefore, as that decision is concerned, it does not in my view detract from the authority of the later decision in *Venkatachariu* v. *Kandappa* (4)

(1) 20 M. 299. (2) 13 M. 60. (3) 5 M. H. C. R. 120.
(4) 15 M. 95 (96). (5) 14 M. 269.

But it was argued on the appellant's behalf that since the presumption of a tenancy from year to year admittedly exists as between Government raiyats and their tenants, it may with equal justice be presumed that the tenant admitted by a zamindar is intended to be admitted on the same terms. If the normal position of the two classes of tenants were the same, the inference would of course be a fair one. But the learned Advocate-General admits, as he cannot avoid admitting, that their circumstances are different, and he allows that the presumption of occupancy right arises far more readily in the case of a zamindari tenant than in that of a tenant holding under a Government raiyat. If the argument prevailed, it would follow that every tenant, admitted by a zamindar after the date of the permanent settlement, would, however long his possession, be liable to eviction unless he could adduce positive proof of an occupancy right. It would avail him nothing to point to his long continued possession, for that, as the cases cited by the Advocate-General show, is not *prima facie* evidence of occupancy right. With regard to certain lands within a zamindari, *e.g.*, pannai lands and possibly with regard to certain zamindaris, the general rule may be that the tenant holds his lands as a yearly tenant or as a tenant from year to year. But that is certainly not the general rule with regard to the ordinary lands in an ordinary zamindari. Many of the occupants of zamindari lands are not tenants in the proper sense of the word, and the fair presumption is that, when new occupants are admitted to the enjoyment of waste or abandoned lands, the intention is that they should enjoy on the same terms as those under which the prior occupants of zamindari lands held. It is open to the zamindar to rebut the presumption. He may show as was shown in *Achayya* v. *Hanumantrayudu* (1) that the usual condition of things does not prevail in his estate, or he may adduce evidence as to the particular contract made between him and his tenant. In other words, he may show that the terms of the [323] contract were different from those which ordinarily prevail between a zamindar and the occupant of zamindari lands.

As the District Judge has not dealt with the appeal on the evidence, I think the case must go back for a finding on the question whether, in view of the facts admitted before us and the other evidence, the plaintiff is entitled to evict the defendants. Fresh evidence may be received. The finding should be submitted within two months from the date of the receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

SUBRAHMANIA AYYAR, J.—The question raised in this case is whether, when, in a zamindari, land, in which none other than the zamindar himself has the kudivaram or similar right, is taken up by a raiyat for cultivation subject, of course, to the payment of sist, and nothing more appears in regard to the duration of the holding, the presumption is that it is a tenancy from year to year.

In order to see whether a particular presumption, such as we are here concerned with, is applicable to a given case, we must ascertain whether the facts, which generate the presumption, are existent. In doing so we must be careful of the phraseology we employ in the discussion of the question. One of the fruitful sources causing confusion in a discussion like the present is a lax use of terms. Terms which in one

(1) 14 M. 269.

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system of law embody one set of ideas are sought to be applied to a quite different system having very slight, if any, correspondence. The result is that all the incidents of a relation constituted by the former by means of those terms are insensibly assumed to follow as a matter of course in the latter. In such a case the caution conveyed by Sir Erskine Perry in *Doe dem, Dorabji* v. *Bishop of Bombay*(1), in the following language cannot be too often repeated :—" When states of fact occur to which analogous con-"ditions in European life may present themselves to the mind of an "English lawyer, the latter should be cautious in applying the rule of "English Law applicable in England, unless he is satisfied that the analogy "is complete ; and, in all cases he should be studious to ascertain whether "the phenomena of human life which come before him are not much "more readily to be traced to an Indian origin, and to be explained "**[324]** "by Asiatic notions and habits than by principles of European "civilization."

Bearing this in mind let us enter into a consideration of the subject. Now the presumption of a tenancy from year to year is well known in English law, and if we consider what the condition of agricultural holding is in England, it is not to be wondered how much that presumption is in harmony with the habits of the community there. For in the language of Dr. Ed. Robertson " practically the whole agricultural land of the "community is cultivated by persons who merely hire it for a limited "time from the owners." In fact the English law raises the presumption because of the general prevalence in England of tenancies in the strict legal sense of the term.

No doubt in this country also that presumption holds good if a similar tenancy is proved. But if we turn to zamindari lands, what is the state of things we meet with ? Practically the whole of the agricultural land there is not cultivated by persons who merely hire it for a limited time. The raiyats most generally hold by no derivative tenure. And even where the right to cultivate passes to them from zamindars the payment made by them, in the absence of a contract, is regulated by custom in the last resort, as provided in Section 11 of the Rent Recovery Act. The raiyats are generally entitled to hold the lands for an unlimited time, that is, as long as they wish to retain it subject to the performance of the obligations incident to the tenure. Nor can it be said that this is true only in regard to so much of the land in the hands of the raiyats as cannot be shown to have been obtained by them from zamindars. For in the case of lands which have been relinquished by the former occupants or which have been lying waste from time immemorial, they too, when taken up by a raiyat, are treated exactly on the same footing as land into the possession of which it is not shown that the raiyat was let in by a zamindar, and the raiyat holds possession of them for an indefinite period. This practice prevails not only in the zamindaris in the southern part of the Presidency, but also in those in the northern part where the rights of raiyats are sometimes erroneously supposed to be inferior to those possessed by raiyats elsewere. As an illustration of the truth of the above statement I may refer to *Appa Rao* v. *Sriramulu*(2) **[325]** which came up before Moore, J., and myself after the argument of this appeal. The dispute in the case under reference related to the apportionment among the zamindar of Nuzvid and certain of the raiyats of the compensation money awarded for lands taken up for the East Coast Railway, part of the land being what had been

(1) Perry's Oriental Cases, 501. (2) Appeal No. 118 of 1898 (unreported).

relinquished by some raiyats and then taken up by those who were in possession at the time of the acquisition by Government. Nor had the lands so taken up been held very long, the earliest case of such occupation being that of 1877, while the others were more recent. Now what is important for the present purpose is, not the actual decision in that case, which was to the effect that the raiyats were not merely tenants from year to year in respect of the lands referred to, but the course of dealing which was shown to prevail in the zamindari, on the one hand with reference to lands relinquished but subsequently taken up and, on the other hand, with reference to the zamindar's home-farm lands. That course of dealing was explained by the two karnams who were called by the zamindar himself and who gave evidence on the point. One of them said "some of the lands "have been held for a long time and some were taken up on relinquish- "ment by others. These accounts show relinquishments and acceptances "by other raiyats in detail for each fasli. Seri-pattas in the same form are "granted in respect of land held for a long time and in respect of those taken "up on relinquishment by others. If the tenants who have taken up lands "after relinquishment die, pattas are granted in the names of their heirs. "If such lands are transferred pattas are granted in the names of trans- "ferees. Such lands are transferred by sale and mortgage in the same "way as lands which have been held from time immemorial." The material portion of other witness's evidence on the point was as follows:— "There are lands in our village under the direct cultivation of the zamin- "dar. The lands of the raiyats concerned in these cases are seri lands. "The pattas for these two kinds of lands are different. The pattas for "home-farm lands are only for one year. It is provided in those pattas "that the tenants should quit the lands at the end of the year. The "pattas now shown to me are for seri lands . . . . No such pro- "vision is inserted in these pattas. No pattas are granted for home- "farm lands. Khats are taken from the raiyats. The home-farm "lands are leased out to the highest bidder. The rent is never varied "in the case of seri lands, except where dry is converted into wet "[326] and the tenant consents . . . If any pattadar dies the lands "are entered in the names of his heirs. There is no transfer in respect of "home-farm lands, nor are they entered in the names of heirs when a "tenant dies."

This is a fairly correct description of what goes on in most zamindaris of this Presidency, and it shows very clearly that the prevalent permanent form of agricultural holding in zamindari tracts extends not only to lands held by raiyats immemorially, but also to what they take up under zamindars, provided the lands so taken up do not form part of the home-farm lands of the zamindars. Such being the state of things, can it be said that even as regards lands to which the raiyat cannot show an immemorial right there is sufficient foundation from which the presumption of a holding from year to year may be raised—that there is, in fact, a general prevalence of tenancies strictly so called? On the contrary, does not a presumption of a different sort, *viz.*, of an ordinary raiyat's holding, fit in with the normal state of things as shown above? The one fact on which great stress is laid, *viz.*, that the zamindar was the owner of the kudivaram right as also of the melvaram right, cannot be entirely dissociated from the surrounding circumstances and be made the sole basis of the presumption that the holding is of an essentially different character, *viz.*, a tenancy from year to year. No doubt that fact would enable a zamindar, at the time he allows a raiyat to take up such land.

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to make special arrangements in regard to the duration, &c., of the holding. But it does not necessarily suggest that such a course has been adopted and that the land is held differently from the bulk of the village lands. Consequently the fact in question is in itself insufficient to shift the burden of proof on to the shoulders of the raiyat.

In order to do so the zamindar must go somewhat further than merely show that the land, when it passed into the hands of the raiyat, was at his disposal as relinquished or immemorial waste land. Of course, he is not called upon to prove that when the raiyat took up the land an actual understanding as to the duration of the holding was come to between the parties. Much less is he bound to adopt any specific mode of proving his case. Nor is he required to adduce a prescribed quantity of evidence. To discharge the onus which is on him, all that he has to show is that the defendants' possession is inconsistent with the *prima facie* view that it is held [327] under the usual and ordinary form of holding prevalent in the zamindaris. He may prove this by showing that the land was dealt with as his home-farm lands, or he may show that the practice in the particular estate is not what it usually is in zamindaris generally. If in either of such ways or otherwise he shows that the defendants' possession is inconsistent with the usual form of holding, then, undoubtedly, the presumption will be that the tenancy is from year to year and the defendant must rebut it if he can.

The Advocate-General, however, likened the case under consideration to that of a Government pattadar or a raiyatwari proprietor, as he is sometimes described, letting his lands to a person for cultivation. But the cases differ materially as will be manifest if we consider the ground on which the presumption of tenancy from year to year has been applied to that case. That ground was explained by Collins, C.J., and Muttusami Ayyar, J., in *Chidambara Pillai* v. *Tiruvengadath Ayyangar* (1) thus :—" Admittedly the village in suit is a taraf village of which the " temple is the registered proprietor entitled to both the melvaram and " the mirasvaram as against the appellant. This being so, the claim of " an occupancy right as overriding the proprietor's right to cultivate his " own land is of a special character, and as such, it is one which the " party seeking to derogate from the ordinary incidents of property is " bound to establish." The ordinary incidents of such property were described in another passage in the judgment which runs thus :—" Ordi- " narily the mirasidar or proprietor in a taraf village has the right of " cultivation also and he is therefore at liberty to arrange for it from time " to time either by granting leases or letting it to purakudies for varam or " under what is usually called the pannai system by means of labourers " who are paid wages in grain." In other words, the view of the learned Judges was that permanent holdings under raiyatwari proprietors being unusual and exceptional, the onus is on the party setting up such a special kind of holding. The *ratio decidendi* of the case seems to me to be rather in favour of the raiyats in instances like the present for reasons already stated. Consequently decisions in the cases which arose between raiyatwari proprietors and cultivators under them are not in point in disputes [328] like the present. If it be permissible to seek in what goes on in raiyatwari villages a parallel to cases like the present, it can scarcely be denied that there is much analogy between them and instances where Government waste land is taken up in the ordinary course on darkhast by

(1) Appeal No. 1 of 1886 (unreported).

raiyats there. In the latter instances, though they are of every day occurrence, the occupants are invariably considered to be raiyatwari proprietors but not tenants from year to year. Nor do I understand *Achayya* v. *Hanumantrayudu*(1) to be really inconsistent with my conclusion. For the land in dispute there, situated in an agraharam village owned by a number of sharers, was admitted to belong to the plaintiff—one of the agraharamdars—in the sense that the cultivators had no right of occupancy, the District Munsif having found so on the basis of previous decisions relating to the village and that finding having been accepted by the District Judge—facts, however, which are not referred to in the report of the case.

It remains to add a few words with reference to the argument founded on Section 106 of the Transfer of Property Act. That the Legislature found it necessary by Section 117 of that Act to exempt agricultural leases from the operation of the said Section 106, among others, furnishes, to my mind, a strong argument against the Courts proceeding to apply the rule of tenancy from year to year to holdings such as we are here concerned with. For it is impossible to doubt that the reason for the exemption is the incompatibility of the presumption with the ordinary local conditions and the consequent inexpediency of applying it except where both the local Government and the Government of India concur in thinking such application to be permissible. It is scarcely necessary to say that when the authorities to whom the decision of the matter has been left by the Legislature have refrained from permitting the application of the presumption to the class of cases to which the present belongs, it is unwarrantable for the Courts to consent to its application on the mere ground that the presumption has found a place in the Statute.

I therefore concur in the order proposed by my learned colleague.

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[329] APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice and Mr. Justice Benson.

MAHARAJAH OF JEYPORE (*Petitioner*), *Appellant v.* PAPAYYAMMA AND ANOTHER (*Counter-petitioners*), *Respondents*.* [22nd, 23rd and 26th February and 20th March, 1900.]

Letters Patent, Section 15—Ganjam and Vizagapatam Agency Courts Act—Act XXIV of 1839—Validity of Agency Rule No. XXII passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court—Indian Councils Act—24 & 25 Vict. cap. 67, Section 25.

An order was made by a single Judge, by consent of the parties, transferring a case from the Court of an Agent to the Governor, Vizagapatam, to a District Court. A further order was made by a single Judge which, though in form an order dismissing a review petition against the first-mentioned order, was in substance an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of such an Agent to a District Court:

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* Appeals Nos. 19 and 21 of 1899, under Section 15 of the Letters Patent, against the orders of the High Court, passed on civil miscellaneous Petitions Nos. 422 of 1899 and 455 of 1898, respectively.

(1) 14 M. 269.

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Held, (1) that both orders were "judgments" within the meaning of Section 15 of the Letters Patent and that an appeal lay therefrom;

(2) that the High Court has no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam;

(3) that Agency Rule No. XXII, made in 1840, under the powers conferred by Act XXIV of 1839, is a valid rule.

[R., 24 M. 345 (349); 25 M. 555; 28 M. 42=2 A.L.J. 135=7 Bom. L.R. 97=9 C.W.N. 257; 35 M. 1 (5)=8 Ind. Cas. 340=8 M.L.T. 453; D., 24 M. 358 (360).]

BY consent of both the respondents, the petitioner (the Agent to the Governor, Vizagapatam), not appearing in person or by Counsel, an order was passed on September 30th, 1898, by the High Court, Madras, transferring original suit No. 1 of 1898 on the file of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam, for disposal.

On September 12th, 1899, the defendant in the said original suit No. 1 of 1898 presented an application to the High Court praying that the said order might be reviewed and reversed. Upon this application the Court (BODDAM, J.) passed the following

ORDER.—This is an application for the review and reversal of my order of the 30th September 1898, transferring original suit No. 1 of 1898 from the file of the Vizagaptam Agency Court to [330] the District Court of Vizagapatam for disposal. That order was made at the request of the Agent and by consent of the parties, but it is said now that this Court had no jurisdiction to make the order, and I have therefore heard the arguments even though the application for review is very much out of timet—he petition having been presented only on the 17th April, 1899.

The question turns on the 15th section of the Act for establishing High Courts in India, 24 and 25 Victoria, cap. 104.

So much of Section 15 as is material is as follows:—" Each of the " High Courts established under this Act shall have superintendence over " all Courts which may be subject to its appellate jurisdiction and shall " have power to call for returns and to direct the transfer of any suit or " appeal from any such Court to any other Court of equal or superior juris- " diction, and shall have power to make and issue rules for regulating the " practice and proceedings of such Courts," &c.

It is contended that this Court had no jurisdiction to make the order because (1) the Agency Courts are not subject to the appellate jurisdiction of the High Court and (2) the District Court at Vizagapatam is not of equal or superior jurisdiction to the Agency Courts.

It is admitted that the Civil Procedure Code, Section 25, does not apply as the Court in question is in a scheduled district within Section 1 of the Civil Procedure Code.

The Agency Court is created under Act XXIV of 1839, " an Act for the administration of justice and collection of revenue in certain parts of the districts of Ganjam and Vizagapatam."

By Section 4 of this Act it is enacted that "it shall be competent to the Governor in Council of Fort St. George by an order in Council to prescribe such rules as he may deem proper for the guidance of such Agents . . . . . and to determine to what extent the decision of the Agents in civil suits shall be final and in what suits an appeal shall lie to the Sadr Adalat," &c.

Rules were passed by the Governor in Council under this section, and rule XXI of such rules provides that from all decrees upon original suits passed by the Agent (with the single exception specified in the next following rule) an appeal shall lie to the Sadr Court, &c., and rule XXII provides that "from decrees of the Agent in suits wherein the landed possession of " a zemindar, &c., may have formed the subject of litigation an appeal " will lie to [331] the Governor in Council alone who may refer any such " appeal for the decision of Sadr Court," &c.

Now the suit in which this present application is made is within this rule and any appeal would under this rule be to the Governor in Council alone; so that under these rules in this very case the appellate jurisdiction is not in the High Court. It is therefore contended that the Agency Courts are not subject to the appellate jurisdiction of the High Court within Section 15 of the Charter Act.

Another reason for this contention is that under the Act establishing the Agency Courts the Governor in Council of Fort St. George is authorised to prescribe such rules as he may deem proper for the guidance of the Agents and therefore the High Court have no power under Section 15 of the Charter Act "to make and issue general rules for regulating the practice and proceedings of such Courts , . . . ", and it is the fact that the High Court has not issued any rules for regulating their practice and proceedings. It is further contended that the jurisdiction of the Agency Courts is superior to that of the District Court of Vizagapatam and the order is therefore bad.

The jurisdiction of the Agency Court of Vizagapatam and that of the District Court is equal in all respects except that by rule XVII of the rules made by the Governor in Council under Section 4 of the Act under which the Agency Courts are constituted, the Agent is given power to hear second appeals—a power which is said to be in excess of the jurisdiction of the District Court.

The counter-petitioners, however, contend that the order which I am asked now to reverse was not *ultra vires* and should not be set aside. They contend that it is only by reason of the rules that there is any other appellate jurisdiction than that of the High Court, and that the power to hear second appeals is given to the Agency Courts and they submit that these rules are *ultra vires*. This must depend upon the power given by the Act under which they purport to be framed, viz., Section 4 of the Act XXIV of 1839.

By Section 3 of that Act the Collector is appointed as Agent to the Governor of Fort St. George to administer civil and criminal justice and to collect and superintend the revenues, and Section 4 gives the Governor in Council power "to prescribe such rules as he may deem proper for the guidance of such Agents and of all the officers subordinate to their control and authority and to [332] determine to what extent the decision of the Agents in civil suits shall be final and in what suits an appeal shall lie to the Sadr Adalat and to define the authority to be exercised by the Agents in criminal trials," &c.

The power given to the Governor in Council to make rules under this section is confined to (*a*) prescribing such rules as he may deem proper for the guidance of such Agents, (*b*) to determine to what extent the decision of the Agents in civil suits shall be final and in what suits an appeal shall lie to the Sadr Adalat, and (*c*) to define the authority to be exercised by the Agents in criminal trials, &c. Now, unless the power to prescribe rules

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for the guidance of Agents contains the necessary authority to create any Court of appeal other than the Sadr Adalat, it is perfectly clear that there is no such power in the words that follow, for they only authorise the Governor in Council to determine to what extent the decision of the Agents in civil suits shall be final and when an appeal is allowed the appeal is directly stated to be to the Sadr Adalat and no power is given to the Governor in Council to create any Court of appeal other than the Sadr Adalat.

I am of opinion that there was no power given by the Act to the Governor in Council to create by rules any Court of appeal from the decision of the Agent in Civil suits and consequently the rule relied on by the petitioner, rule XXII, is *ultra vires* and of no effect, and that the Agency Courts are subject only to the appellate jurisdiction of the High Court. Moreover, I do not think that the power given to prescribe rules for the guidance of Agents precludes the High Court from making and issuing general rules for regulating the practice and proceedings of such Courts under Section 15 of the Charter Act.

The only question that remains is whether the jurisdiction of the Agency Court is superior to that of the District Court. I am of opinion that it is not. The extent, pecuniarily, of the two Courts is equal and the High Court has equal power to review the decrees of both (see rule XX), and the fact that by rule XVII power is given to the Agent to admit a special appeal from a final appellate decision of his divisional assistant (even if that part of the rule which makes an appellate decision of a divisional assistant final is not *ultra vires* as I think it is, for the Act gives no power to the Governor in Council to make any decision of an Assistant of the Agent final) is not sufficient of itself to make the jurisdiction of **[333]** the Agency Court superior to that of the District Court in the circumstances.

For these reasons I am of opinion that the order of the 30th September 1898 transferring the case from the file of the Agent to that of the District Judge of Vizagapatam, was not *ultra vires*, and I dismiss this civil miscellaneous petition with costs.

Against these orders the last-mentioned petitioner appealed.

Mr. *N. Subrahmaniam* (Mr. *C. Krishnan* with him), for respondents, took the preliminary objection that no appeal lay against either order, and contended that the order rejecting the application for review being a final order under Section 629 of the Civil Procedure Code, and the original order of transfer not being appealable, neither of the orders was a judgment within the meaning of Section 15 of the Letters Patent (*Sriramulu* v. *Ramasami* (1)).

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*, and *Tiruvenkatachariar*, for appellant :—Section 629 of the Code of Civil Procedure has no application. It says "an order of the Court for rejecting the application for review shall be final." In the present case the application for review had been admitted and the learned Judge really re-heard the original matter. Under Section 630 of the Code of Civil Procedure, the case may be re-heard immediately after the application is granted. That was the real nature of the proceedings in the Court below. Further, the decision of the Full Bench in *Chappan* v. *Moidin Kutti* (2) is against the respondent's contention. An appeal will lie under the Letters Patent from any judgment of a single Judge, and the order now appealed

(1) 22 M. 109. (2) 22 M. 68.

against is a judgment. It is an adjudication of the question whether the Court had the power to make the original order or not.

Mr. N. *Subrahmaniam*, in reply.

[Their Lordships overruled the preliminary objection and heard the appeals.]

The Acting Advocate-General :—The original order transferring the suit from the Agent's Court to the District Court of Vizagapatam was made by consent. If the High Court has no **[334]** jurisdiction to make such an order, consent cannot give jurisdiction. As the Court declared the Agency rules to be *ultra vires*, notice was issued by the High Court to Government, and I appear for Government in support of the validity of the rules ; especially of rule XXII, which provides that in a certain class of cases, namely, suits relating to the landed possessions of zamindars and hill chieftains of the Agency tracts, an appeal lies to the Governor in Council. The contention put forward as to the validity of this and other rules is twofold ; first, they are not *ultra vires* so far as Act XXIV of 1839 is concerned, and secondly, even if they were, they have been validated by Section 25 of the Indian Councils Act, 1861. The distinction between regulation and non-regulation provinces continued to be of considerable importance untill the passing of the Indian Councils Act. The regulation provinces were those which were governed by laws passed by the Governor-General of India in Council or the Governor of Madras in Council. In the non-regulation provinces, government was carried on, not under legislative provisions, but by executive orders of the local government. In 1839, certain wild and backward portions of the districts of Ganjam and Vizagapatam were, by the policy of the Legislature, removed from the operation of the ordinary regulations. The Sadr Adalat at first consisted of the Governor in Council—Regulation V of 1802. The constitution was altered by Regulation IV of 1806, and by Regulation III of 1807 the Governor was no longer a Judge of the Sadar Court (1 Morley's 'Digest,' Introduction, pages lxii to lxv). The Governor in Council was for some time the final Court of Appeal for all mufussal cases. There is therefore nothing strange in finding Indian enactments conferring civil appellate jurisdiction on the local government. Act XXIV of 1839 provides for the administration of justice and collection of revenue as branches of the executive government. Section 2 takes these Agency tracts out of the ordinary regulations and the administration of justice was to be carried on only as provided by the Act. The appellate jurisdiction of the Sadr Courts was therefore taken away. Section 3 provides for the administration of justice and for the collection of revenue by the Collectors of Ganjam and Vizagapatam, respectively, as agents to the Governor of Fort St. George. The words "Agents, &c.," are not words of description or designation as in the corresponding Bengal Regulation XIV of 1833, but define the character of the persons. The administration **[335]** of justice is vested in the Collector as Agent and is to be exercised by him as Agent. The principal, therefore, *i.e.*, the Governor in Council, has absolute control over his Agents in the administration of justice as well as in the collection of revenue. No express enactment was necessary to confer appellate jurisdiction on the Governor in Council, since he exercises it as principal over his agent. Strictly speaking the appeal contemplated by rule XXII is perhaps not an appeal but a power to deal with the decree of the Agents in certain classes of suits as the Governor may deem fit ; and the power to make rules conferred by Section 4 of Act XXIV of

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1839 extends to the making of such a rule as rule XXII. That section empowers the Governor in Council to prescribe, by an order in Council, rules for the guidance of Agents and subordinates, determining to what extent the Agent's decision in civil suits shall be final and in what suits the appeal shall lie to the Sadr Adalat. The words "to what extent" are sharply contrasted with "in what suits." The section clearly contemplates by the words "to what extent the decision of the Agents in suits shall be final" that rules may determine that in cretain suits the Agent's decision shall be final, but that in certain others it shall be subject to revision by the Governor in Council, or not final until approved by the Governor in Council. If it were simply meant that in some suits the Agent's decision shall be final and that in others an appeal is to lie to the Sadr Court, the words would have been "in what suits" instead of "to what extent." The Sadr Court is under the duty of hearing the appeal under Section 6 only when a rule is made giving such a right of appeal. Sections 3 and 4 should be read together. Rule XXII has been in existence for nearly sixty years and its validity has never been questioned and has been acted upon by the High Court and Privy Council in *Mahadevi* v. *Vikrama* (1). Section 7 of the Scheduled Districts Act, 1874, provides that rules in force prior to the Act are to continue. Such of the Agency Rules as were made prior to 1861, even if they are *ultra vires* with reference to Act XXIV of 1839, are validated by Section 25 of the Indian Councils Act, 1861. Rule XXII has been in existence from 1840. The legislative powers of the Governor in Council at Madras were taken away except in cases of urgent necessity by 3 and 4 Will. IV, cap. 85. From 1833 to the passing of the Indian **[336]** Councils Act, 1861, the Governor in Council had no legislative powers. The effect of Section 25 of the Indian Councils Act, 1861, is to validate all rules and regulations passed by the Governor in Council in respect of a non-regulation province, provided that the invalidity is only as being contrary to 3 and 4 Will. IV, cap. 85. But for Section 59 of the Statute of 1833 the Governor in Council could have enacted rule XXII. The fact that the Agency Rules are expressed to be made under Act XXIV of 1839 would not prevent the rules, though invalid under that Act, from being valid under other and general powers if such powers existed. The tracts in question are a non-regulation province for the purpose of Section 25 of the Statute of 1861.

The next question is whether the High Court has power to order a transfer of a suit of this kind from the Agency Court to the District Court of Vizagapatam. Section 25 of the Civil Procedure Code does not apply, the tracts in question being a scheduled District. (See Section 1 of the Code of Civil Procedure). The only other power to transfer is under Section 15 of the High Courts Act, 1861. That section empowers the High Court to transfer a suit from and to Courts subject to its appellate jurisdiction. If Rule XXII is valid then the Agency Court is not subject to its appellate jurisdiction in respect of this class of suits. But even if the rule is invalid, Section 15 of the High Courts Act does not contemplate the inclusion of the Agency Court as subject to its appellate jurisdiction. *Generali'a specialibus non derogant*—Maxwell on the 'Interpretation of Statutes,' page 243. The policy of the Legislature would be defeated if the Agency Courts were included; moreover, the interpretation relied upon by the respondent would involve the existence of two rule-making authorities for the same matters, *viz.*, the Governor in Council

(1) 14 M. 365.

under Act XXIV of 1839 and the High Court. The concluding words of Section 15 show that the High Court only has power to issue general rules of practice for Courts subject to its appellate jurisdiction. Even if the High Court has appellate jurisdiction over the Agency Court the transfer under Section 15 should be from one Court to another of equal or superior jurisdiction. The District Court is of inferior jurisdiction to the Agency Court, as rules XVI and X (2), XVII, XIX XX and XXVII clearly show. Among other things, the Agent hears special appeals, has the power of revision and of compulsory reference to arbitration, which [337] the District Court in a regulation province has not. In *Niladevi Patta Mahadevigar* v. *Appa Rao Pantulu* (1) the High Court refused to order a transfer.

Mr. *N. Subrahmaniam*, for respondent:—The Agency Rules purport to be and are issued under Act XXIV of 1839. That Act does not make the Governor in Council an appellate authority; no new Court of jurisdiction was created. The only appellate authority that existed prior to the Act namely, the Sadr Adalat, continued after it. The tracts in question were not made a non-regulation province. They were not without any regulation and subject only to the executive government. The Act XXIV of 1839 itself supplied the machinery. It and the rules validly made under it are the laws which governed those tracts. Now, the Scheduled Districts Act also applies. Section 3 vests the administration of justice in the Collector. He is made a Court. He exercises jurisdiction as a Court. The analogy of principal and agent is totally misleading and inapplicable. The Collector when he exercises such functions is called Agent to the Governor of Fort St. George. The word "Agent" is undoubtedly a word of designation or appellation, and not a term of definition. The expression occurs also in the corresponding Bengal Regulation of 1833, and it is clearly used there as an appellation. The words are "designated as Agent, etc." A comparison of the two regulations shows that Act XXIV of 1839 was modelled upon the Bengal enactment. Compare the terms in use as political agents and special agents. The Legislature would have expressed the idea in clear terms if that were the meaning intended. Moreover, the expression is not Agent to the Governor in Council but only Agent to the Governor,—a very different thing. If appellant's argument is correct then the Agent is the Agent not of the local government but only of the Governor, who is not the government. The appeal under rule XXII is not to the Governor but to the Governor in Council. Section 4 is equally against the appellant. The rules that can be validly made may determine in what suits the Agent's decision shall be final, and in what an appeal lies to the Sadr Court. The stress laid upon the words "to what extent" is entirely unjustified taking the whole together. The words may refer to pecuniary limits or indicate that the appeal is to be confined [338] to points of law only or to facts as well. It has nothing whatever to do with the appellate powers of the Governor in Council. The only Court is the Sadr Court; no other Court is created or mentioned. The argument that rule XXII does not confer strictly appellate jurisdiction but is only tantamount to saying that the decree of the Agent is to be final only if approved by Governor in Council is opposed to the plain wording of rule XXII. An appellate jurisdiction unless expressly conferred by Statute cannot be invoked.

(2) Civil Miscellaneous Petition No. 392 of 1886 (unreported).

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It is submitted that the rules are *ultra vires*. The fact that the question has not been raised before is no argument in support of the rules.

In Section 7 of the Scheduled Districts Act the words "in force" are against the appellant. "In force" means "validly or legally in force." Section 25 of the Indian Councils Act is next relied upon. The origin and history of that enactment is to be found in Ilbert's 'Government of India.' Newly added provinces not within the three long-established presidencies had to be governed, and were governed, in the absence of parliamentary legislation, by Lieutenant-Governors or Chief Commissioners under the Government of India. A body of rules which obtained in these provinces by being enforced by the executive government was validated by Section 25. Punjab is an instance. The tracts in Ganjam and Vizagapatam are not non-regulation provinces. They are neither "non-regulation" nor "provinces." A province is a tract of country having a central government of its own. These tracts were not subject to any other Government, but were exactly like the rest of the presidency. The machinery of justice was differently carried on; that was all. They were under the operation of all the regulations. By Section 2, only rules for administration of justice ceased to be in force in the affected tracts—, not ordinary laws of property, inheritance and other civil rights. Then again, they were subject to Act XXIV of 1839 and rules validly made thereunder. They were thus subject to laws and rules having the force of law. In the last resort justice was administered in the tracts, not by executive orders of Government, but in virtue of legislative provisions contained in Act XXIV of 1839. In no sense were they a non-regulation province. That is not the same as a scheduled district. Section 25 would only apply if the rule is invalid only by reason of offending against the Statute of 1833, Section 59, which deprived the Governor in Council [339] of legislative powers. Here the rules are not invalid only by reason of that. They are invalid as offending against a special Act which is not referred to or covered in Section 25. They purport to be made under that Act. The exercise of the power will not be good unless it is made under the Act, and if it purports to be made under a special power which the Act does not contain, it is bad. Decided cases show that for the interpretation of Section 15 of the High Courts Act the phrase "appellate jurisdiction" does not mean exclusive appellate jurisdiction. It is enough if the High Court has concurrent appellate jurisdiction. Here the High Court, as heir to the Sadr Court, has the general appellate jurisdiction, and the Governor in Council has, even if rule XXII were valid, only a special and limited appellate jurisdiction. The Agency Courts are covered by Section 15. The words are sufficiently comprehensive and the only condition precedent is that the High Court should have appellate jurisdiction over the Agent's Court. The maxim that special Acts are not affected by general provisions, relied upon by the other side, applies only where the enactments are of the same legislatures. Act XXIV of 1839 is that of a subordinate legislature and will be controlled by the provisions of an Act of Parliament. The argument as to there being two rule-making authorities merely begs the question, since under Section 15 the High Court alone can make rules now. The Agent's Court is not a Court of superior jurisdiction to the District's Court. Both are of equal jurisdiction. By jurisdiction, is meant ordinary jurisdiction, not special jurisdiction conferred by some Act or rules. Original civil jurisdiction is unlimited in both cases and is the same. That is the test. It might be contended that the District Court is superior since it has jurisdiction under the

Temple Act, the Land Acquisition Act, the Rent Act, the Trust Act, the Probate Act, and various other special Acts which the Agent's Court has not. 1900 MARCH 20.

The Acting Advocate-General in reply:—The appellate jurisdiction which the Governor in Council had under Regulation V of 1802, as constituting a Sadr Court from all mufassal cases in the regulation provinces, was not re-granted in respect of the Agency tracts by Act XXIV of 1839. The Governor in Council had ceased to be the Sadr Court. The appellate jurisdiction of the Sadr Court was taken away in respect of these tracts by Section 2. They were taken from the category of regulation and placed in [340] that of non-regulation provinces. The administration of justice was vested in the Collector and was to be exercised by the Collector as Agent to the Governor. The de-regulationizing meant, by itself, that all the branches of Government, including administration of justice, were in the executive government, and thus it was to be exercised by the Collector as Agent to the Governor in Council, the latter having full authority to control and direct the agents in civil proceedings. The appellate jurisdiction of the Sadr Court could be and was validly taken away by Act XXIV of 1839. The Sadr Court was the Company's Court and not in the position of the Supreme Court at the Presidency town. If Section 4 of Act XXIV of 1839 is ambiguous the construction placed by the rules immediately after the Act was passed may be considered of some little weight since their validity itself is questioned. (See *ex parte Weir* (1)). The rules were drafted by the Sadr Court when the intention and policy of the Act were known to them, and their interpretation of the Act is a species of contemporaneous exposition and the rules have been acted upon ever since. (See Hardcastle on the 'Construction of Statutory Law,' 2nd edition, page 171, and Sidgwick on 'Statute and Constitutional Law,' 2nd edition, page 213). As to Section 25 of the Indian Councils Act, it was argued that it does not apply to the tracts in question but only to provinces. The reference to the Governor in Council in that section clearly shows that the non-regulation province may be within the limits of this presidency. The phrase "non-regulation province" was a sort of administrative slang, and was used in that sense in Section 25. The word "province," there means "tract" or "district."

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JUDGMENT.

SIR CHARLES ARNOLD WHITE, C.J.—These are two appeals from orders of Boddam, J., dated respectively, September 30th, 1898, and September 12th, 1899. The first order was an order made by consent, transferring a suit which was pending in the Court of the Agent to the Governor, Vizagapatam district, to the District Court, Vizagapatam. The second order was an order dismissing an application to review that order.

The appeals purport to be brought under Section 15 of the Letters Patent. A preliminary objection has been taken that no appeal lies. The application for an order of transfer was made at [341] the suggestion of the Agent on the ground that as he had acted as the adviser of both parties and had formed decided views on the questions involved in the suit he felt he could not approach the case with an open mind. No question was raised, or considered, as to the jurisdiction of the High Court to make an order of transfer and the order was made by the consent of all parties. On April 17th, 1899, a review petition was presented to Boddam, J.,

(1) L.R. 6 Ch. App. 879.

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on behalf of the defendant in the suit asking that the order of transfer might be set aisde on the ground that it had been made without jurisdiction. The petition came on for hearing on September 12th, 1899. On the hearing of this petition the question of jurisdiction was argued. The learned Judge held that there was jurisdiction in the High Court to make the order of transfer and he accordingly dismissed the petition. In form, the order of Boddam, J., of September 12th, 1899, was an order dismissing a review petition. In substance it was an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of the Agent to the District Court. I am of opinion that both orders are "judgments" within the meaning of Section 15 of the Letters Patent, and that an appeal lies therefrom. My learned colleague takes the same view. The preliminary objection is overruled.

Section 25 of the Code of Civil Procedure has no application to the present case inasmuch as the Court from which the suit was transferred is in a scheduled district as defined in Act XIV of 1874.

Section 15 of the Indian High Courts Act, 1861, (24 and 25 Vict., cap. 104) provides as follows:—"Each of the High Courts established "under this Act shall have superintendence over all Courts which may "be subject to its appellate jurisdiction, and shall have power to call for "returns, and to direct the transfer of any suit or appeal from any such "Court to any other Court of equal or superior jurisdiction, and shall "have power to make and issue general rules for regulating the practice "and proceedings of such Courts, and also to prescribe forms for every pro- "ceeding in the said Courts for which it shall think necessary that a form "be provided and also for keeping all books, entries and accounts to be "kept by the officers and also to settle tables of fees to be allowed to the "sheriff, attorneys and all clerks and officers of Courts, and from time to "time to alter any such rule or form or table; and the rules so made, and the "forms so framed, and the tables so [342] settled shall be used and "observed in the said Courts, provided that such general rules and forms "and tables be not inconsistent with the provisions of any law in force, "and shall before they are issued have received the sanction in the Presi- "dency of Fort William of the Governor-General in Council and in "Madras or Bombay of the Governor in Council of the respective "Presidencies."

On the construction of this section Boddam, J., held that the Agency Court was subject to the appellate jurisdiction of the High Court on the grounds that any rules framed by Government which purported to take away, or restrict, the appellate jurisdiction of the High Court over Agency Courts were *ultra vires*, that a District Court was a Court of equal or superior jurisdiction to an Agency Court, that consequently all the requirements of the section had been satisfied and the order of transfer was valid.

It will be observed that there are two conditions which must exist before an order of transfer can be validly made under the section:—(1) The Court from which the suit is transferred must be subject to the appellate jurisdiction of the High Court. (2) The Court to which the suit is transferred must be a Court of equal or superior jurisdiction to the Court from which the transfer is made.

In the present case the suit in respect of which the order of transfer has been made is a suit of the character described in rule XXII of certain rules framed by Government in 1840 which purport to have been made

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under the powers conferred by Act XXIV of 1839 and which may be referred to as the Agency Rules.

Rule XXI provides, "From all decrees upon original suits passed by "the Agent (with the single exception specified in the next following "rule) an appeal shall lie to the Sadr Court to be disposed of as provided "in Section 6, Act XXIV of 1839; provided such appeal is preferred either "to the Agent or the Sadr Court within three months after the Agent's "decision; or after that period if sufficient cause can be assigned to the "Sadr Court for any delay which may have occurred by petition on the "prescribed stamp, and subject to the other rules required in other appeals "to the Sadr Court, as provided in the Madras Code and Acts applicable "to that Presidency."

[343] Rule XXII provides, "From decrees of the Agent in suits "wherein the landed possession of a zemindar, bissoye, or other feudal "hill chief may have formed the subject of litigation, an appeal will lie to "the Governor in Council alone, who may refer any such appeal for the "decision of the Sadr Court, provided that the decree of the latter Court "shall not be carried into execution without the permission of the Gover-"nor in Council."

In my opinion, for reasons which I will mention later, assuming these two rules to be valid so as to confer an appellate jurisdiction upon the Governor in Council, an Agency Court may be said to be subject to the appellate jurisdiction of the High Court within the meaning of Section 15 of the Act of 1861. The general question, however, as to whether the Agency Rules were made with or without authority has been raised before us and it is better that we should deal with it.

The first point to be considered is whether the body of rules in which the two rules above referred to are contained is within the powers conferred by Act XXIV of 1839—an Act whereby it was declared that the operation of the rules for the administration of civil and criminal justice, as well as for the collection of revenue should cease to have effect within the tract of country in which the Jeypur zemindari—the subject matter of this suit—is situate. At the time the Act came into operation, the tract of country in question was subject to the ordinary law of the land with regard to the administration of civil and criminal justice and the judicial powers at one time exercised by the Governor and by the members of Council had ceased to exist. Under the system introduced in 1802 by Regulation V of that year—"a Regulation for constituting a Sadr Adalat or Chief Court of Civil Judicature for trying appeals from the decisions of the Provincial Courts of Appeal"—the Sadr Adalat consisted of the Governor in Council (Section 2) and from its decisions in civil suits of the value of Rs. 45,000 and upwards an appeal lay to the Governor-General in Council (Sections 31-36). Under this system so far as the mufassal was concerned, the executive government was the highest appellate authority, not in its executive capacity but as a judicial tribunal. In 1806 the constitution of the Sadr Adalat was altered and new Judges were appointed (Regulation IV of 1806) and in the following year the Governor was declared to be no longer a Judge of the Court (Regulation III of 1807). In 1825, the Court was made to [344] consist of such number of Judges as the Governor in Council might deem requisite (Regulation III of 1825). It does not seem clear when the councillors ceased to be members of the Sadr Adalat and it would appear that a member of the executive council was Chief Judge of the

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Court down to 1862, but there can be no question that in 1839 when the Agency Courts were created by the Act of that year the executive government had been divested of the appellate jurisdiction which had at one time been vested in them as a judicial tribunal. Sections 2, 3 and 4 of Act XXIV of 1839 are as follows :—

Section 2. "And it is hereby enacted, that from and after the said 1st day of December 1839, the operation of the rules for the administration of civil and criminal justice, as well as those for the collection of the revenue, shall cease to have effect, except as hereinafter mentioned, within the undermentioned tracts of country at present included in the districts of Ganjam and Vizagapatam."

* * * *

Section 3. "And it is hereby enacted that the administration of civil and criminal justice (including the superintendence of the police) and the collection and superintendence of the revenues of every description, within the tracts of country specified in the foregoing section, which are now included in the district of Ganjam shall be vested in the Collector of Ganjam and within those which are now included in the district of Vizagapatam, in the Collector of Vizagapatam and shall be exercised by them respectively as Agents to the Governor of Fort Saint George."

Section 4. " And it is hereby enacted that it shall be competent to the Governor in Council of Fort Saint George by an order in Council, to prescribe such rules as he may deem proper for the guidance of such Agents, and of all the officers subordinate to their control and authority, and to determine to what extent the decision of the Agents in civil suits shall be final, and in what suits an appeal shall lie to the Sadr Adalat and to define the authority to be exercised by the Agents in criminal trials, and what cases he shall submit to the decision of the Fouzdary Adalat."

The Officiating Advocate-General contended that the effect of these sections was to take away from the Sadr Adalat the appellate jurisdiction which was vested in that tribunal at the time the Act came into operation and to restore to the Governor in Council the [345] appellate jurisdiction which, as regards the Governor, had been taken away in 1807, and as regards the Councillors appears to have been taken away in 1825. Section 3 of the Act provides that the administration of civil and criminal justice shall be vested in the Collectors and shall be exercised by them as Agents to the Governor. In my opinion the use of the word " Agent " in describing the officer in whom the administration of civil and criminal justice is, in express terms, vested by the section cannot be said to vest this jurisdiction in the Governor in Council. If the Legislature had intended to take away the appellate jurisdiction of the Sadr Adalat and to transfer this jurisdiction to the Governor in Council, they would, in my opinion, have done so directly and explicitly, and not by side wind. The effect of the section in my opinion is to vest the administration of civil and criminal justice in the Agents—not as agents to a principal, the principal being the Governor in Council, but as the officers in whom the administration is vested by the section. subject to the provision that the administration should be carried on in accordance with such rules as the Governor in Council might prescribe for the guidance of the Agents under the powers conferred by Section 4 of the Act.

The logical conclusion of the Officiating Advocate-General's argument is that the effect of the Act of 1839 was to take away the administration of criminal and civil justice from the established tribunals of the

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country and to vest it in the Governor in Council. Yet it could scarcely be argued that the effect of the Act is to authorise the Governor in Council to try suits which since 1839 have been tried by the Agent.

In support of the view that the word "Agent" is not used in Section 3 in its technical and legal sense, it may be pointed out that Section 3 of the Act of 1839 is a reproduction in a slightly condensed form of a corresponding Bengal enactment (Regulation XIV of 1833), and that the Bengal enactment speaks of the officer in whom the administration of civil and criminal jurisdiction is vested, as an officer "to be denominated" the Agent of the Governor.

In my opinion the wording of Section 4 of the Act of 1839 supports the view that it was not intended to revest appellate jurisdiction in the Governor in Council or to interfere with the existing jurisdiction of the Sadr Adalat Court except to the extent of authorizing the Governor in Council to determine to what [346] extent the decision of the Agents in civil suits should be final. It appears to me that all the section contemplated was an exhaustive division of civil suits into two classes, in one of which (by virtue of the determination of the Governor in Council) the decree of the Agent should be final, and in the other of which there should be an appeal to the existing appellate tribunal—the Sadr Adalat; not, as the Officiating Advocate-General has argued, a division into three classes—in one of which the decree of the Agent should be final, in the second of which an appeal should lie to the Governor, and in the third of which (by virtue of the determination of the Governor) an appeal should lie to the Sadr Adalat as a tribunal to which the appellate jurisdiction of the Governor restored (as the Officiating Advocate-General contended), by the Act of 1839, was for certain purposes to be delegated. So far as this section is concerned, the Officiating Advocate-General had to rely entirely on the variation in the phraseology adopted in the section—"to what extent" the decision of the Agents in civil suits shall be final and "in what suits" an appeal shall lie to the Sadr Adalat. It seems to me that for the purposes of this section the two phrases "to what extent" and "in what suits" mean the same thing. As I construe the Act of 1839 nothing more was conferred upon the Governor in Council than a power to frame rules of procedure for the guidance of the Agents, and a power to determine in what suits the decision of the Agent should be final and in what suits the decision should be appealable, and it was not the intention of the Legislature by the Act to confer upon the Governor in Council appellate jurisdiction in the ordinary sense of the term. No doubt the existence of this jurisdiction as created by rule XXII was assumed in an order of transfer which was made on the application of an Agent in original suit No 3 of 1892, and was taken for granted by this Court and by the Privy Council in the case of *Mahadevi* v *Vikrama*(1), but the point which has been raised in this appeal was not argued in that case.

It does not of course follow that because the Act does not itself confer appellate jurisdiction the Act might not confer powers under which the Government might assume such jurisdiction.

The next question, therefore, is, does the Act authorize the Governor, by rule or otherwise, to assume appellate jurisdiction. [347] In my opinion it does not. It is to be observed that the scope and purpose of the rules are limited to the guidance of the Agents and their Subordinate

(1) 14 M. 365.

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officers. The mode in which the Governor in Council is to determine the extent to which the decision of the Agents in civil suits shall be final, and in what suits an appeal shall lie to the Sadr Adalat, is left at large. Presumably the Legislature meant to draw some distinction between the manner in which the power to make rules of procedure was to be exercised and the manner in which the power to deal with existing rights of appeal was to be exercised. The distinction appears to have been recognised by the Legislature in the Scheduled Districts Act (XXIV of 1874), Section 6 of which enacts that rules for the guidance of officers in force at the commencement of that Act should continue to be in force. The Agency Rules which were issued shortly after the passing of the Act of 1839 and which, it would seem, were drafted by the Sadr Adalat at the request of the Governor in Council (see the letter of the Registrar of the Court to the Chief Secretary, dated April 7th, 1840) are described as rules framed by Government for the guidance of the Governor's Agents under Act XXIV of 1839. The words "for the guidance of the Governor's Agents" would appear to cover nothing more than matters of procedure. However, if the rules only dealt with matters with which in some form or other the Governor in Council under Section 4 of the Act was competent to deal, the fact that those matters purport to have been dealt with by rule instead of having been dealt with by executive order would present no difficulty. But on a careful consideration of the terms of Section 4 of the Act of 1839, read by the light of Section 3 of the same enactment, I can come to no other conclusion than that any rule or order which purported to transfer appellate jurisdiction vested in the Sadar Adalat at the time of the passing of the Act from that Court to the Governor in Council is beyond the powers conferred by the Act. Rule XXII purports to do this. Consequently Rule XXII so far as the Act of 1839 is concerned is, in my opinion, *ultra vires* and invalid.

The next question for consideration is whether the rule in question though, in my judgment, invalid for the reasons stated, so far as the Act of 1839 is concerned, has been validated by subsequent legislation. Section 7 of the Scheduled Districts Act, 1874, enacts that all rules prescribed by the Local Government for the guidance of officers appointed for the purposes of Section 6 of that [348] Act in force at the time of the passing of the Act shall continue to be in force. The words "in force" clearly mean "legally and validly in force" and the section cannot be construed as validating any rules which might be illegal and invalid.

In my opinion, however, the rules in question are valid and legal rules by virtue of the provisions of Section 25 of the Indian Councils Act, 1861, (24 and 25 Vict., cap 67). In the Court below the attention of the learned Judge was not called to this enactment. The Act recites that it is expedient that power should be given to the Governor in Council of the Presidencies of Fort St. George and Bombay to make laws and Regulations for the Government of the said Presidencies, and, as regards the Madras Presidency, the object of the Act is to restore to the Governor in Council the legislative authority which was taken away in 1833 by 3 and 4 Will. IV, cap. 85. Section 25 declares that no rule, law or regulation passed by the Governor in Council in respect of a non-regulation province shall be deemed invalid only by reason of the same not having been made in conformity with the provisions of the Acts 3 and 4 Will. IV, cap 85, and 16 and 17 Vict., cap. 95, or of any other Act of Parliament respecting the powers of the Governor in Council. The provisions of

16 and 17 Vict., cap. 95, have no application to this case. The material provision of the Act of Will. IV is the proviso to Section 59, which is to the effect that no Governor in Council shall have the power of making or suspending any regulations or laws in any case whatever unless in case of urgent necessity (the burden of the proof whereof shall be on the Governor-in Council) and then only until the decision of the Governor-General of India in Council shall be signified thereon. Section 25 of the Indian Councils Act, 1861, is not easy to construe, but I have come to the conclusion though not without some doubts, that the intention of the Legislature was to validate all rules passed by the Governor in Council in respect of a non-regulation province (and for the purpose of this section "province" clearly means tract or district) notwithstanding the fact that the legislative powers of the Governor in Council had been taken away in 1833 except in cases of urgency, unless it could be shown that such rules were inconsistent with the legislative powers possessed by the Governor in Council prior to 1833. It has not been suggested on behalf of the respondent that these rules could not have been made under the legislative powers possessed by the Governor or the Governor in [349] Council prior to 1833. If the section is capable of this construction—and, in my opinion, it is,—the rules in question were, if not validated retrospectively in 1861, at any rate valid at and from that date, and, as regards rules passed prior to 1861, are now of the same power and effect as if they had formed part of the Act of 1839. If the ordinary modern phraseology had been adopted and the rules had been described as made under a specified Act and all other powers and authorities enabling the Governor in that behalf, or if no Act had been specified as the authority under which the rules were made, their validity—assuming Section 25 of the Act of 1861 can be construed as indicated above—could not now be impeached. In my opinion if the rules can be shown to be valid under the general law, their validity is not affected by the fact that they purport to be made under a specified enactment which did not, in law, confer authority to make them.

In my judgment, for the reasons stated, the rules made in 1840 with their subsequent amendments with reference to Agency tracts are valid rules.

It was argued by the Officiating Advocate-General that, even assuming the rules to be invalid, the order of transfer which had been made was not authorized by Section 15 of the Indian High Courts Act, 1861. As I have already stated the two conditions which must exist are—first, that the Court from which the order of transfer is made should be subject to the appellate jurisdiction of the Court making the order; secondly, that the jurisdiction of the Court to which the suit is transferred should be equal or superior to that of the Court from which the transfer is made. As regards the first condition it seems to me that, in any view, an Agency Court may be said to be "subject to the appellate jurisdiction of the High Court." Even if the Act of 1839 can be construed as the Officiating Advocate-General has asked us to construe it, its effect is to make the Agency Court for certain purposes and to a limited extent subject to the appellate jurisdiction of the High Court and the rules provide for the manner in which this jurisdiction is to be exercised. The words of the section are "subject to the appellate jurisdiction"—not, subject to the exclusive appellate jurisdiction and it does not follow that, because there is appellate jurisdiction in the Governor in Council, an Agency Court is not "subject

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to the appellate jurisdiction" of the High Court within the meaning of the section. As regards the second condition, [350] however, I do not think that a District Court is a Court of equal or superior jurisdiction to an Agency Court within the meaning of these words as used in Section 15. So far as the two Courts are comparable, it would seem that the jurisdiction of the Agency Court is ampler than that of the District Court. Both Courts have unlimited original jurisdiction. The Agent's Court may hear a special appeal from an appellate decision of a divisional assistant which, subject to this right of special appeal, is final (see rule XVII). The District Court does not possess any corresponding jurisdiction. Under rule XIX the Agent has power of revision. The District Court has no such power. Rule XXVII gives to the Agent a compulsory power of reference to arbitration. The District Court has no such power. Again, under rule XX, all decrees passed by an Agent on appeal from decrees of his subordinates are final, subject to a power to the Sadr Court on special grounds, to require him to review his judgment, whilst the effect of rule X (2) and rule XVI is to give to the Agent in respect of appeals in suits exceeding Rs. 5,000 in value, an ampler jurisdiction than that of the District Court. On the other hand it has been urged that the Courts are, for all practical purposes, of equal jurisdiction, that the fact that in certain cases the decision of the Agent was final whilst that of the District Court was appealable was no ground for saying that the jurisdiction of the Agent's Court was larger than that of the District Court and that many of the rules upon which the argument that the Agent's Court was superior to the District Court was based were themselves *ultra vires*.

However, I do not think this question ought to be decided on a minute comparison of the respective jurisdictions of the two Courts. In my view it was not the intention of the Legislature to bring Agency Courts within the scope of Section 15 of the Indian High Courts Act, 1861. If the words "such Courts" are to be construed as including Agency Courts there would be two rule-making authorities, the Governor in Council under the Act of 1839 and the High Court subject to the sanction of the Governor in Council under the Act of 1861. Further, a power in the High Court to order a transfer from an Agency Court is quite inconsistent with the general policy of the Act of 1839, and if Parliament had intended to go back upon this Policy in the Act of 1861 they would have given effect to their intention in clear and unambiguous terms. [351] The Act of 1839 was passed to meet the special requirements of wild and backward districts for which the machinery of the Regulations was unsuitable. When Parliament passed the Act of 1861 they must be taken to have known of the special requirements of these non-regulation provinces and of the way in which the Indian Legislature had sought to meet their special requirements by the Act of 1839. It is obvious that the policy of the Act of 1839 might be almost entirely frustrated if there were a general power in the High Court to transfer suits from an Agency Court to itself.

In my opinion Section 15 of the Act of 1861 does not apply to suits instituted in an Agency Court.

I think the order of Boddam, J., transferring the suit in question was made without jurisdiction and should be set aside. As the order was in the first instance made by consent we make no order as to costs.

BENSON, J.—These are Letters Patent appeals against orders of Mr. Justice Boddam transferring original suit No. I of 1898 from the Court

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of the Governor's Agent Vizagapatam, to the District Court of Vizagapatam, and refusing to review that order when asked to do so on the ground that it was passed without jurisdiction. A preliminary objection was raised that no appeal under Section 15 of the Letters Patent lies against such orders, but I am of opinion that the orders were "judgments" within the meaning of that section as explained by Bittleston, J., in *DeSouza* v. *Coles*(1) and that, therefore, an appeal does lie in accordance with the principle of the decision of the Full Bench in *Chappan* v. *Moidin Kutti*(2). The order of the learned Judge transferring the case is impugned on the ground that the High Court has no jurisdiction to make such an order, and that the consent of the parties cannot cure the defect.

It is conceded that the High Court has no jurisdiction under Section 25, Code of Civil Procedure, to make the transfer as the Agent's Court is in a Scheduled District within the meaning of Section 1 of the Code.

The question is whether the High Court has jurisdiction to make the order by virtue of Section 15 of Act 24 and 25 Vict., cap. 104, the Act which established the High Court. It runs as [352] follows:—"Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for returns and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, etc."

The first matter that was argued is whether the Court of the Governor's Agent at Vizagapatam is "subject to the appellate jurisdiction of the High Court," within the meaning of this section. If it is not, it is conceded that the High Court has no power to transfer the suit.

In order to determine this matter it is important to bear in mind the circumstances under which the Agent's Court was established, as well as the terms of the Statute which created it.

Following the system already introduced into Bengal by Lord Cornwallis, Civil Courts of various grades—Native Commissioners, Zillah Courts and Provincial Courts—were established by a series of Regulations passed in 1802 by the Governor of Madras in Council. These Courts had no jurisdiction in the Presidency Town, but only in the mufussal, and the ultimate appeal from their decisions lay to the Sadr Adalat, which at that time consisted of the Governor in Council, with a further appeal from its decisions, in suits of a certain value, to the Governor-General in Council (Regulation V of 1802). In like manner, the Governor in Council was the highest Court of criminal jurisdiction under the name of the Fouzdary Adalat (Regulation VIII of 1802). In 1806 the Courts were constituted with the Governor as Chief Judge to exercise "occasional superintendence" and two additional Judges who were not members of Council (Regulation IV of 1806), and in the following year the Governor ceased to be the Chief Judge and a member of Council took his place (Regulations I and III of 1807). This arrangement continued until the amalgamation of the Sadr Courts with the Supreme Court in 1862. In 1818, the Governor-General having relinquished his right of hearing appeals from the Sadr Adalat at Madras, an appeal to the King in Council was permitted (Regulation VIII of 1818). Thus it will be seen that when civil and criminal Courts were first established in the mufussal under the

(1) 3 M.H.C.R. 384. (2) 22 M. 68.

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Regulations of 1802, the appellate jurisdiction was vested in the Governor and his Council—that is in the [353] executive government exercising its functions under the title of Sadr Courts. The connection of the executive government with the Sadr Courts was however soon withdrawn by subsequent regulations except as regards the Chief Judge, who continued to be a member of the Executive Council until 1862. The regulations were all enacted under the legislative powers conferred on the Governor of Madras in Council, but in 1833 these legislative powers were taken away by Section 59 of 3 and 4 Will. IV, cap. 85 (except in cases of urgent necessity) and all legislative power in India was vested in the Governor-General in Council to be exercised at a meeting of the Council, continued so to be vested until 1861 when local legislative Councils were re-established in Madras and Bombay under the Indian Councils Act (24 and 25 Vict., cap. 67).

Soon after the legislative power was transferred to the Governor-General in Council, he resolved to abolish the ordinary machinery of the administration—the civil and criminal Courts—in certain wild and backward parts of the country, and to substitute therefor a special administration, regarded as more suitable to the special conditions of those tracts. This was effected so far as the Madras Presidency was concerned by the passing of Act XXIV of 1839—the Act from which the Agent's Courts still derive their powers. It is styled "An Act for the administration of justice and collection of revenue in certain parts of the districts of Ganjam and Vizagapatam." The parts are specified, and they include the zemindari of Jeypore, part of which is the subject of the present suit. Section 2 enacts that in the tracts specified "the operation of the rules for the administration of civil and criminal justice, as well as those for the collection of revenue, shall cease to have effect, except as hereinafter mentioned" from the 1st December 1839. Having thus abolished the existing administration, it goes on to enact (Section 3) that "the administration of civil and criminal justice (including the superintendence of the police) and the collection and superintendence of the revenue of every description" shall be vested in the Collectors of the respective districts "and shall be exercised by them respectively as Agents to the Governor of Fort Saint George." Section 4 enacts that "it shall be competent to the Governor in Council of Fort Saint George, by an order in "Council, to prescribe such rules as he may deem proper for the guidance "of such Agents, and of all [354] the officers subordinate to their control "and authority, and to determine to what extent the decision of the "Agents in civil suits shall be final and in what suits an appeal shall "lie to the Sadr Adalat, and to define the authority to be exercised by the "Agents in criminal trials, and what cases he shall submit for the "decision of the Fouzdary Adalat."

Under the authority given in this section the Governor in Council prescribed a body of rules, often referred to as "the Agency Rules," which established, *inter alia*, various grades of civil Courts subordinate to the Agents and defined the powers of all the Courts including that of the Agents both as original and appellate Courts, and laid down rules for their procedure. These rules were, at the request of the Governor in Council, drafted by the Sadr Court (see the Court's letter, dated 7th April 1840, to Chief Secretary) and were framed generally on the lines of the rules made under the corresponding enactment passed for similar tracts in Bengal a couple of years previously, and were promulgated by Government in 1840. The existing rules are substantially the same as those of

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1840. They not only define the powers of the Agents and the Lower Courts, but also lay down the powers of the Sadr Court. A decree of the Agent on appeal from the Lower Courts is final (rule XX), but power is reserved to the Sadr Court to require him, for special reasons, to review his judgment. By rule XXI an appeal is allowed to the Sadr Court against all original decrees of an Agent save those specified in rule XXII. This rule XXII, as framed in 1840, provided that from decrees of the Agent in suits where in the landed property of a zemindar, bissoye, or other feudal hill chief may have formed the subject of litigation, "an appeal will lie to the Governor in Council alone." In 1860 the latter part of the rule, as it now stands, was added, *viz.*: "who may refer such appeal for the decision of the Sadr Court, provided," &c. Rule XXVIII requires the Agent to submit to the Sadr Court half-yearly statements of cases disposed of. Rule XXXI provides that petitions against the proceedings of the Agent shall, in the first instance, be submitted to the Government who will refer them when necessary to the Courts of Sadr or Fouzdary Adalat or to the Board of Revenue, as the case may be; and rule XXXII makes a similar provision for dealing with references by the Agent as to matters not dealt with by the rules. Thus it will be seen that under the rules no appeal lies to the Sadr Court, [355] in a large and important class of suits (including that out of which the present appeal arises), the appeal in such suits being reserved to the Governor in Council alone. It is, however, contended that the reservation of appellate power to the Governor in Council by rule XXII is *ultra vires* and of no force, because the Act of 1839 does not empower the Governor in Council to set up any appellate authority except the Sadr Court, nor does it expressly reserve appellate powers to the Governor in Council. The construction of Section 4 of the Statute is not free from difficulty, but if the whole scheme and history of the Statute be considered, I do not think that the rule will be found to be *ultra vires*. The purpose of the Act was to abolish the application of the complex regulations in certain wild and backward parts of the country and to substitute a simple system of administration more suited to the conditions of the people in those tracts. To this end all power was vested in the Collector to be "exercised by him as the Agent of the Governor in Council," by which I understand that he was to exercise his powers under the control, and in accordance with the directions, of the Governor in Council from time to time. It is difficult to see what other meaning can be attached to the concluding words of Section 3. If, then, the Governor in Council was intended to control and direct the Agent in the exercise of his powers, the Governor in Council possessed the power to allow an appeal to himself in any particular case or in any class of cases which he might specify. This power, which is given by implication under Section 3, is not, I think, limited by Section 4 which deals with the power of the Governor in Council to prescribe rules for the guidance of the Agent, and "to determine to what extent the decision of the Agent in civil suits shall be final and in what suits an appeal shall lie to the Sadr Court." Those words do not seem to me necessarily to carry with them the idea of the finality of the Agent's decision in all cases where no appeal is allowed to the Sadr Court. If the section ended with the word, "final," the power "to determine to what extent the decision of the Agent shall be final" might well be taken to include the power of saying that certain classes of decrees should not be final unless approved by the Governor in Council; and the addition of the words "and in what suits an appeal

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shall lie to the Sadr Adalat," though they at first sight suggest such appeal as the only alternative to finality, do not, I think, necessarily imply it. The words are not "in what suits" [356] the decision of the Agent shall be final, but in "what suits" an appeal shall lie to the Sadr Adalat, and to "what extent" in other suits, the Agent's decree shall be final. The words "to what extent" are very general, equivalent to "how far," and seem to be wide enough to cover limitation as to pecuniary value, or conditions as to confirmation by the Governor in Council, and the like, thus giving full effect to what appears to be the policy of the Act as shown in the preceding sections. The reservation of appellate power in certain civil suits to the Governor in Council would have seemed less strange then than now, since it was then but a few years since the Governor in Council was the Sadr Court for all purposes, and the system established by the Act of 1839 merely restored in certain exceptional tracts the conditions of administration which existed everywhere before the establishment of the regular Courts.

It is to be observed that, in the rules framed under the corresponding Bengal Act, a similar reservation of appellate power is made in favour of the Governor-General is Council. I think, too, that in construing the Act where it is ambiguous, we may properly bear in mind the construction which was placed upon it at the time by those who were authorised to make rules to give effect to its policy (see the remarks of James and Mellish, L., JJ., in *Ex parte Weir*(1). When we find that, as in the present case, the rules were framed by the highest judicial authority in the presidency, in communication with Government immediately after the passing of the Act and while its policy was still fresh in their minds, we may fairly attach some importance to those rules as a *contemporanea expositio*, though, of course, too much weight must not be given to such exposition when, as in this case, the validity of the rule is itself in question. (Hard-Castle, on the 'Construction of Statutory Law,' 2nd edition, page 171, Sidgwick on Statute and Constitutional Law, 2nd edition, page 213.) The reservation of appellate power to the Governor in Council under rule XXII has been in existence now for sixty years, and in no case, so far as I am aware, has its validity been questioned in the Courts. Its validity was tacitly assumed and acted upon by the High Court and the Privy Council in the case of *Mahadevi* v. *Vikrama* (2) and it may be that many properties are now held under titles [357] dependent on its validity. In these circumstances I should be unwilling to hold that it is *ultra vires* unless it is clearly so. For the reasons I have already given I do not think it by any means clear that it is *ultra vires*.

If, however, it is *ultra vires*, I am of opinion that it is rendered valid by Section 25 of the Indian Councils Act (24 and 25 Vict., cap. 67). I have already noticed that prior to 1833 the Governor of Madras in Council had power to make regulations, and did make regulations, establishing Courts of justice and regulating their powers and procedure in the mufussal districts of Madras. In 1833 that power was taken away (save in cases of urgency) and was vested in the Governor-General in Council, with the proviso that it was to be exercised only at a meeting of the Council (3 and 4 Will. IV, cap. 85).

Doubts were entertained as to the validity of certain rules, laws and regulations made for certain "non-regulation" territories or provinces by

(1) L R. 6 Ch. App. 879. (2) 14 M. 365.

the Governor-General in Council by reason of their not having been made at a meeting of the Council, as required by 3 and 4 Will. IV, cap. 85, and doubts were also entertained as to the validity of certain rules, laws and regulations made by the Governor in Council of Madras and Bombay for the "non-regulation" territories under their jurisdiction after their legislative powers had been abolished, except in cases of urgency, by the said Statute. Section 25 of the Indian Councils Act was enacted to remove these doubts, and its effect appears to be to give the same validity to laws, rules and regulations made by the Governor in Council for non-regulation territories in Madras between the passing of 3 and 4 Will. IV, cap. 85 and 24 and 25 Vict., cap. 67 as they would have possessed if 3 and 4 Will. IV, cap. 85, had never been passed. In other words, it validates in these wild territories any rule made between 1833 and 1861 provided it was a rule which could have been legally enacted by the Governor in Council under the powers possessed by him prior to 1833, but it does not validate any rule which could not have been then legally enacted. It is, perhaps, hardly necessary to add that rule XXII was such as might legally have been enacted by the Governor in Council prior to 1833, and the non-regulation territories referred to in Section 25, so far as Madras is concerned, were the territories in Ganjam and Vizagapatam, in which the operation of the regulations had been abolished by Act XXV of 1839.

[358] Rule XXII, then, not being invalid, we find that the Sadr Court had no appellate jurisdiction in the important class of suits referred to in that rule, and the appellate jurisdiction which it possessed in other suits was the creature of the rules, framed by Government under the Act, was limited by those rules, and might at any time be curtailed, or even abolished altogether, by an alteration of the rules. Under the rules too, the Sadr Court possessed no power to transfer a suit from any of the Agency Courts either to another Agency Court or elsewhere.

That being the position deliberately assigned to the Sadr Court by special legislation passed for tracts of a special character, it may, I think, well be doubted whether the Legislature intended that that position should be affected by the general terms of Section 15 of the High Courts Act (24 and 25 Vict., cap. 104) already quoted:—"Each of the High "Courts established under this Act shall have superintendence over "all Courts which may be subject to its appellate jurisdiction and "shall have power to call for returns and to direct the transfer of any "suit or appeal from any such Court to any other Court of equal or "superior jurisdiction and shall have power to make and issue general "rules for regulating the practice and proceedings of such Courts," etc. The main purpose of the Statute in Madras was to merge the then existing Supreme Court (with original jurisdiction in the town of Madras) and the Courts of Sadr Adalat and Fouzdary Adalat (with appellate jurisdiction over the mufussal) into a single High Court of Judicature, and the jurisdictions of the old Courts were continued to the new Court. It is a well-established rule of construction that general words in a later Statute are not to be taken as altering or revoking by implication, and in the absence of a clearly expressed intention the special provisions of an earlier Statute, directed towards a special object, where the general words may otherwise have their proper application. "Having already given its attention to a particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent

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general enactment, unless that intention is manifested in explicit language, or there is something which shows that the attention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely [359] that an exception was intended as regards the special Act. The general Statute is read as silently excluding from its operation the cases which have been provided for by the special one," (Maxwell on the 'Interpretation of Statutes,' 3rd edition, page 243 and the cases there quoted.) Thus, for example, where an Act took away the right of bringing an action respecting certain disputes, which were referred to the summary adjudication of the justices, it was held that the subsequently established County Courts acquired no jurisdiction to try such cases, under the general authority to try "all pleas" (*Ex parte Payne* (1)). In the Agency tracts of Ganjam and Vizagapatam the Legislature, having given its special attention to the matter, deliberately abolished the jurisdiction of the ordinary Courts, including that of the Sadr Court, by special legislation, and set up special Courts in their place. No power was reserved to the Sadr Court, save such as might be given by the Governor in Council by rules framed under the Act. Neither in the Act, nor in the rules under the Act, has the Sadr Court any power to transfer suits from the Agent's Courts. There is nothing in Section 15, or in any other section, of the High Courts Act, to indicate that it was the intention of the Legislature to interfere by that Act with the special system established under Act XXIV of 1839. The High Courts Act was passed for another purpose and there is full scope for the application of Section 15 without applying its general terms to revoke or override the policy of the special Act. If the High Court has the power to transfer suits from the Agency Courts to the ordinary Civil Courts, and should exercise the power freely, the whole policy of Act XXIV of 1839 might be set at naught, since the effect would be to subject such suits to the jurisdiction of the ordinary Courts, and to the complex procedure and rights of appeal which it was the policy of that Act to set aside. It is true that the High Court is not likely to exercise the power unwisely, but the history of the conflict between the Supreme Courts and the Executive towards the close of the last century shows that a complete divergence of policy between the two authorities is not impossible, and might lead the High Court to exercise its powers so as to nullify the policy of the Act. That the general policy of the Act remains unchanged appears to be clear from its being retained in force, and from the subsequent [360] enactment of the Scheduled Districts Act (XIV of 1874) and the exclusion of the operation of the Civil Procedure Code from those districts.

For all these reasons I am of opinion that Section 15 must be read as silently excluding from its operation the special Courts established by Act XXIV of 1839, and that it does not authorize the High Court to transfer suits away from the Agency Courts. It may be added that the previous decisions of this Court throw but little light on the matter. In *Agent to the Governor, Vizagapatam* v. *Srinivasa Bhakshipatrudu* (2) a single Judge transferred a suit to the District Court on the *ex parte* application of the Agent. In *Niladewi Patta Mahadevigar* v. *Appa Rao Pantulu* (3) a Bench of two Judges refused to make a transfer on the ground

(1) 5 D. & L. 679.
(2) Civil Miscellaneous Petition No. 971 of 1892 (unreported).
(3) Civil Miscellaneous Petition No. 392 of 1886 (unreported).

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that under the rules they had no power to do so—but neither the validity of the rules nor the effect of Section 15 of the High Courts Act appears to have been argued before the Judges.

Lastly, even if Section 15 is applicable to Agency Courts it is doubtful whether a District Court can be said to be a Court "of equal or superior jurisdiction" to that of an Agent under Act XXIV of 1839 so as to justify such a transfer as that under consideration. The jurisdictions of the two Courts are, in many respects, dissimilar, so that it is difficult to compare them as regards equality, but if a comparison is made, the Agents' Courts would seem to be superior, since they possess superior powers in regard to appeals over Rs. 5,000 in value [rules XVI and X (2)], and special appeals (rule XVII), and revision of Lower Courts (rule XIX), and reference to arbitration without consent of parties (rule XXVII), and in regard to the finality of their decrees (rule XX).

In the result I am of opinion that the orders of Mr. Justice Boddam must be reversed and the appeals must be allowed, on the ground that Section 15 of the High Courts Act does not give the High Court jurisdiction to make the transfer, nor does the consent of parties cure the defect of jurisdiction. As the first order of transfer was made by consent, I would make no order as to costs.

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[361] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Boddam.

RAMASWAMI SASTRULU (*Defendant No.* 13), *Appellant v.* KAMESWARAMMA (*Plaintiff*), *Respondent.** [15th and 25th August, 1899 and 19th February, 1900.]

Civil Procedure Code—Act XIV of 1882, Section 244—"Parties to the suit"—Subsequent suit by a defendant who had been exonerated in a former suit—Maintainability of such suit.

A family consisted of plaintiff's father, first defendant's father, and second defendant's grand-father. Plaintiff's brother died, leaving a widow. Plaintiff's father then died and also left a widow (plaintiff's mother), him surviving. The brother's widow brought a suit for maintenance against the representatives of the first and second defendants' branches of the family, plaintiff's mother being joined as third defendant. A decree was passed against the two first-mentioned defendants, but plaintiff's mother was exonerated on the ground that, being a female, she was not liable. In execution of the decree, certain lands were brought to sale and purchased by the brother's widow, who transferred them to another person. At the death of plaintiff's mother, which occurred subsequently, the said lands would have vested in the plaintiff, who now brought this suit claiming that the sales referred to were not binding on her (plaintiff) inasmuch as her mother had not been a party to the decree under which they had taken place:

Held, that where a party defendant in a suit is exonerated from such suit, the suit being dismissed against him and a decree passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold,

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* Second Appeal, No. 814 of 1898, against the decree of J. H. Munro, Acting District Judge of Kistna, in appeal suit No. 511 of 1896, affirming the decree of N. Swaminadha Ayyar, Subordinate Judge of Kistna, in original suit No. 41 of 1894.

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the latter is not entitled to maintain a suit for recovery of possession of the property, and the question of his claim to, and to recover possession of, the property is a question falling within Section 244 of the Code of Civil Procedure, so as to debar him from maintaining such suit.

Gadicherla China Seetayya v. *Gadicherla Seetayya*, 21 M. 45, explained.

[**Diss.**, 23 A. 346 (351); **F.**, 14 M.L.J 137; **R.**, 6 Bom. L.R. 697; 15 C.P.L R. 106; 17 Ind. Cas. 126; 17 M.L.J. 416; 18 M.L.J. 32-N; **Disappr.**, 30 C. 134=6 C.W.N. 10; **D.**, 16 M.L.J. 433.]

SUIT for possession of land with mesne profits. A family consisted of plaintiff's father, first defendant's father and second defendant's grandfather. Plaintiff's brother had pre-deceased her **[362]** (plaintiff's) father, leaving a widow, defendant No. 12, him surviving. Plaintiff's father then died, her (plaintiff's) mother having possession of his share of the property, as widow. Suit No. 337 of 1875 for maintenance was brought by defendant No. 12 (widow of plaintiff's brother) against the representatives of the first and second defendants' branches of the family, plaintiff's mother being also joined as third defendant. A decree was passed against the two first mentioned defendants, but plaintiff's mother was exonerated on the ground that, being a female, she was not liable. In execution of the said decree the lands now sued for were brought to sale and bought by defendant No. 12, who transferred them to defendant No. 13. The widow, plaintiff's mother, had died in 1884, at which date the right to the property, according to plaintiff, became vested in her; and she claimed that the sales under which defendant No. 13 had acquired the lands were not binding on her inasmuch as her mother had not been a party to the decree under which they had taken place. The Subordinate Judge upheld this view, and decreed for possession to be given to plaintiff, as prayed. Defendant No. 13 appealed to the District Judge who affirmed the decree of the Lower Court.

Defendant No. 13 preferred this second appeal.

The case came on for hearing before O'FARRELL and MICHELL, JJ., when their Lordships made the following

ORDER OF REFERENCE TO FULL BENCH.

MICHELL, J.—It is contended for the appellant (thirteenth defendant) that the plaintiff was precluded from bringing this suit for recovery of possession of the properties in question because she was bound to bring a suit to set aside the sale of the properties effected in execution of the decree obtained by twelfth defendant in suit No. 337 of 1875 and not having brought such a suit within one year from the date of confirmation of that sale, such suit is barred under Article 12 of Schedule II of Act XV of 1877. That suit, as appears from the judgment therein (Exhibit P), was a suit by a widow for maintenance against three persons, of whom the first and second defendants were male members of the family to which the late husband of the plaintiff therein (present twelfth defendant) and the father of the present plaintiff belonged, and the third defendant therein was present plaintiff's mother, through whom present plaintiff claims the properties now in question. All the defendants in that suit were *ex parte* and judgment was given against the first **[363]** and second defendants therein only, the third defendant (present plaintiff's mother) being exonerated from the suit on the ground that being a female she was not liable. But the appellant's vakil relies on *Suryanna* v. *Durgi* (1). That case, however, was dissented from in the Full Bench

(1) 7 M. 258.

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judgment in *Kadar Hussain* v. *Hussain Saheb* (1). In both those cases the plaintiff in the suit for possession of the property of which he had been dispossessed in consequence of its having been sold in execution of the decree in the former suit, appears not to have been a party to such former suit, whereas in the present case the person through whom the plaintiff claims was a party to the former suit But the reasoning of the decision in *Kadar Hussain* v. *Hussain Saheb* (1) appears to me to render that decision equally applicable to a case, such as the present, in which the plaintiff, though a party to the former suit, was exonerated from that suit, and was not affected, in regard to her title to the property in question, by the decree in such former suit, and proceedings taken in execution thereof. In the present case, moreover, the decree in the former suit was only a personal decree, whereas in those cases it was a decree against immoveable property. In my opinion, therefore, this contention fails.

It is also contended that plaintiff's mother's only remedy was by application in the matter of the former suit (No. 337 of 1875) and that this suit is barred by the provisions of Section 244 of the Code. *Kuriyali* v. *Mayan* (2) is relied on. But in that case the plaintiff had been brought in as the representative, on the record in the former suit, of the deceased defendant therein, against whom the decree in such former suit had been passed, whereas in the present case the person through whom plaintiff claims was exonerated in the former suit, which was dismissed as against her. In *Vibhudhapriya Thirthasami* v. *Vidianidhi Thirthasami* (3), however, on which also the appellant's vakil relies, it was held that a defendant against whom no decree had been passed, the suit having been dismissed against him, was entitled to take proceedings under Section 244 if his rights were invaded in execution proceedings taken against other defendants against whom the decree had been passed. This decision appears to me to be in conflict with the **[364]** decision in *Nagamuthu* v. *Savarimuthu* (4), and, with great respect for the opinion of the learned Judges in the former case to the contrary, I am unable to see that the two cases are distinguishable. The decision in *Gadicherla China Seetayya* v. *Gadicherla Seetayya* (5) is in conformity with that in *Nagamuthu* v. *Savarimuthu* (4).

I think, therefore, that the question, as to which there is, as it appears to me, this conflict of decisions, should be referred to a Full Bench.

O'FARRELL, J.—I concur. As to the first point, whatever may be the class of cases to which Article 12, Schedule II, Act XV of 1877, applies, we are bound by the Full Bench decision in *Kadar Hussain* v. *Hussain Saheb* (1) to say that cases like the present, where dispossession is the cause of action, do not fall within its scope.

On the second point, whether the present suit is barred by the provisions of Section 244 (*c*), Civil Procedure Code, I agree that there should be a reference to a Full Bench. The decision in *Vibhudhapriya Thirthasami* v. *Vidianidhi Thirthasami* (3) appears to me to be directly in conflict, not only with the cases therein attempted to be distinguished, but with *Gadicherla China Seetayya* v. *Gadicherla Seetayya* (5), which is not referred to. I would follow the decision last named. It appears to me that Section 244 is only intended to apply to parties to the suit and their representatives who fill the position at the time the question arises for determi-

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(1) 20 M. 118. (2) 7 M. 255. (3) 22 M. 131.
(4) 15 M. 226. (5) 21 M. 45.

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nation. It has therefore no reference to the case of parties who have been exonerated from the suit before decree and who are in the same position as if they had never been parties at all. As the cases are in conflict, however, I concur in a reference to a Full Bench.

We accordingly refer to a Full Bench the following question :— When a party defendant in a suit is exonerated from such suit, the suit being dismissed as against him, and a decree is passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, is the latter entitled to maintain a suit for recovery of possession of the property, or is [365] the question of his claim to, and to recovery of, possession of the property a question falling within Section 244 of the Code of Civil Procedure, 1882, so as to debar him from maintaining such suit.

The case next came on for hearing before the Full Bench constituted as above.

V. Krishnaswami Ayyar, for appellant, referred to *Vibhudapriya Thirthasami* v. *Vidianidhi Thirthasami* (1), *Gadicherla China Seetayya* v. *Gadicherla Seetayya* (2), *Nagamuthu* v. *Savarimuthu* (3), *Sankaravadivammal* v. *Kumarasamya* (4), *Muttia* v. *Appasami* (5), *Gowri* v. *Vigneshvar* (6) and *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (7). He contended that plaintiff should have set aside the sales complained of by suit; that inasmuch as she had not done so the present suit was barred; and that the matter was one that could only be dealt with under Section 244 of the Code of Civil Procedure.

Sundara Ayyar and *Nagabhushanam*, for respondent, submitted that there was no decree to be executed, that Section 244 of the Code of Civil Procedure did not apply, and that the cause of action was a new one. They referred to *Mukarrab Husain* v. *Hurmat-unnissa* (8), *Krishnabhupati Devu* v. *Vikrama Devu* (9), *Vibhudapriya Thirthasami* v. *Vidianidhi Thirthasami* (1), *Sanwal Das* v. *Bismillah Begam* (10), *Kameshwar Pershad* v. *Run Bahadur Singh* (11), *Gour Kishore Chowdhry* v. *Mahomed Hassim Chowdhry* (12), and *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (7). The decision in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (7) was considered in *Mammod* v. *Locke* (13). *Gowri* v. *Vigneshvar* (6) was opposed to the other decisions and *Nagamuthu* v. *Savarimuthu* (3) and *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (7) supported their contention, as did *Kameshwar Pershad* v. *Run Bahadur Singh* (11). In *Sankaravadivammal* v. *Kumarasamya* (4), there was a decree against plaintiff's property; and in that sense it was passed against her. The words "parties to the suit" must be understood with reference to those [366] that follow. A defendant who has been dismissed from a suit is no longer a party to the suit within the meaning of the section. The decree, if any, in such suit cannot be executed as against such a defendant. The words "parties to the suit" must mean "judgment-creditors and judgment-debtors." The fact that the Code made provision for cases relating to third parties in Sections 335 and 280 showed that such cases did not fall within the scope of Section 244.

(1) 22 M. 131. (2) 21 M. 45. (3) 15 M. 226.
(4) 8 M. 473. (5) 13 M. 504. (6) 17 B. 49.
(7) 19 I.A. 166 = 19 C. 683. (8) 18 A. 52. (9) 18 M. 13 (17).
(10) 19 A. 480. (11) 12 C. 458. (12) 10 W.R. C.R., 191.
(13) 20 M. 487.

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JUDGMENT OF THE FULL BENCH.

We are of opinion that when a party defendant in a suit is exonerated from such suit—the suit being dismissed against him and a decree passed against a co-defendant in the suit—and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, the latter is not entitled to maintain a suit for recovery of possession of the property, and that the question of his claim to, and to recover possession of, the property is a question falling within Section 244, Civil Procedure Code of 1882, so as to debar him from maintaining such suit.

It was contended before us that a defendant in whose favour the suit is dismissed is not a party to the suit within the meaning of the section, because there is no decree which can be executed against him and that the words "parties to the suit" in the section must be limited to the judgment-creditors and judgment-debtors, because they are the only persons between whom questions could arise "relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." We do not think this is a correct view of the section.

We do not think that the words "parties to the suit" can be limited in the way suggested. The Privy Council have more than once pointed out that a narrow construction should not be placed on the words of this section—the object of the enactment being to check needless litigation.

The view we hold is in accordance with the decision in *Sankaravadivammal* v. *Kumarasamya* (1) (which was apparently not brought to the attention of the Judges making the reference), and which has been approved in *Gowri* v. *Vigneshvar* (2), and the same view of the law was expressed in *Vibhudhapriya Thirthasami* v. *Vidianidhi Thirthasami* (3).

[367] The decision in *Gadicherla China Seetayya* v. *Gadicherla Seetayya* (4), which was cited as being in conflict with this view, is not so in reality. The report of the case is not clear, but on reference to the records it appears that the names of the defendants exonerated were in fact removed from the suit and they had thereby ceased to be parties to the suit.

If the decision in *Nagamuthu* v. *Savarimuthu* (5) can be held to support the respondent's contention—a point which is by no means clear—we are unable to agree with it for the reasons above given.

The case then coming on for final hearing after the receipt of the above Full Bench decision, the Court (SUBRAHMANIA AYYAR and DAVIES, JJ.) delivered the following final

JUDGMENT.*

According to the Full Bench ruling, this suit will be dismissed with costs throughout with reference to item 5 in plaint Schedule A, and in regard to items 6 and 7 in that schedule the appeal will be dismissed with proportionate costs.

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* [Final judgment of the Divisional Bench.—ED.]

(1) 8 M. 473. (2) 17 B. 49. (3) 22 M. 131.
(4) 21 M. 45. (5) 15 M. 226.

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APPELLATE CIVIL.

23 M. 367 = 9 M.L.J. 263.

23 M. 367=9 M.L.J. 263.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice) and Mr. Justice O'Farrell.

GOURACHANDRA PATNAIKUDU (*Defendant*), *Appellant v.* VIKRAMA DEO (*Plaintiff*), *Respondent.**
[31st August and 1st and 6th September, 1899.]

Ganjam and Vizagapatam Agency Courts Act—Act XXIV of 1839—*Agency Rules passed under the Act—Agent's Court at Vizagapatam—Court of lowest grade—Jurisdiction.*

The Agent to the Governor at Vizagapatam has jurisdiction over all suits of a civil nature arising in the Agency.

The rule regarding the institution of suits of a lesser pecuniary value than Rs. 5,000 in the Divisional Assistant's Court is, like the analogous rule contained in Section 15 of the Code of Civil Procedure, one of procedure and not of jurisdiction. *Velayudam* v. *Arunachalam* (I.L.R., 13 Mad. 273), considered.

[R., 11 Ind. Cas. 742=U.B.R. (1911), 1st Qr., 82; 2 L.B.R. 192 (193).]

[368] SUIT instituted in the Court of the Agent to the Governor at Vizagapatam for the recovery of a village with mesne profits. The Acting Agent, after finding in favour of the plaintiff and ordering the defendant to restore it, said:—"It should be mentioned that defendant objects to the jurisdiction of this Court, on the ground that under the agency rules of civil justice all suits, except (i) those cognizable by District Munsifs, and (ii) those valued at Rs. 5,000 and over, shall be instituted in the Court of a Divisional Assistant. This suit was instituted in the Agent's Court. The objection was not taken by defendant until the last hearing. It is stated by plaintiff that he brought this question of jurisdiction to the notice of the Court when filing the suit and that the question was reserved for consideration. The Court has no recollection whatever of the fact but is prepared to accept the statement. I cannot however consider that the rule alluded to is exclusive and prohibitory. I think that common sense indicates that the greater jurisdiction includes the less and that this Court has jurisdiction to try this suit."

Defendant appealed on the grounds, among others, that the Lower Court had no jurisdiction to try the suit, and that its ruling that the greater jurisdiction included the less was opposed to law and to the provisions of the Agency Rules framed under Act XXIV of 1839.

Ramachandra Rao Saheb and *Nagabhushanam*, for appellant.—The value of this suit is Rs. 1,820. According to the Agency Rules framed under Act XXIV of 1839, suits ranging in value between Rs. 500 and Rs. 5,000 have to be instituted in the Court of the Divisional Assistant. See Rule X, Clauses 1 and 2 which are as follows:—Clause 1:—"With the exception, firstly, of the particular suits described in the preceding rule, which are cognizable by the Munsifs, and, secondly, of the suits described in Clauses 2 and 3 of the present rule, all suits shall be instituted in the Court of the Divisional Assistant. Provided always that the Divisional Assistant may transfer any civil suit of a value not exceeding Rs. 500 instituted before him to any Munsif within his division for trial."

* Appeal No. 209 of 1898 against the decree of W. O. Horne, Acting Agent to the Governor at Vizagapatam, in original suit No. 6 of 1897.

Clause 2 :—"Suits exceeding Rs. 5,000 in value shall be instituted in the Court of the Agent, who may, however, when he thinks proper, refer any such suit for the decision of the Divisional Assistant." Clause 5 of the same rule also provides :—"The Civil Courts of each grade shall receive, try, and determine suits [369] hereby declared to be cognisable by those Courts, if, in the case of suits for land or other immoveable property, such land or property shall be situate within the limits to which their respective jurisdictions may extend, and in all other cases, if the cause of action shall have arisen or the defendant at the time of commencement of the suit shall dwell or personally work for gain within such limits."

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The present suit should accordingly have been instituted in the Court of the Divisional Assistant. It was, however, instituted in the Court of the Agent, and it is submitted that the Agent had no jurisdiction to try the suit. The view taken by the Agent that the greater jurisdiction includes the less is opposed to the Agency Rules. In the Agency Rules there is no provision corresponding to the first Clause of Section 12 of the Madras Civil Courts Act (III of 1873). That section confers upon District Judges and Subordinate Judges jurisdiction to try all original suits and proceedings of a civil nature. In virtue of that section, there is no inherent want of jurisdiction in a District Judge or a Subordinate Judge to try a suit cognizable by a District Munsif. But the absence of any corresponding provision in the Agency Rules would seem to indicate that the Agent cannot exercise jurisdiction over suits cognizable by Courts subordinate to his. The decision in *Velayudam* v. *Arunachalam* (1) is exactly in point. That decision was passed in spite of Section 12 of the Civil Courts Act. *A fortiori* it follows that in this case the Agent acted without jurisdiction. [In the course of the argument *Aukhil Chunder Sen Roy* v. *Mohiny Mohun Dass* (2), *Shri Sidheshwar Pandit* v. *Shri Harihar Pandit* (3), and *Bibi Ladli Begam* v. *Bibi Raje Rabio* (4) were also cited.]

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and *Tiruvenkatachariar*, for respondent.—The Agent had jurisdiction to try the suit. No doubt, according to the Agency Rules, this suit should strictly speaking have been filed in the Court of the Divisional Assistant. But it cannot be said that there was any inherent want of jurisdiction in the Agent to try the suit. Rule XIX empowers the Agent to call to his own file any suit pending in the Court of his subordinates, and when he does call for a suit he can presumably try it. The object of the Agency Rules seems to [370] be to assimilate the jurisdiction of Agents and Divisional Assistants to that of District Judges and Subordinate Judges in the districts to which the Madras Civil Courts Act applies. Moreover, there is no provision in the Agency Rules directing each suit to be filed in the Court of the lowest grade competent to try it. Even such a rule contained in Section 15 of the Code of Civil Procedure has been held to be a rule of procedure and not of jurisdiction. *Midhi Lal* v. *Mazhar Husain* (5), *Matra Mondal* v. *Hori Mohun Mullick* (6), *Krishnasami* v. *Kanakasabai* (7) and *Augustine* v. *Medlycott* (8).

JUDGMENT.

The learned vakil for the appellant does not desire to argue the appeal on the merits, and the only point which he presses is the question of jurisdiction. No doubt the Agency Rules provide that suits exceeding Rs. 5,000

(1) 13 M. 273. (2) 5 C. 489. (3) 12 B. 155. (4) 13 B. 650.
(5) 7 A. 230. (6) 17 C. 155. (7) 14 M. 183. (8) 15 M. 241.

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in value shall be instituted in the Court of the Agent, and therefore by implication that suits below that value and not cognizable by a Munsif shall be instituted in the Court of the Divisional Assistant. There is, however, nothing equivalent to the positive direction in Section 15 of the Civil Procedure Code that every suit shall be instituted in the Court of the lowest grade, competent to try it. Even that provision has been held to be a rule of procedure and not of jurisdiction; a direction to the suitor and not an absolute rule binding the Court (see *Midhi Lal* v. *Mazhar Husain* (1), *Matra Mondal* v. *Hori Mohun Mullick* (2), *Krishnasami* v. *Kanakasabai* (3), *Augustine* v. *Medlycott* (4). We think these decisions are sound, and we doubt the correctness of the decision in *Velayudam* v. *Arunachala* (5). We do not see why the same principles should not be applied in the case of the Agent and his Divisional Assistant whose respective positions are analogous to those of District and Subordinate Judges. The Agent has power under Rule XIX to remove to his own or any other Court in the jurisdiction any suit which may be pending in a Lower Court; from which it would appear that his jurisdiction extended over all suits of whatever value within the agency. Although, therefore, there is no provision in the Agency Rules equivalent to Section 12 of the Civil Courts Act (III of 1873) which expressly provides that the jurisdiction of a District Judge extends to all original suits and proceedings of a civil nature, we think it is fairly inferrible from the wording of the **[371]** rules that the Agent has jurisdiction over all suits of a civil nature arising in the agency, and that the rule regarding the institution of suits of a lesser pecuniary value than Rs. 5,000 in the Divisional Assistant's Court is, like the analogous rule contained in Section 15, Civil Procedure Code, one of procedure and not of jurisdiction. We must not however be understood as implying that the rule may be disregarded with impunity. Recourse to the Agent' s Court rather than that of the Divisional Assistant throws upon the unsuccessful party the burden of an appeal to the High Court or the Governor in Council, and may be a good ground for refusing the costs of a successful respondent who has unnecessarily sued in the higher Court. In the present case, however, we understand there were good reasons why the suit should have been heard by the Agent, and the appellant does not contest the correctness of the decision on the merits. We, therefore, dismiss the appeal with costs.

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(1) 7 A. 230. (2) 17 C. 155. (3) 14 M. 183.
(4) 15 M. 241. (5) 13 M. 273.

23 M. 371 (F.B.) = 10 M.L.J. 123.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Boddam.

MASTHAN SAHIB (*Defendant*), *Appellant v.* ASSAN BIVI AMMAL (*Plaintiff*), *Respondent.**
[20th October, 1899 and 30th January and 1st March, 1900.]

Muhammadan Law—Suit for dower—Dower prompt or deferred—Presumption.

According to Muhammadan Law, dower, being consideration for marriage, is, unless payment of the whole or part of it is expressly postponed, presumed to be prompt and exigible on demand.

Tadiya v. *Hasanebiyari* (6 M.H.C.R. 9), followed.

[R., 33 A. 291 (294) = 8 A.L J. 27 = 9 Ind. Cas. 200; 35 B. 386 (388) = 13 Bom. L.R. 511 = 11 Ind. Cas. 558.]

SUIT by a Muhammadan wife against her husband for dower. Plaintiff contended that her husband had agreed to pay the dower on demand, which defendant denied. The first issue framed by the District Munsif was "whether the plaintiff's dower was exigible [372] on demand or not." He found that no express agreement on defendant's part to pay the dower on demand had been made out, and (following *Tadiya* v. *Hasanebiyari* (1)) that in the absence of express contract dower is presumed to be prompt and may be enforced at any time. He gave judgment for plaintiff for the amount sued for. The Subordinate Judge concurred in the finding that no agreement for express dower had been made out, and upheld the decree on the ground that in the absence of any express agreement one way or the other the presumption is that the dower is prompt.

The defendant preferred this second appeal.

The case first came on for hearing before SIR CHARLES ARNOLD WHITE, C.J., and MOORE, J., when their Lordships made the following

ORDER OF REFERENCE TO FULL BENCH.

The question referred arises out of a suit for dower. The parties are Muhammadans. The Court of First Instance found that no express agreement on defendant's part to pay the dower on demand had been made out. The Lower Appellate Court concurred in this finding. The Lower Appellate Court held that, in the absence of any express agreement one way or the other, the presumption was that the dower was prompt, *i.e.*, payable in whole on demand. In so holding the Lower Appellate Court appears to have relied on the authority of *Tadiya* v. *Hasanebiyari* (1). In that case this Court decided that according to Muhammadan Law dower is presumed to be prompt in the absence of express contract. The ground of the decision was that the authorities agreed that there was a presumption of Muhammadan Law to this effect. This seems to be the only reported decision of this Court upon the point in question.

* Second Appeal, No. 1436 of 1898, against the decree of N. Sarvothama Rao, Temporary Subordinate Judge of Tinnevelly, in appeal suit No. 52 of 1898, affirming the decree of T. V. Vasudeva Sastri, Acting District Munsif of Tinnevelly, in original suit No. 681 of 1896.

(1) 6 M.H.C.R. 9.

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There are decisions of the Bombay and the Allahabad High Courts which are inconsistent with this presumption and the balance of authority generally seems to us to support the contention that there is no such presumption. The principal authorities in support of the view that such a presumption exists appear to be as follows:—(*a*) The case above referred to (*Tadiya* v. *Hasanebiyari* (1)). (*b*) A passage in Macnaghten's 'Principles and Precedents of Muhammadan Law,' page 59, Clause 22, to the following **[373]** effect: "Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." (*c*) A Privy Council decision (*Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor* (2)). The decision turned on the construction of the contract, but the judgment contains the following expression of opinion: "The admitted rule seems to be that laid down in Macnaghten's 'Principles.'"

The principal authorities in support of the view that no such presumption exists appear to be as follows:—(*a*) A case reported (*Fatma* v. *Sadruddin* (3)). In that case the Court adopted the rule given in Baillie's 'Digest of Muhammadan Law,' page 126 (2nd edition, page 127) as "the more approved rule." (*b*) A case (*Eidan* v. *Mazhar Husain* (4)). It was there held that when the payment of the dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt;" and that the amount of the portion must be determined with reference to custom, and, where there is no custom, by the Court with reference to the status of the wife and the amount of the dower. The Court declined to adopt the view expressed in Macnaghten's 'Principles' on the ground that the greater weight of authority was in favour of the doctrine set forth in Baillie's 'Digest.' (*c*) The passage in Baillie's 'Digest' above referred to. The passage is as follows:—"When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman." The second edition of Baillie's 'Digest' contains a note in which the authorities on which Macnaghten's view is based are discussed. (*d*) A passage in Shama Churn Sircar's 'The Muhammadan Law' (1875), Volume II, page 358, Article 461. In Ameer Ali's 'Muhammadan Law' (1894), on pages 386 and 387, a distinction is drawn between the Shiah Law and the Hanafi doctrine with reference to this question, and it is pointed out that the principle upon which the Hanafi doctrine is founded seems to have been overlooked in the Privy Council decision (*Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor* (2)). The question is also discussed in Sir Roland Wilson's 'Digest of **[374]** the Anglo-Muhammadan Law' (1895), page 42, paragraph 46. In our opinion the balance of authority appears to be in favour of the principle adopted by the Bombay and Allahabad High Courts. The question we refer for the decision of a Full Bench is "whether, in the absence of an express contract as to whether the dower was to be prompt or deferred, the Lower Appellate Court was right in dealing with the case on the presumption that the whole dower was exigible on demand, or whether the Lower Appellate Court, for the purpose of determining whether the dower was, in whole or in part, exigible on demand, ought to have taken

(1) 6 M.H.C.R. 9.
(2) 19 W.R. C.R. 315.
(3) 2 B.H.C.R. 291.
(4) 1 A. 483.

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into consideration the woman, the amount of the dower and any other material facts."

The case next came on for hearing before the Full Bench constituted as above.

K. Srinivasa Ayyangar, for appellant.—There is no presumption in Muhammadan Law that dower will be prompt. The only decision against that view is that in *Tadiya* v. *Hasanebiyari* (1), and there are some *dicta*. There has been a divergence of opinion between Macnaghten and Baillie: the former being followed in Calcutta and the latter in Allahabad and Bombay; whilst Baillie is not referred to in the Calcutta cases. Baillie deals with the point in his 'Digest of Muhammadan Law,' 2nd edition, page 127, as follows:—" When the parties have explained how much of the dower is to be *mooujjul* or prompt, that part of it is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be *mooujjul* or prompt, accordingly, without any reference to the proportion of a fourth or a fifth; but what is customary must also be taken into consideration." On this the author has a note in which he fully discusses the view taken by Macnaghten. See also Shama Churn Sircar's 'Muhammadan Law' (Tagore Law Lectures, 1873-74), part I, page 358. Deferred dower is due either upon divorce or separation, or at the wife's death—when it is payable to her heirs—or at the death of the husband: it is a debt due to the wife in respect of which she has a lien on the husband's **[375]** property, before its division amongst the other sharers; and it is a debt provable in insolvency. The arrangement between the parties in the present case having been simply for dower, the sole question is whether such an arrangement is to be construed as prompt or deferred. Macnaghten purports to cite the Hedaya, in support of his view of the presumption, but the Hedaya does not contain the proposition. [BODDAM, J.—Dower being the consideration for marriage, it is difficult to understand on what principle its payment should be assumed to be deferred after the marriage has taken place.] It is more in the nature of maintenance, and the wife is not entitled to maintenance so long as her husband supports her. Syed Ameer Ali in his work on 'Muhammadan Law,' volume II, at page 386, draws a distinction between Shiahs and Hanafis. These parties are Shiahs. In most Muhammadan marriages a large dower is fixed because divorce of a wife is so easy that the prospect of having to pay a deferred dower (which would become due on divorce) acts as a deterrent and is for the wife's benefit. The earliest reported decision is in 1 Morley's 'Digest,' N.S., page 182, paragraph 5, where it is laid down that a wife cannot claim more than one-third of her dower while her husband lives, and a case from the North-West Provinces is cited. See also the Full Bench decision in *Fatma* v. *Sadruddin* (2), where Baillie is cited. In the Privy Council case, the question of "prompt or deferred" was not really before the Committee as the wife had died, and the son sued the father to recover his share of his mother's dower, which was then admittedly due. The contention was that, though prompt, the dower was not payable till the death of the husband, as the marriage would not be dissolved until that event. The Privy Council decided against that view. [DAVIES, J.—The rule in Macnaghten is however quoted with approval and

(1) 6 M. H. C. R. 9. (2) 2 B.H.C.R. 291.

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it concurs with good reason.] *Mussamut Mulleeka* v. *Mussamut Jumeela*(1) was an appeal from the decision in *Mussamut Beebee Jumeela* v. *Mussamut Mulleeka* (2) and the Privy Council left this particular question undecided. In the following year the case of *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor* (3), was decided and the reference in the judgment to Macnaghten's proposition would seem to indicate that it had been [376] treated as being the correct one in the course of argument, so that the point was not really argued before their Lordships.

Mr. *Joseph Satya Nadar*, for respondent, referred to Wilson's 'Digest,' page 365; also to Syed Ameer Ali's 'Muhammadan Law,' Volume II, page 386, paragraph 1; *Taufik-un-nissa* v. *Ghulam Kambar* (4) following *Eidan* v. *Mazhar Husain* (5); and Shama Churn Sircar's 'Muhammadan Law,' part II, page 361, from which it appears that dower is the absolute property of the wife from the date of the consummation of marriage, and can be alienated by her.

JUDGMENT OF THE FULL BENCH.

We think the decision of the Lower Appellate Court that in the absence of an express contract the dower in this case was exigible on demand, was a right decision, following the rule laid down in *Tadiya* v. *Hasanebiyari* (6). That rule has been quoted with approval by the Privy Council (*Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor* (3). The rule is, in our opinion, more consonant with reason than the rule held to prevail in some other Presidencies where the proportion in which such dower is to be considered prompt or deferred is left uncertain. We take it that the dower is consideration for the marriage and therefore that unless payment of the whole or part of it is expressly postponed it is payable on demand. This appears to be the view the parties themselves entertained of the matter, for the defendant did not plead that any part of the dower was deferred, but on the other hand he pleaded that it had been paid in full, thereby showing his consciousness that it ought to have been so paid either according to custom or according to the law ruling in this Presidency for the last thirty years. Even if the weight of authority in other parts of India were opposed to the law laid down in *Tadiya* v. *Hasanebiyari* (6), we think more harm than good would be done by altering it after this lapse of time in favour of another rule which is inexact and unworkable in practice.

The case then came on for final hearing after receipt of the above Full Bench opinion, when the Court (SIR CHARLES ARNOLD WHITE, C.J., and BENSON, J.) delivered the following final

JUDGMENT.

In accordance with the Full Bench decision the second appeal is dismissed with costs.

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(1) 11 B.L.R. 375. (2) (1864) W.R.C.R. 252. (3) 19 W.R.C.R. 315.
(4) 1 A. 506. (5) 1 A. 483. (6) 6 M.H.C.R. 9.

23 M. 377=10 M.L.J. 91.

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APPELLATE CIVIL.

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[377] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Michell.

ERUSAPPA MUDALIAR (*Petitioner*), *Appellant v.* COMMERCIAL AND LAND MORTGAGE BANK, LIMITED (*Counter-Petitioners*), *Respondents.** [30th and 31st October and 6th November, 1899.]

Transfer of Property Act—Act, IV of 1882, *Sections* 60, 88, 99—*Purchase by mortgagee holding decree for sale, of portion of mortgaged property, subject to mortgage—Impossibility of mortgagee freeing himself by such purchase from liability to be redeemed—Civil Procedure Code—Act XIV of* 1882, *Sections* 244, 258—"*Court executing a decree*" *includes proceedings initiated by decree-holder and by judgment-debtor.*

A mortgagee having obtained a decree against his mortgagor for the sale of the mortgaged property, a portion of the latter was subsequently sold, subject to the said decree, in execution of a money decree obtained by a third party against the mortgagor. The mortgagee purchased the portion so sold, whereupon the mortgagor presented a petition under Section 258 of the Code of Civil Procedure claiming that the mortgagee was bound to discharge his mortgage-debt and should be called upon to certify satisfaction of his decree:

Held, that petitioner was not entitled to the relief prayed for, but only to proceed upon the footing that the portion of the mortgaged property which had been purchased by the mortgagee remained, notwithstanding such purchase, redeemable by petitioner together with the remainder of the property.

On the question whether the purchase by a mortgagee of a portion of the mortgaged property at a Court sale in execution of the money decree of a third party involves a taking advantage by the mortgagee of his fiduciary position as mortgagee:

Held, that the principle of the impossibility of a mortgagee freeing himself from his liability to be redeemed as affirmed in *Martand* v. *Dhondo* (I.L.R., 22 Bom. 624) and *Mayan Pathuti* v. *Pakuran* (I.L.R., 22 Mad., 347) was applicable, even in the absence of fraud or collusion between the mortgagee and the third party in execution of whose decree the purchase of the equity of redemption had been made, and that such a purchase contravened the principle underlying Section 99 of the Transfer of Property Act and expressed in Section 88 of the Indian Trusts Act.

The provision in Section 244 of the Code of Civil Procedure that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of a decree shall be determined by order of the Court executing the decree, relates not only to proceedings initiated by the decree-holder but also to applications made by the judgment-debtor.

[378] Whether the subject-matter of the petition was an "adjustment" of the decree, within the meaning of Section 258 of the Code of Civil Procedure—*Quære*.

[**Diss.**, 12 M.L.J. 390; 3 S.L.R. 17 ((29); **N.F.**, 27 M. 428; **R.**, 35 C. 61=6 C.L.J. 320=11 C.W.N. 1011; 30 M. 313=2 M.L.T. 181; 12 C.L.J. 574 (577)=14 C.W.N. 579=6 Ind. Cas. 47; 7 O.C. 307; 8 O.C. 327; **Disappr.**, 24 M. 96 (111).]

PETITION presented by a mortgagor under Section 258 of the Code of Civil Procedure praying that the mortgagees (counter-petitioners) might be called upon to certify satisfaction of a decree obtained by them in a suit on the mortgage. The mortgagees had sued petitioner, as mortgagor, in original suit No. 27 of 1896, and obtained a decree for the sale of the mortgaged property. Subsequently a portion of the latter was sold in execution of a money decree for Rs. 1,339 held by a third party, and was purchased by the mortgagees. The sale proclamation under which the

* Civil Miscellaneous Appeal No. 65 of 1899 against the order of L. C. Miller, Acting District Judge of Trichinopoly, in Civil Miscellaneous Petition No. 1007 of 1898 in the matter of Original Suit No. 27 of 1896.

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sale took place declared the property to be subject to certain encumbrances, among them to the debt amounting to Rs. 1,20,000, due to the mortgagees,—the decree-holders in the said original suit No. 27 of 1896,—under their decree. The property was sold subject to these encumbrances, and was purchased by the mortgagees, for Rs. 475. The mortgagor, the judgment-debtor in original suit No. 27 of 1896, now prayed the District Court to compel the decree-holders, to certify satisfaction of their decree in that suit by the said purchase. The Acting District Judge, after dealing with the facts, said :—" The effect of the contention is that the mortgagee having purchased the property as described in the sale proclamation, must be taken to have paid for the equity of redemption on the footing that the property sold, though only part of that mortgaged, was worth the whole mortgage debt and so to have satisfied the debt and extinguished the mortgage. But he is not bound to extinguish the mortgage and his intention cannot have been to do so by purchasing only part of the mortgaged property. It may be that the property so purchased is worth the whole amount of the debt, in which case the mortgagor may be able, when the mortgagee proceeds to execute his decree, to prevent the sale of the rest of the property. I do not think the mortgagee can be made liable for more than the actual value of the property purchased by him (*Chunna Lal* v. *Anandi Lal* (1)) if sold free of encumbrance even though the sale proclamation did not declare that that property was liable only for a portion of the mortgaged debt. That being so, the mortgage is still alive and the decree is not satisfied." He dismissed the petition.

[379] The petitioner appealed against the order of dismissal on the ground, among others, that the mortgagees, decree-holders, having purchased the property subject to the whole mortgage, the Lower Court ought to have directed the decree-holders to certify satisfaction of the whole decree.

Sundara Ayyar, for appellant.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and *S. Srinivasa Ayyangar*, for respondents.

JUDGMENT.

The facts of this case are as follows :—The respondents before this Court, the Commerical and Land Mortgage Bank, Limited, India, in original suit No. 27 of 1896 on the file of the District Court of Trichinopoly, sued the now appellant before this Court on a mortgage of certain properties of which he was the owner for over Rs. 1,20,000 and obtained a decree under Section 88 of the Transfer of Property Act for sale of those properties. Subsequently a portion of those properties was sold in execution of a simple money decree for Rs. 1,339 and interest thereon and costs obtained by one A. Srinivasa Ayyar against the appellant in regular suit No. 239 of 1896 on the file of the District munsif of Trichinopoly, and was purchased by the Bank. The property so sold was sold subject to the decree debt under the above-mentioned decree held by the Bank. Thereupon the appellant presented a petition to the District Court of Trichinopoly purporting to be made under Section 258 of the Code of Civil Procedure claiming that, under the circumstances above stated, the Bank were bound to discharge their mortgage-debt and praying that they might be called upon to certify satisfaction of the decree in original suit No. 27 of 1896.

(1) 19 A 196 (199).

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The District Judge was of opinion that the Bank's mortgage-debt was not extinguished by reason of their having purchased the property sold in execution of the decree in suit No. 239 of 1896, and that they could not be held liable for more than the actual value of that property, supposing it to be sold free of incumbrance, "even though the sale proclamation did not declare that that property was liable only for a portion of the mortgage-debt." He therefore dismissed the petition.

Against this order of the District Judge the petitioner appeals on the grounds (1) that the respondents having purchased the property sold in execution of the decree in suit No. 239 of 1896 subject to the whole mortgage, the Lower Court ought to have [380] directed them to certify satisfaction of their whole decree; and (2) that even on the view taken by the Lower Court it ought to have directed the ascertainment of the real value of that property and directed the Bank to certify satisfaction of their decree to the extent of such value.

Before dealing with the merits of the case, we will dispose of a preliminary objection which was raised by the learned vakil for the respondents to the entertainment by the Lower Court of the petition of the appellant, on the ground that the alleged extinguishment of the respondents' mortgage-debt, by their purchase of the portion of the mortgaged property at the execution sale, assuming such purchase to have had that effect, was not an "adjustment" of the decree within the meaning of Section 258 of the Civil Procedure Code. We should hesitate before we held that what occurred was such an "adjustment" of the decree, but we do not consider it necessary to decide this question, because we are of opinion that, apart from Section 258, the Court had power to entertain the petition under Section 244 of the Civil Procedure Code. We are unable to accede to the contention of the learned vakil for the respondents that, with reference to the terms of Section 244, the question raised by the petition could only be raised in answer to a claim made by the respondents on an application by them for execution. That section simply provides that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree shall be determined by order of the Court executing the decree and not by separate suit. We cannot construe the words "a Court executing a decree" as meaning, as contended on behalf of the respondents, that the section only covers cases of proceedings initiated by the decree-holder and does not include applications (relating to the execution, discharge or satisfaction of the decree) made by the judgment-debtor.

Turning now to the merits of the case, in none of the cases cited in argument by the learned vakils on either side, as they admit, nor in any reported case, so far as we are aware, does precisely the same question, which we have now to determine, appear to have been decided. The question before us resolves itself, we think, mainly into this, whether the purchase by the Bank at the Court-sale in execution of the money decree of the third party of a portion of the properties mortgaged to the Bank and in respect of [381] which they had obtained their decree for sale, involved a taking advantage by them of their fiduciary position as mortgagees, and, if so, what are the legal consequences in regard to the respective rights and liabilities of the mortgagor and mortgagees under the mortgage. It is contended for the Bank that as they did not purchase under a decree obtained by themselves, and as leave to bid at the Court auction was therefore not necessary and as there is no ground apart from the mere fact of their being

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mortgagees of the property for regarding them as having purchased collusively or otherwise than *bona fide*, the purchase cannot be considered to have involved any undue advantage taken by them of their fiduciary position as mortgagees.

In *Martand* v. *Dhondo* (1), it was held that a mortgagee who had attached the mortgaged property in execution of a money decree obtained by him against the mortgagor for a debt other than the mortgage-debt and had himself purchased the property at the sale in execution of that decree without obtaining the leave of the Court to bid at the auction had not thereby freed himself from his liability to be redeemed by the mortgagor, not because he had purchased without obtaining leave but because of "the impossibility of a mortgagee by such sales and purchases as these freeing himself from his liability to be redeemed." That case was decided under the law as it existed before the Transfer of Property Act came into force in the Bombay Presidency, but upon the same principle as that embodied in Section 99 of the Transfer of Property Act. It was pointed out, in the judgment, that that section extends to attachments under personal decrees for any debts, whether the mortgage-debt or any other debt, the principle which had been held, in cases there referred to, to apply to attachments under personal decrees obtained on the covenant or contract by the mortgagor to pay the mortgage-debt. The Court was of opinion that "the same reasoning applies to a mortgagee buying the equity of redemption under a decree obtained upon a claim independent of the mortgage as applies to a decree obtained upon a collateral instrument to secure the mortgage-debt." This decision of the Bombay High Court was concurred with by this Court in *Mayan Pathuti* v. *Pakuran* (2), in which the facts were similar, and in which after holding that the execution sale of the [382] mortgaged property to the mortgagee having been confirmed, the mortgagors were precluded from obtaining the relief to which they would otherwise have been entitled under Section 99 of the Transfer of Property Act, *viz.*, the setting aside of the sale, Mr. Justice Subrahmania Ayyar said that this decision as to the finality of the order confirming the sale was not to be understood to imply that the mortgagors were precluded from redeeming the property, which they might still be entitled to do "owing to the impossibility of the respondent, as the mortgagee, freeing himself by such a sale and purchase from the liability to be redeemed (*Martand* v. *Dhondo* (1))." It appears to us that the same principle which was affirmed in those cases requires that we should go yet a step further and hold that it applies also to a case, which the present case is, when a mortgagee buys the equity of redemption at a Court auction in execution of a personal decree for money obtained by a third person against the mortgagor, even though there be no fraud or collusion between him and the third party. It appears to us that the advantage which his position as mortgagee gives him over competing or would-be competing bidders, in respect of his presumably superior knowledge or better opportunities of knowledge of the mortgaged property and its value and otherwise, exists equally in such a case as it does in a case when the personal decree in execution of which he purchases is a decree obtained by himself, and that therefore in both cases alike he must be looked upon as availing himself of his position as mortgagee to obtain an undue advantage over the mortgagor or otherwise to be acting *mala fide* in the eye of the law (whether there be actual fraud or collusion or not), and in contravention

(1) 22 B. 624.

(2) 22 M. 347.

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of the principle which underlies Section 99 of the Transfer of Property Act, and which is given expression to in Section 88 of the Indian Trusts Act.

The learned vakil for the respondents relied on (among other cases) the case of *Shaw* v. *Bunny* (1), in which it was held that when a first mortgagee having a power of sale duly exercises it, and a subsequent mortgagee becomes the purchaser, the latter, in the absence of special circumstances showing want of *bona fides* on his part, acquires the same irredeemable title as a stranger purchasing would have acquired. Even in that case, however, one of the two Lords Justices who decided the case, Lord Justice Turner, was [383] prepared to dissent from the view taken by Lord Justice Knight Bruce and to hold that the first mortgagee had not lost his right of redemption, if he could have found authority to support this view, and he expressed himself as submitting with much reluctance to the judgment of the Master of the Rolls upon this point, which took the view which was taken by Lord Justice Knight Bruce, being affirmed. Assuming that the law laid down in that case would be the law to be followed in a similar case arising in this country, *viz.*, a case in which the question is one between a second mortgagee purchasing, in a sale under the first mortgage, and the mortgagor,—a point on which it is not necessary for us to express an opinion—such a case is materially distinguishable from the present case, inasmuch as in the former the purchase is in law free from the mortgage held by the purchaser (it becoming extinguished thereby), whereas in the latter the purchase is subject to the mortgage. In the former case it is the interest of the second mortgagee to offer a price which would cover both the mortgage-debts, whereas in the latter, on the other hand, it is the interest of the mortgagee, whose mortgage is unaffected by the sale, to buy at the lowest price.

In one point of view, the principle which was affirmed in *Martand* v. *Dhondo* (2) appears to us to apply even more forcibly in a case, like the present, where the decree in execution of which mortgaged property is sold and bought by the mortgagee is a decree obtained by a stranger than in a case where such decree is one obtained by the mortgagee. For whereas in the latter case the mortgagee is required to obtain the leave of the Court to bid, in the former case there is no such check against his purchasing.

It was contended for the appellant that the advantage unduly gained by the mortgagee and corresponding loss sustained by the mortgagor, in such a case as the present, if his purchase of the mortgaged property, or part of it, is to hold good just as if it had been a purchase by a third party, consists in the difference between the market value of the property free from the mortgage and the price for which the equity of redemption was bought by the mortgagee. We think this is not the true view. What constitutes the substantial advantage which would be gained by the mortgagee and the substantial prejudice to the mortgagor, in our [384] opinion, is the fact that the mortgagor would be deprived of the right of redemption and of the time and opportunities which the law allows to a mortgagor for redemption. There might or might not be a loss to the mortgagor and advantage to the mortgagee by reason of the latter purchasing the property; that would depend upon the price paid. But in all cases there would result, to use the words of Lord Justice Turner in *Shaw* v. *Bunny* (1) "an entire change of character in the person who has made the purchase,"

(1) 2 De G. J. & S. 468. (2) 22 B. 624.

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and a corresponding change of character in the mortgagor, resulting in the latter being deprived of his right, and the former being set free from his liability, to redemption. This, therefore, in our opinion, is the loss of the mortgagor which must be made good, and this is the advantage gained by the mortgagee which must be accounted for by him, upon the principle above considered. This view is not, we think, inconsistent with the provisions of the last paragraph of Section 60 of the Transfer of Property Act, because those provisions, though they would apply to a case where a purchase by a mortgagee of part of the mortgaged property was effectual to extinguish the equity of redemption in respect of that part (as, *e.g.*, when it was sold to him by the mortgagor by a voluntary sale), do not touch a case where the question is whether such a purchase by the mortgagee can have the effect of depriving the mortgagor of his right to redeem.

The other authorities referred to in the argument do not, in our opinion, require to be noticed, except perhaps *Moro Raghunath* v. *Balaji Trimbak*(1). There, it is to be observed, the mortgagor, for some reason or other not appearing in the report, proceeded on the assumption that the equity of redemption in respect of the portion of the property which had been sold under the decree obtained on the second mortgage had been extinguished. In that view, no doubt, the utmost that he could claim was that credit should be given to him for a portion of the mortgage-debt proportionate to the full value of the portion of the property which was treated as having been so absolutely vested in the mortgagee.

In the view we have taken, the appellant must be held to have misconceived his rights, and we must accordingly confirm the order dismissing his petition, on the ground that he is not entitled to the relief he seeks, but only to proceed on the footing that the portion [385] of the property which has been purchased by the Bank is, notwithstanding such purchase, redeemable by him together with the remainder of the property. Under the circumstances we think each party should bear his own costs of this appeal.

(1) 13 B. 45.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

JANARDANA SHETTI GOVINDARAJAN AND OTHERS (*Plaintiffs*), *Appellants v.*
BADAVA SHETTI GIRI AND OTHERS (*Defendants Nos.* 2 *to* 4), *Respondents.**
[27th October and 22nd November, 1899.]

Specific Relief Act—Act I of 1877, *Section* 42—*Suit by trustees for a declaration that an appointment to the office of pattamali was invalid—Omission to ask for consequential relief—Custody by pattamali of articles belonging to temple—Possession by trustees not divested where pattamali was acting in the capacity of a mere servant—Maintainability of suit without prayer for consequential relief.*

Some of the trustees of a temple having sued others for a declaration that an appointment by the latter of a person to the office of pattamali was invalid, it was objected by the defendants that even if the allegation were true, the suit must fail as the pattamali (who was also impleaded as a defendant) had taken charge of documents and jewels belonging to the temple, and consequential relief should have been prayed for. The plaint was accordingly amended, but the District Court, whilst holding that the appointment of the pattamali was invalid, dismissed the suit on the ground that the amendment had been made after the lapse of the period of limitation :

Held, that the suit for a declaration would lie without consequential relief being prayed for, inasmuch as its object was not to establish any legal character or any right to any property in the plaintiffs but was in effect to have an act done by the other trustees in contravention of duty declared null and void. Even if Seotion 42 of the Specifio Relief Act applied to such a decree, which was doubtful, no further relief than the declaration was necessary, as the custody of the documents and jewels by the pattamali was merely that of a servant under the trustees, with whom the possession in fact and in law remained. There was therefore nothing of which delivery oould be sought from the possession of the pattamali and no question of limitation arose.

[386] SUIT for a declaration and for possession of documents and jewels. Plaintiffs were trustees of the Srimal Janardana temple at Amarapathy in British Cochin, as also were defendants Nos. 1 to 3. Plaintiffs complained that defendants Nos. 1 to 3 had improperly appointed defendant No. 4 to the office of pattamali in the said temple, and that he had been interfering in its affairs. The suit as originally instituted asked merely for a declaration that defendant No. 4 was not the lawful pattamali of the temple. To this, objection was taken that, even if the appointment should not be vaild, the suit for a mere declaration was not maintainable, as defendant No. 4 was admittedly in possession of the document, jewels, &c., belonging to the temple. The plaint was accordingly amended by the addition of a prayer for consequential relief, namely, for the surrender by the fourth defendant of the said documents and jewels belonging to the temple. This amendment was made after a period of three years had elapsed from the date upon which the pattamali had taken posssession of the said articles. The Subordinate Judge found that the appointment had been validly made and dismissed the suit. On appeal, the District Judge, though differing from the Subordinate Judge on the

* Second Appeal No. 1515 of 1898 against the decree of W. H. Welsh, Acting District Judge of South Malabar, in Appeal Suit No. 611 of 1897, affirming the derece of M. Srinivasa Rao, Subordinate Judge of Cochin, in Original Suit No. 5 of 1894.

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question of the validity of the appointment, held that the suit, being in form one to recover moveables, was barred by limitation as the amendment of the plaint had been made more than three years after defendant No. 4 had taken possession of such moveables.

Plaintiffs preferred this second appeal.

Mr. *A. G. Gover*, for appellants.

P. K. Subrahmania Ayyar, for respondents Nos. 1 and 2.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*), *Sankaran Nayar* and *Subramania Sastri*, for respondent No. 3.

JUDGMENT.

SUBRAHMANIA AYYAR, J.—The plaintiffs (appellants) along with the defendants Nos. 1 to 3 are the adhikaris, managers or trustees of a temple in British Cochin. The latter improperly appointed the fourth defendant to the office of pattamali, under colour of which office the fourth defendant had been interfering in the affairs of the temple. The appellants sought in their plaint, as it originally stood, for a declaration that the appointment of the fourth defendant is invalid. Subsequently, on the defendants Nos. 2 to 4 raising an objection that the fourth defendant having taken charge of the documents relating to [387] temple lands, the temple jewels, and the utensils specified in the plaint schedules, a prayer for their surrender also should have been asked for, the plaint was allowed to be amended accordingly.

The Subordinate Judge, being of opinion that the appointment was valid, dismissed the suit. On appeal the District Judge found upon the evidence that the appointment was not made in accordance with the usage of the institution at a properly convened meeting of the yogakars—a general body of worshippers—and the adhikaris, and was therefore invalid, yet he upheld the Subordinate Judge's decree on the ground that the amendment of the plaint was made after the lapse of three years—the period of limitation prescribed for a suit for the recovery of the documents, &c., to which the amendment related.

In ascertaining whether the decision of the District Judge is correct, we must see what the question, arising for determination on the facts disclosed in the case, is. That question is whether a mere declaration that the appointment is invalid would not be sufficient and whether a prayer for delivery of the documents, &c., or for an injunction restraining the fourth defendant from performing the duties of a pattamali should have been also included in the plaint. If the declaration would be sufficient, the amendment of the plaint must be treated as surplusage and cannot affect the plaintiffs' right to the declaratory decree asked for.

Now what is the nature of the suit? It is not one to establish any legal character or any right to any property vested in the plaintiffs but is, in effect, one brought by some trustees to have an act done by other trustees in contravention of their duty declared null and void. It is clear that such a suit will lie. Suppose, instead of asking after the appointment was made for a declaration that the appointment was invalid, the plaintiffs had asked, on the eve of the appointment, for an injunction prohibiting the defendants Nos. 1 to 3 from proceeding to appoint a pattamali against the usage of the institution and in violation of their duty, surely there would have been nothing to prevent the Court from granting the injunction. Does it not follow from this that if the appointment had already been made the plaintiffs might well ask for a decree declaring that

the appointment was invalid? There is no reason to suppose that such a decree cannot be granted independently of Section 42 of the Specific Relief Act (compare *Fischer* v. [388] *Secretary of State for India in Council* (1). Even if Section 42 is applicable to a case like the present, it is difficult to see how any further relief than a mere declaration, either by way of delivery of documents, &c., or of injunction, is necessary. Now a person properly appointed to the office of pattamali is but a servant of the temple, and as such has only a servant's custody of the things in his charge. He consults the documents for the purpose of ascertaining such particulars as are to be found therein in respect of the rents due to the temple. He gives the jewels and utensils out from time to time to the other servants whose business it is to use them and, on the articles being returned, keeps them safely in the temple premises. This sort of dealing with temple property on the part of a mere servant, or one purporting to act as such under the trustees, it is obvious, cannot affect, in the slightest degree, the possession which in fact and in law remains with the latter. All that a valid appointment as a pattamali would have conferred on the fourth defendant and all that he himself claimed throughout was, in the words of Sir Frederick Pollock, "a mere authority or license to deal with the thing in a certain way." Thus there is nothing to seek delivery from the possession of the fourth defendant and hence no question of limitation on that ground arises. When once the pretended appointment is declared invalid the fourth defendant has to walk out of the temple and to refrain from exercising the functions of the office. And as no circumstances have been disclosed in the case necessitating the grant of an injunction, no such remedy is called for.

I would, therefore, allow the appeal with costs through out, reverse the decrees of the Lower Courts and declare and adjudge that the fourth defendant was not validly appointed as pattamali of the plaint mentioned temple. The memorandum of objections is dismissed with costs.

MOORE, J.—I concur.

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[389] APPELLATE CIVIL.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Boddam.

HAJI ISMAIL SAIT (*Plaintiff*), *Appellant v.* THE TRUSTEES OF THE HARBOUR, MADRAS (*Defendants*), *Respondents.**

[30th and 31st January, 1st and 2nd February and 6th March, 1900.]

Madras Harbour Trust Act (Madras)—Act II of 1886. *Sections* 33, 60, 61, 87—*Maintenance of harbour causing encroachments on seashore—Liability of a Public Body for maintaining works authorised by statute—Common law liability where not expressly excluded by statute—Limitation.*

A harbour, which was in the first instance constructed by Government, was, by the Madras Harbour Trust Act, 1886, vested in trustees, together with the foreshore within the limits of the port. Prior to the date of the Act, an erosion,

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* Appeal No. 20 of 1899, under Section 15 of the Letters Patent, against the decree of the High Court, in original side appeal No. 5 of 1899, preferred from the decree of the High Court, original side, in civil suit No. 105 of 1898.

(1) 26 I. A. 16 (27, 28) = 22 M. 270.

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by the action of the sea, of a portion of the foreshore had commenced, in consequence of the existence of the harbour; and a revetment or barrier of stones had been built to counteract it. The trustees subsequently, but prior to 1891, extended the arms of the harbour, and in 1895 the result of the continuous encroachment of the sea was that a part of the said revetment or barrier of stones and some land was washed away. Plaintiff was the owner of land adjoining that which was so washed away, and the sea also encroached upon and injured plaintiff's land and the buildings upon it. The Madras Harbour Trust Act contains no provision for the payment of compensation by the trustees. By Section 61, the trustees are empowered to perform all works necessary to carry out the objects of the Act. Plaintiff sued the trustees to recover damages for the injury caused to his land by their maintaining and extending the arms of the harbour, as erected when the Board of Trustees was created, without taking steps to erect such buildings as would prevent the sea from encroaching upon and injuring the plaintiff's land:

Held (affirming SHEPHARD, J.), that the plaint containing the above averments of fact disclosed no cause of action.

The dates upon which damage to the plaintiff's buildings was alleged to have occurred were 25th December 1897, and 9th and 10th April 1898 respectively. By Section 87 of the Madras Harbour Trust Act, no suit shall be commenced against any person under the Act after six months from the accrual of the cause of such suit. The plaint was originally presented on 9th July 1898, and it was amended on 13th September 1898. On the day upon which the six months from 25th December 1897 expired, and until the day before the plaint was presented, the Court was closed. By the same section, it is provided that no suit or other proceeding shall be commenced against any person for anything done or purporting to have been done in pursuance of the Act without giving to such person one [390] month's previous notice in writing of the intended suit or proceeding, and of the cause thereof. Two letters had been written on behalf of the plaintiff The first of these, dated 14th April 1898, represented the damage caused to plaintiff's property as above set out, and notified, under Section 87, if that section should apply, that if the amount of damage suffered and assessed by plaintiff in the said letter should not be paid on or before the expiry of one month from the date thereof, legal proceedings would be instituted to recover the damage without further notice. The second letter, dated 11th May 1898, referred to further damage suffered and called upon defendants to pay an increased sum, failing which action would be brought to recover such sum together with a further sum representing any further damage that might be done to the property by the sea before the suit should be filed or heard. The letter stated the ground of complaint to be that the encroachment of the sea was the result of the harbour groynes by which the action of the sea had been affected, that defendants had acted illegally and negligently in maintaining and extending those groynes and so causing the encroachment, and that by so doing they had caused the foreshore vested in them to be washed away and the sea to be let in to the plaintiff's premises, thus causing the damage complained of, which defendants had taken no steps to prevent:

Held, *Per* SHEPHARD, J., that the plaintiff must be deemed to have commenced the suit in due time, since it was owing to the act of the Court itself that he was prevented from presenting his plaint till the day upon which it was filed. Also, that the notice was sufficient; and that on the facts of the case Section 87 had no application. *Semble*, that though a special rule of limitation was prescribed by the Act, Section 5 of the Limitation Act applied.

Per O'FARRELL, J.—That the last clause of Section 87, which provides that neither the Board nor any of its officers or servants shall be liable in damages for any act *bona fide* done or ordered to be done in pursuance of the Act, had no reference to the present case. That section applied only to cases of acts done without legal authority or in excess of legal authority, but under the *bona fide* belief that they were covered by such authority.

Per BODDAM, J.—That the cases in which it has been held that that no action lies for non-feasance apply only to highways and have no application to the present case.

Per DAVIES, J.—The liability of the trustees, in the absence of any statutory duty cast upon them to insure plaintiff from loss, was confined to the maintenance of the particular work they took over, and, if there was any general obligation to protect the plaintiff's property, it lay on the Government, who constructed the harbour, the Legislature not having imposed it on the trustees.

[F., 14 Ind. Cas. 579 = 23 M L.J. 221 = 12 M.L.T. 169; R., 34 M. 505 (510) = 5 Ind. Cas. 884 = 20 M L.J. 283 = 7 M L T. 132; 16 C.W N 721 (723); 6 Ind. Cas. 752 = 13 O.C. 103 (107); 24 M.L.J. 41 (44); 7 N L.R. 176 (178).]

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SUIT for damages. Plaintiff in his plaint stated as follows:—

"The plaintiff is the owner of a piece of land with godowns and other erections thereon, which is situated in the village of Royapuram to the north of the Madras harbour within the jurisdiction of this Honourable Court and bounded on the north and west by the new road, on the south by Mada Church Road and on the east by the remains of the defendants' railway.

[391] "The north and south arms of the Madras harbour and all the foreshore lying within the limits of the port of Madras including the foreshore to east of the said property of the plaintiff and the revetment or stone barrier thereon became vested in the defendants by Madras Act II of 1886.

"The defendants negligently and unlawfully and without taking due and sufficient precautions to prevent injury from being thereby occasioned to the plaintiff, took over and allowed to continue and maintained and extended harbour arms or groynes, which at the time of such taking over, had caused and were causing and have since continued to cause an encroachment of the sea on the coast to the north of the said harbour, whereby the said foreshore to the east of the plaintiff's premises has been submerged and washed away by the inroad of the sea and the sea has been let in on to the plaintiff's said premises and the damage mentioned in the fifth paragraph hereof has been thereby caused.

"The defendants have failed and neglected to repair and maintain the said revetment or stone barrier or to take such other remedial or precautionary measures as were necessary to prevent the mischief referred to in paragraph 3 hereof.

"On or about the 25th December 1897 parts of two of the plaintiff's godowns were destroyed and other erections on the plaintiff's land were damaged by the inroad of the sea caused by the defendants as aforesaid and part of the plaintiff's land was likewise washed away and on or about the 6th, 9th and 10th April 1898 further similar damage was likewise caused to the plaintiff's said premises.

"The defendants since the said 25th December 1897 with a view to repair and strengthen the said revetment or stone barrier have caused a break-water of stones to be placed on the foreshore next to the plaintiff's said piece of land and in part on the sides of the outer walls of the godowns which were washed down, with the object of preventing further inroads of the sea, but the said break-water was not properly constructed and has not prevented such further inroad.

"That the damage done to the said godowns and premises and to plaintiff's property and the value of the land lost as aforesaid amount to Rs. 35,000, particulars whereof are set forth in the schedule hereto; the plaintiff has demanded such amount from the defendants, but they have refused to pay.

[392] "The cause of action arose on the dates mentioned in paragraph 5 hereof.

"The plaintiff, therefore, prays judgment:—(1) For payment by the defendants to him of the sum of Rs. 35 000 damages and interest thereon. (2) For costs of this suit. (3) Such further or other relief in the premises

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as to this Honourable Court may seem meet and the nature of the case may require."

To this the defendants filed the following written statement:—

"The defendants allege that the Madras harbour was commenced by the Government of Madras and was with the other works pertaining thereto continued by the defendants, the said harbour and works being vested in the defendants by Madras Act II of 1886 to be by them maintained, conserved and improved.

"The defendants admit that they have allowed to continue, maintained and extended the groynes of the Madras harbour, part of the harbour vested in them as aforesaid, but they say that they were authorized by the said Act II of 1886 to continue, maintain and extend the said groynes that, in so continuing, maintaining and extending the said groynes, they have not been guilty of any negligence.

"The defendants deny that they were under any legal duty to take measures to prevent any injury being caused to the plaintiff in consequence of the continuance, maintenance and extension of the said groynes.

"The defendants deny that they have failed to maintain the said revetment or stone barrier in proper repair.

"The defendants deny that they were under any legal duty towards the plaintiff to repair and maintain the revetment or stone barrier referred to in paragraph 4 of the plaint, and they say that, even if they have failed to repair and maintain the said revetment, the plaintiff cannot recover damages from the defendants by reason of their omission to do so.

"The defendants deny that the damage alleged to have occurred in paragraphs 3 and 5 of the plaint was due to the failure on the part of the defendants to maintain the said revetment or stone barrier in repair or to the continuance, maintenance and extension of the said groynes.

"The defendants continued, maintained and extended the said groynes *bona fide* in pursuance of Madras Act II of 1885 and are by virtue of Section 87 of the said Act exempt from any liability [393] for any damage that may have been caused to the plaintiff by reason of the continuance, maintenance and extension of the said groynes.

"In respect of the damage alleged to have been done to the plaintiff's land on the 25th December 1897 the plaintiff has not brought his suit within six months of the accrual of the cause of action as required by Section 87 of Madras Act II of 1886.

"The defendants do not admit that damage to the extent alleged in the plaint was done to the plaintiff's land.

"The amount claimed as damages is excessive.

"The cause of action mentioned in the notice of action is not that upon which the plaint has been brought."

Particulars of the alleged negligence were delivered by plaintiff, of which the following are material:—

1. At the time defendants took over the harbour arms or groynes referred to in paragraph 3 of the plaint, the said arms or groynes had been and were causing or contributing towards causing the encroachment of the sea referred to in the said paragraph. Defendants acted negligently and were and are in default in that they maintained and permitted to continue

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the said arms or groynes without constructing sea-walls or other walls upon the foreshore to the north of the harbour for the purpose of resisting the said encroachment and protecting the said foreshore from the inroads of the sea. Defendants acted negligently and were and are in default in that they maintained and permitted to continue the said arms or groynes without constituting such sea-walls or other walls as would have efficiently resisted the said encroachment and protected the foreshore to the north of the harbour from the inroads of the sea.

2. Defendants extended the arms or groynes without constructing sea-walls or other walls on the foreshore to the north of the harbour for the purpose of resisting the said encroachment and protecting the foreshore from the inroads of the sea.

3. For allowing the revetment referred to in paragraph 2 of the plaint to fall into disrepair —(after taking it over)—and become weakened and so less efficient for the purpose of checking the inroads of the sea to the north of the harbour than it was when they took it over.

4. Defendants acted negligently and were and are in default in that after taking over the said revetment or stone barrier they [394] omitted to strengthen and extend the said revetment or stone barrier for the purpose of resisting the said encroachment and protecting the said foreshore from the inroads of the sea.

The following issues were framed :—(1) Does the plaintiff show any cause of action in the plaint ? (2) At the time the defendants took over the harbour works, was an encroachment of the sea being caused by the works so taken over ? (3) Since the taking over of the works by the defendants, have their maintenance or extension by the defendants caused any and what further encroachment ? (4) Has any part of the foreshore mentioned in paragraph 3 of the plaint been caused to be washed away in consequence of any negligence, either active or passive, of the defendants and which ? (5) Is the suit barred by limitation to any and what extent? (6) Are the defendants protected by Section 87 of Act II of 1886 to any and what extent? (7) Has any proper notice of action been given? (8) To what relief, if any, is the plaintiff entitled ?

Section 87 of the Madras Harbour Trust Act is as follows :—" No suit or other proceeding shall be commenced against any person for anything done or purporting to have been done, in pursuance of this Act, without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding.

" The Board shall not be responsible for any act or default of any officer or servant appointed under this Act, or of any master attendant, any harbour master or of any pilot or of any deputy or assistant of any of the officers aforesaid, or of any person acting under the authority or direction of any such officer, deputy or assistant ;

" nor for any damage sustained by any vessel in consequence of any defect in any of the moorings, hawsers or other things belonging to the Board ;

" nor shall the Board, or any of the said officers or servants, be liable in damages for any act *bona fide* done, or ordered to be done, by them in pursuance of this Act. "

The other material sections of the Madras Harbour Trust Act are to be found set out in the judgment of Boddam, J. Two letters, Exhibits A

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and C, dated 14th April and 11th May 1898, respectively, were written on behalf of plaintiff, giving notice of action. They are as follows :—

[395] HIGH COURT, MADRAS,
14th April 1898.

EXHIBIT A.

To

THE TRUSTEES OF THE HARBOUR OF MADRAS.

SIRS,

Our client, Mr. Haji Ismail Sait, of the English Warehouse, Madras and Bangalore, is the owner of a piece of land with four godowns and other buildings thereon, bounded on the east by the sea to the north of the Madras harbour, a short distance from the north arm of the harbour.

It is represented to us by our client that by reason of the extension of the north arm of the said harbour, the sea has encroached on the lands to the north of the harbour.

It is further represented to us by our said client that, on or about the 25th December last, the greater part of two of the said godowns was washed down by the sea, that a third was much damaged and will probably come down; and that a fourth has cracks in the walls and cannot be used without danger; the wall also which extends from the godowns to the end of the piece of land on the north was washed down, and our client has also lost a piece of his land which has been washed away by the inroads of the sea.

It is further represented to us that our client wrote to the Secretary of your Board on the said 25th December, 1897, calling your attention to the damage done to his property, but that he has received no reply to his letter.

Our client claims that by your failure to take such remedial or precautionary steps as should counteract the mischievous results upon his private property of the creation and maintenance in its present condition of the north arm of the harbour which is vested in you, you have illegally diverted the wash of the sea, which you have caused or permitted to encroach upon his land to the damage of his property as above mentioned.

We are instructed to give you notice, which we hereby do, that our client assesses the damages caused to his property as above mentioned at the sum of Rs. 30,000 ; and we beg to inform you under Section 87 of your Act, if such section apply to our client's claim, that. if that sum be not paid to him or to us on his behalf by you on or before the 28th instant, he will, at the expiry of one [396] month from the date of this letter, without further notice, institute legal proceedings against you for the recovery of the aforesaid damages.

We are,
Sirs,
Yours obediently,
BARCLAY, ORR & DAVID.

HIGH COURT, MADRAS,
11th May 1898.

To

EXHIBIT C.

THE TRUSTEES OF THE HARBOUR OF MADRAS.

SIRS,

We beg to call your attention to the fact that the deposit of stones on our client Mr. Haji Ismail Sait's property at Royapuram affords no protection whatever against the sea.

On the 8th, 9th and 10th April last, the sea washed over the portions of our client's property already breached although there was no more than the ordinary wind and sea of the hot weather.

We are instructed by our client to call on you to pay the sum of Rs. 35,000 as damages for the injury already done to his said property by the encroachment and inroad of the sea and to give you notice if you do not pay it that he will sue you for it and for a further sum representing any further damage that may be done to his property by the sea before the suit is filed or heard. His grounds for claiming that you should be held liable to pay such damages (on which the suit will be based) are, that the encroachment of the sea to the north of the harbour is the result of the harbour groynes by which the action of the sea has been affected, that you have acted illegally and negligently in maintaining and extending those groynes in the way you have done and so causing the encroachment and that by so maintaining and extending those groynes you have caused the foreshore vested in you to the east of our client's premises to be washed away or submerged and have thereby let the sea in on to our client's premises and caused the injury to our client's property resulting from the inroads of the sea, and that you have taken no due steps to prevent the inroads of the sea on our client's property or the consequent loss to our client.

Yours obediently,
BARCLAY, ORR & DAVID.

[397] The case came on for hearing in the first instance before Shephard, J., on the questions raised by issues Nos. 1, 5, 6 and 7, on the allegation made in the plaint together with the admitted facts referred to by his Lordship in the following judgment.

The Advocate-General (Hon. Mr. *C. Arnold White*), Hon. Mr. *E. Norton* and Mr. *K. Brown*, for plaintiff.

Mr. *J. H. M. Ryan* and Mr. *R. A. Nelson*, for defendants.

On the 8th December 1898 the Court (SHEPHARD, J.) delivered the following

JUDGMENT.

The first question is whether the suit is barred by limitation. The plaint was originally presented on the 9th July 1898, and it must be assumed that the cause of action arose on the 25th December 1897 and the 9th and 10th April 1898. The plaint was amended on the 13th September 1898. According to Section 87 of the Madras Harbour Trust Act, under which the Board of Trustees is constituted, no suit shall be commenced against any person under the Act after six months from the accrual of the cause of such suit. It is argued on the plaintiff's behalf that, although the suit was commenced more than six months after the 25th December 1897, it is nevertheless maintainable because, on the day when the six months expired and until the day before the plaint was presented, the Court was closed. If Section 5 of the Limitation Act is applicable to the present case this argument clearly must prevail, and there is authority for holding that that the second paragraph of that section is applicable to a case for which a special rule of limitation is prescribed by the Madras Forest Act of 1882 (*Reference under Forest Act V of* 1882 (1)). This case was not recorded by the Full Bench in *Veeramma* v. *Abbiah* (2). Apart from

(1) 10 M. 210. (2) 18 M. 99.

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authority and assuming that the provisions of the general law of limitation do not control the special provision of the Harbour Trust Act, I should be prepared to hold that the plaintiff must be deemed to have commenced this suit in due time because it was owing to the act of the Court itself that he was prevented from presenting his plaint till the 9th July (see *Aravamudu Ayyangar* v. *Samiyappa Nadan* (1) and cases therein cited).

This argument does not avail the plaintiff if the amended plaint, which must be taken as having been presented on the 13th September, contains any new cause of action. But the view put forward **[398]** by Mr. Norton on the plaintiff's behalf was that no such alteration of the plaint had really been effected. This is a matter which I shall have to consider hereafter. In any view of the amended plaint the suit is not altogether barred by the law of limitation.

The next question is as to the sufficiency of the notice which under the same section of the Act has to be given by an aggrieved party. For the purpose of this question, three letters were admitted, one of the 14th April from the plaintiff's solicitors to the defendants, one of the 25th April in reply thereto, and a further letter from the plaintiff's solicitors, dated 11th May 1898. Two objections were raised by the said counsel for the defendants. It is said that the two notices sent on the plaintiff's behalf are bad, because they are conditional in form and because they do not state with sufficient clearness the cause of action alleged. I do not think that either of these objections can be allowed to prevail. Having regard to the object for which notice of action is required, I think that the defendants were sufficiently apprised as to the complaint which the plaintiff had to make, and that they cannot say that they had not full opportunity to consider the complaint and prepare their defence or make amends.

I now have to deal with the more important question raised by the first and sixth issues. I have had some difficulty in ascertaining with any precision what it is that the plaintiff charges against the defendants. The third paragraph of the amended plaint admittedly contains the principal allegations. The principal charge made is that the defendants maintained and extended the harbour groynes without taking due and sufficient precaution to prevent injury from being done to the plaintiff who is the owner of premises lying to the immediate north of the harbour. In consequence of this conduct of the defendants, it is alleged that the plaintiff's premises have been submerged by the sea. The fourth paragraph of the plaint, which, as Mr. Norton, I think, rightly admitted, is immaterial or at any rate of secondary importance, alleges that the defendants have failed to maintain the revetment which in the second paragraph is described as being constructed on the foreshore to the east of the plaintiff's premises and as being part of the property vested in the defendants. The fourth paragraph goes on to complain of omission to adopt other remedial and precautionary measures for the purpose of preventing the mischief already complained of. I understand from the plaintiff's counsel **[399]** and it is clear from the plaint itself that no act of commission is charged. Omission to take preventive measures appear to be the gist of the plaintiff's action. As Mr. Norton put it, the case was that, although the erosion of the foreshore on the north was the natural and necessary consequence of the construction of the harbour, that consequence might have been prevented and it was the duty of the defendants to take steps to prevent it. In order to see if such a duty is imposed upon the defendants, it is

(1) 21 M. 385.

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necessary to consider the provisions of the Act. The preamble says that it is expedient to make provision for the regulation, conservancy and improvement of the harbour of Madras. It was for the management of an existing harbour and not for the construction of a new harbour that the defendant's Board was brought into existence, and here it may be noted that the plaint admits that the encroachment of the sea on the north had begun at the time when the defendants took over the control of the harbour. By Section 25 certain property including the ground on which the revetment stands was vested in the Board. Sections 60 and 61 prescribe the works which the Board may execute including works for the protection of the harbour and such as may be expedient for carrying out the purpose of the Act. Reference was also made to the last clause of Section 87, but, as it seems to me, this need not be considered, because it is not charged against the Board that they did any act or ordered any act to be done to the detriment of the plaintiff. There is no provision in the Act for compensating proprietors of land injuriously affected by the operation of the Board on the maintenance of the harbour nor was any section indicated, in which the Board is enjoined to take steps or incur expenditure for the protection of such persons. Now in so far as the plaint charges as wrongful the maintenance of the harbour entrusted to the management of the Board and complains of damage done to the plaintiff's land as a consequence of the existence of the harbour, it is plain that no action will lie. It must be taken that, if the Legislature did not actually know of the mischief caused by the erection of the harbour, they, at least, contemplated the necessary consequences of their own act. Their intention would be defeated if it were open to persons in the plaintiff's position to complain of the harbour as of a nuisance (*Hammersmith, &c., Railway Company* v. *Brand*(1)). To **[400]** any such complaint the simple answer of the defendants is that they are acting under their statute and doing no more than it enjoins them to do. The Court cannot treat as a wrong that which the Legislature has authorised. *Vaughan* v. *The Taff Valley Railway Company* (2) was cited and it was argued that the defendants were bound to use care and diligence in the performance of their duties. In my opinion there is no analogy between that case and the present case, because here it is not alleged that anything was done by the Board. There is nothing here to correspond to the running of the locomotive engine in *Vaughan* v. *The Taff Valley Railway Company*(2). Even in cases which more nearly resemble the present, such as *Hammersmith, &c., Railway Company* v. *Brand* (1) and *London and Brighton Railway Company* v. *Truman*(3), cause for complaint arises only when something is done. The railway must have trains run over it or no vibration can be occasioned; the cattle yard must be used or no inconvenience to neighbours can arise, and the degree of inconvenience may depend on the mode of user, which is left to the discretion of railway company similarly with the Harbour Board. It may well be that they may be liable for damage done to ships or otherwise in consequence of the neglected condition of the harbour or careless management of the traffic, unless they are protected by the provisions of Section 87. But the present case is altogether different. The mere existence of the harbour in a state of quiescence, and independently of the use of it, is the cause of damage to the plaintiff's land. It is not alleged against the Board that they might have maintained the

(1) L. R. 4 H.L. 171. (2) 29 L.J. Ex. 247; 5 H. & N. 679.
(3) L.R. 11 App. Cas. 45.

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harbour in such a way as not to cause such damage or that they had any choice but to maintain it in the condition and on the lines according to which it was originally constructed by the Government. No case was cited in which, in the absence of express provisions, a public body authorized by statute to maintain property in a condition which must be prejudicial to third parties, has been held liable for mere omission to take measures to obviate the mischief. Some stress was laid on the circumstance that the soil on which the revetment rests is vested in the Board. The defendants might have maintained the revetment and therefore, it is argued, they ought to have done so. [401] Assuming that the fourth paragraph of the plaint is to be treated as alleging a substantive cause of action—and I have already observed that it was not so treated in the argument—I do not think the averments made in it are sufficient. There is no averment that the maintenance of the revetment would have had the effect of preventing the mischief of which the plaintiff complains, and I do not see how any such averment could have been made, considering that it is admitted that the encroachment of the sea had begun when the Act was passed and, therefore, had not been prevented by the presence of the revetment. What the plaintiff requires is not merely the maintenance of the protective works which were in existence when the Board was incorporated but the improvement and strengthening of those works and the construction of others for the same purpose. This is in effect a repetition of what is claimed in the third paragraph of the plaint. That being so, the observations already made apply equally to the fourth paragraph of the plaint.

The plaintiff's case is certainly one of some hardship and it may reasonably be said that the Act ought to have provided compensation for owners of land affected by the harbour works. The omission of such provision is, however, no ground for an inference in the plaintiff's favour. The proposition which I am asked to affirm, *viz.*, that, although the Board are freed from the liability which would attach to an ordinary individual, they are nevertheless responsible in damages for omission to construct protective works, is one which would strike at the root of the immunity from action which the Legislature must be deemed to have conferred on the Board. The Legislative sanction, which protects the Board from actions for nuisance in the maintenance of the harbour, would be valueless if, instead of that action, the present action were maintainable. Having regard to the averments made in the plaint and the provisions of the Act, I think the plaintiff has failed to make out a case and, therefore, I must dismiss the suit with costs.

Against the above judgment the plaintiff preferred an appeal, (original side appeal No. 5 of 1899), which, in due course, came on for hearing before SIR S. SUBRAHMANIA AYYAR, OFFG. C. J., and O'FARRELL, J.

[402] The Advocate-General (Hon. Mr. *C. Arnold White*), Hon. Mr. *E. Norton*, and Mr. *R. F. Grant*, for appellant.

Mr. *J. H. M. Ryan*, Mr. *R. A. Nelson*, and Mr. *Allan Daly* for respondents.

The Advocate-General:—Plaintiff is the owner of land near the harbour. It is conceded that a process of erosion has continued for a considerble time; that it probably commenced before the harbour was built—certainly before the trustees took it over: and that it is a natural process. But it is contended on behalf of the plaintiff that the erosion

has been increased by the construction of the harbour. Prior to the Madras Act II of 1886, the harbour was in the hands of Government. After the existing works had been handed over to the trustees, under that Act, the trustees extended the works and so increased the erosion. It is contended that such extension is not authorized by the Act. (He referred to the Madras Harbour Trust Act, 1886, Sections 2 and 3, and Chapter II.) The plaintiff's contention is that the Board of Trustees can carry out the powers conferred upon it by the Legislature without injuring third parties. We concede that if the Board cannot exercise its power without injuring others, it is protected by the statute. But we also contend that we are entitled to have that question tried—the question, in short, is, whether the maxim *sic utere tuo ut alienum non lædas* applies. (He referred to Schedule A of the Act which defines the property that became vested in the Board on the passing of the Act; also to Sections 60, 61, 87.) The negligence complained of is the omission to erect works to protect the property of the plaintiff, as a member of the public, from erosion. Defendants did take steps to counteract the erosion, by erecting a revetment—which also shows their knowledge that the sea was advancing. But they have failed to maintain that revetment and so damage has been caused. (He referred to the particulars of negligence.) Even without an allegation of negligence, it is submitted that there is a good cause of action and the maxim referred to applies. (He referred to the judgment of the Lower Court). We complain that there has been a positive act,—not merely quiescence :—arms have been built out into the sea, and these have caused the sea to set in a certain direction. [SUBRAHMANIA AYYAR, OFFG. C.J. :—If the harbour was a nuisance at the time when it was handed over, must it not be assumed that the Legislature authorized that nuisance and authorized the Board to **[403]** carry it on?] If so, which is not admitted, the action of the Board must be limited to such acts as are expressly authorised. In *Hammersmith, &c., Railway Company* v. *Brand*(1), the real ground of the decision is that the Legislature intended, under the Lands Clauses Act, to take away the right of compensation altogether : the Legislature had framed a complete code, from which any right to compensation was omitted, and so it must be inferred that it was intentionally omitted. The head-note states that the right of action is taken away—namely, by that Act. The Harbour Trusts Act does not expressly take away the common law right to sue for compensation, and so it must be inferred that that right was left. In *London and Brighton Railway Company* v. *Truman* (2). it was the natural and necessary consequence of keeping a cattle-shed that it should be a nuisance. But it is not the necessary result of a harbour that the land of adjoining owners must be washed away. [SUBRAMANIA AYYAR, OFFG. C. J.:—Can it be predicated that the erection of a harbour will not necessarily alter the direction of the beat of the sea on the shore ?] It is submitted that a harbour can be maintained without inflicting damage on any one, and if damage is inflicted the Board is liable, unless that damage was unavoidable. In *Metropolitan Asylum District* v. *Hill* (3) and *Vaughan* v. *The Taff Valley Railway Company* (4), it was shown that the best mechanical appliances available had been used. If the Harbour Board can prove the same, they may possibly have a good defence, but that question should be tried. In

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(1) L.R. 4 H.L. 171.
(2) L.R. 11 App.Cas. 45.
(3) L.R. 6 App. Cas. 193.
(4) 29 L.J. Ex. 247 ; 5 H. & N. 679.

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Jordeson v. *Sutton, Southcoates and Drypool Gas Company* (1) the law was accepted and damages alone were assessed. [He also referred to *Geddis* v. *Proprietors of Bann Reservoir* (2). *Glossop* v. *Heston and Isleworth Local Board* (3), per Brett, L. J., at page 119 : *Vernon* v. *Vestry of St. James, Westminster* (4), *Evans* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (5).] It is sufficient for plaintiff to show that damage has been sustained by reason of the harbour to establish a *prima facie* case, which the defendants should be called upon to answer. It is incumbent on defendants to show that they could not execute [404] the works authorized by the statute to be executed, without causing the injury complained of, and that question should be tried.

Mr. *J. H. M. Ryan.*—The case of *Cracknell* v. *Mayor &c., of Thetford* (6), as explained in *Geddis* v. *Proprietors of Bann Reservoir* (2), is conclusive. The real complaint against the Board is not merely that they extended the harbour arms so as to cause injury but that they extended them without building protective sea walls on the foreshore ; that they did an act that was authorized but that they omitted to do it with proper precautions. But the answer is that the Board is not authorized to build sea walls for any object except that of protecting the harbour itself : the sole object of the Act is the protection of the harbour : see Sections 60, 61 and 33, the latter of which only permits expenditure to be made on the walls of the harbour itself. Even if the harbour has caused damage, which damage could have been prevented by building sea walls, the Board has no power to spend money on such walls and such expenditure would have been *ultra vires*. On this, *Cracknell* v. *Mayor &c., of Thetford* (6) is conclusive. A converse case was *Geddis* v. *Proprietors of Bann Reservoir* (2), where a corporation was held to be liable where it had power to take preventive measures and neglected to take them. The decision in the latter case turned on Clause 2 of the statute, namely, as to whether the corporation had power to scour and cleanse the Muddock river except for the purposes of the defendant's statute. The corporators had the power to scour the river for the purposes of their scheme, and if they had so scoured it the plaintiff's lands would not have been flooded. But here, the harbour trustees were not endowed with power to do what plaintiff says would have prevented the injury. If the trustees owe a duty to plaintiff, they owe a similar duty to all other landowners along the shore ; had they shielded the plaintiff, they would have thrown the set of the tide against another owner's land lower down ; and the duty would have been endless. The complaint is not the extension simply, but the extension without proper precautions. Whether the Board is liable or not depends on the intention of the Legislature. The encroachment had commenced before the harbour was handed over ; yet the Legislature gave the Board only limited powers and such protective works as it did authorize were only [405] authorized for the protection of the harbour itself. Further, it is submitted that the defendants are protected by Section 87, and that even if plaintiff should be held entitled to some remedy he is not entitled to damages.

The Advocate-General in reply :—In order to enjoy protection under Section 87 defendants must show that they acted *bona fide* ; and that is a question of fact to be proved, and the *onus* is on defendants to prove it.

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(1) (1898) 2 Ch. 614.
(2) L.R. 3 App. Cas. 430.
(3) L.R. 12 Ch. D. 102 at p. 119.
(4) L.R. 16 Ch. D. 449.
(5) L.R. 36 Ch. D. 626.
(6) L. R. 4 C. P. 629.

It is wrongly contended that defendants had no power to do an act to check the injury they had set going; Section 33 enables works to be executed to carry out the object of the trust, and that would entitle the Board to execute works necessary to prevent injury from occurring to others and so to save the Board from liability. There is also a common law duty imposed on the defendants not to injure others and this is not taken away by the statute; so that expenditure incurred with that object cannot be said to be *ultra vires*.

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On 23rd August 1899 the Court delivered the following judgments :—

SUBRAHMANIA AYYAR, OFFG. C.J. :—This case comes up for decision on the pleadings. Now, putting aside vague general expressions which occur in the plaint and the written statement filed on behalf of the plaintiff and taking the definite allegations therein, the plaintiff's case is that the Harbour Trust Board, in maintaining and extending the northern wall of the harbour without providing a revetment or sea-wall sufficient to protect the plaintiff's property from being encroached upon by the sea, has committed an actionable wrong and is responsible to the plaintiff for the damages sustained by his buildings having been undermined and destroyed by the sea.

In arguing on his behalf the learned Advocate-General contended that the wall as it stood when constructed by the Government and as subsequently extended by the Board, was and is a nuisance to the plaintiff and relied strongly on the maxim *sic utere tuo ut alienum non lœdas*. Now though that maxim is an oft-quoted one, yet it is obvious that only in cases where the relative rights of owners of two different landed properties are clear, with reference to specific rules of law, and one of those properties has been used in a manner inconsistent with such rules, the maxim can be safely employed as indicating that the law has [406] been broken. Where such is not the case, however, the maxim furnishes no certain guide for the solution of the question whether the user of one of the two properties to which user objection is taken, does or does not amount to an actionable wrong. See per Erle, C.J., in *Brand* v. *Hammersmith and City Railway Company* (1) who there points out that the maxim is no help to decision as it cannot be applied till the decision is made. And the fallacy of characterizing a work like the wall in question as a nuisance is shown by the passage which follows that just quoted, where the Chief Justice, referring to the act complained of in that instance, observes that the term nuisance means "both annoyance that is actionable, and also that which is not actionable; and where the question is whether an annoyance is actionable, the word 'nuisance' introduces an equivocation which is fatal to any hope of a clear settlement."

It is therefore necessary to enquire whether any right of the plaintiff has been infringed. The plaintiff does not allege that the building of a wall such as the one in question is *per se* a nuisance. Indeed, it is difficult to see how such an allegation can be sustained, for the building of a harbour and such like is only a natural mode of using the property near the foreshore. (Moore's 'History of the Foreshore,' page 660. See, as to the Crown's prerogative to establish ports, &c., Bacon's 'Abridgment,' 7th edition, Volume VI, page 402 and *Hunter* v. *Northern Marine Insurance Company* (2). Nor is it alleged that the harbour wall itself has been negligently constructed. Under the circumstances the mere fact

(1) L.R. 2 Q.B. 223 at p. 247. (2) L.R. 13 App. Cas. 717 at pp. 722-723.

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that damage has been caused by the wall is not decisive of the question whether any right of the plaintiff has been infringed. See *West Cumberland Iron and Steel Company* v. *Kenyon* (1) where Lord Esher (then Brett, L.J.,) expressed himself on the point thus:—"The action is brought on the ground of an alleged breach of the maxim *sic utere tuo ut alienum non lædas.* The cases have decided that where the maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use [407] of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he cannot succeed." See also *Wilson* v. *Waddel* (2) where Lord Blackburn observes:—"The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of user: unless in so doing he interferes with some right created either by law or contract."

Having thus seen that the plaintiff has not shown that the Board or the Government has been using their property in any but a natural manner unattended by negligence in the construction of the wall itself, the question arises whether there was any negligence on their part in omitting to provide and maintain such a revetment or sea-wall as would have protected the plaintiff's property from destruction by the sea. In other words, were they under a duty to construct such a work in the interests of the plaintiff though not required for the purposes of the harbour. No authority was cited for the view that the Government or the Board owed any such duty to the plaintiff. Of the decisions cited on his behalf as establishing the liability of the defendants, none seems to touch the present case. No doubt one of them, *Geddis* v. *Proprietors of Bann Reservoir* (3) at first sight appears to be very similar to the present case and the observations of Lord Blackburn there may seem to settle the question here. But in that case it was established upon the construction of the particular statute incorporating the defendant company that there was on its part a duty to exercise its statutory powers of dredging and cleansing the channel. As Lord Justice Collins points out in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (4):—"In *Geddis* v. *Proprietors of Bann Reservoir* (3), Lord Blackburn was dealing with a case in which the rights of adjoining owners had been in fact invaded, the statute under which the defendants acted not enabling them to flood the plaintiff's lands when such flooding might have been avoided by dredging, as the defendants had power to do, the channel by which they sought to pass their compensation water back to the river. They were under a duty to pass the water down to the river, and they were given powers to make and maintain channels for this purpose, and where they had [408] not exercised these powers they could not say that the damage to the adjoining proprietors was a necessary incident of the exercise of their statutory right. The statutory power which Lord Blackburn thought them bound to exercise was one without which their duty of passing the water on could not be properly carried out." It is true, that here the Government or the Board, as the owners of the soil, can errect protective works of the kind mentioned by the plaintiff, but where is the duty making it obligatory to erect such works when as already stated, they were using

(1) L R. 11 Ch. D. 782 at pp. 787, 788.
(2) L.R. 2 App. Cas. 95 at p. 99.
(3) L.R. 3 App. Cas. 430.
(4) [1898] 2 Ch. 603 at pp. 611, 612.

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their property only in a natural manner unattended by negligence? The Government or the Board may have been bound so to construct the harbour wall as to interfere as little as possible with the plaintiff's property. Neither is, however, called upon to undertake any independent work for the protection of the plaintiff. In support of this, reference may be made to the case put by Collins, L. J., at page 612 in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1) by way of illustration, *viz.*, that of an owner of a house, for which no right of support from the adjoining house had been acquired, with reference to the owner of the latter house withdrawing the support to which the former owner was not entitled. Though in a such case the pulling-down owner must be careful to interfere as little as possible with the other house, he is certainly not called upon to take active steps for its protection, as by shoring it up. Reference may also be made to *Ponting* v. *Noakes* (2) as, in principle, a somewhat analogous case. Though it is well known that yew trees are poisonous to horses that eat of them, yet it was held in that case that a person who grew a yew tree near the boundary of his land was under no duty to take means to prevent his neighbour's horses from eating of the tree. In cases like the above there is, as Collins, L. J., pointed out, "a broad distinction between exercising a right with reasonable care so as not to do avoidable damage and taking active measures to insure the continuance of something that is not a right in the adjoining owner." *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1). While I am in this part of the case I may refer to *King* v. *Commissoners of Sewers of Bognor* (3) not, indeed, as an authority for the proposition sought to be laid **[409]** down here, but for showing to what unreasonable lengths the duty, if there be any such, would be carried, and that hence such a duty ought not to be implied in law. There Lord Tenterden, C.J., observed "if we were to say the Commissioners in this case were bound at their expense to erect a groyne to protect this land and the effect of that erection might, and probably would, be to do damage to the land lying further eastward and then other persons would have a right to call upon them to erect a groyne to defend them, and so they might go on travelling eastward from place to place until at last they came to the North Foreland. It is well known the sea is encroaching along the whole of the coast round by the Isle of Thanet, notwithstanding it is so different from that of Felpham, it being a high line of chalk cliff. It has encroached very greatly even there. Now if we were to say the Commissioners could be called upon to do this, it would be carrying the proposition to an extent to which, as it seems to me, in reason and law it cannot be carried." Considering the difference between the sea and ordinary water courses, it is difficult to maintain that the distinction, recognised in the case of the latter, with reference to what may be done by way of defence and what may be done by way of natural user, is applicable to the former. Therefore though the harbour wall in question was not raised by way of defence against the encroachment by the sea, as in the case referred to, still it would seem that the reasoning of the Chief Justice in the above extract should be followed in cases like this, since the purpose for which the wall was built was a perfectly legitimate one. As regards the non-repair of the revetment which was constructed on the foreshore with a view to prevent the

(1) [1898] 2 Ch. 603 at p. 612.
(2) [1894], 2 Q. B. 281.
(3) 6 L. J. K. B. 338 at p. 342.

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encroachment by the sea, it is scarcely necessary to say that in the circumstances of the case, that amounts to nothing more than a discontinuance of a favour shown by the defendants to the plaintiff.

In my view, therefore, the plaintiff has not shown that the Government or the Board had, in omitting to provide a revetment or sea-wall to protect his land, failed to carry out any duty which they owed to him. Such omission is therefore not actionable.

Supposing, however, that in building the wall without making adequate provision for the protection of the plaintiff's land the Government had infringed his right, still it cannot be held that the Board is responsible to him, since, under Madras Act II of [410] 1886, which vests the harbour in the Board, that body is not at liberty to spend any money coming to its hands for a purpose such as the construction of works needed for the protection of persons in the position of the plaintiff but not required for the purposes of the harbour. Now, Clauses 1 to 5 of Section 33 of the Act, which enumerate the different specific purposes to which money received by the Board is to be applied, have no reference whatever to works like the revetment. Nor can the words of the sixth and remaining clause "generally for the purposes of this Act" be possibly held to cover expenditure on such a work, since, as already stated, it is not one required for any of the purposes of the Board. It is hardly necessary to say that had the Legislature intended to empower the Board to utilize its money in connection with the defence and protection of properties belonging to other persons affected by the construction of the wall in question, express provisions as to it would have been inserted in the Act. The absence of such provisions is fatal to the suggestion that it is competent to the Board to devote any part of its moneys for protection and defence as aforesaid. In short, the Act must be held to empower the Board to maintain and improve the harbour, notwithstanding that the wall in question proved to be a nuisance to the plaintiff or those through whom he claims when it was constructed. This case is therefore distinguishable from *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company* (1), cited for the plaintiff, in that there the statute under which the defendants were acting was construed to entitle them to exercise their powers only in so far as such exercise did not affect the legal rights of their neighbours.

In the view I take of this case in holding, that the Board had been making only a natural use of the property, any enquiry into whether the damage can be avoided or mitigated is quite immaterial. Much less will such enquiry be material even if the user be taken to be not natural, for the plaintiff will then have a right to relief for any consequential damage, and the Court, as Lord Hatherley said, in *Attorney-General* v. *Colney Hatch Lunatic Asylum* (2) "is not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong." Nor is it necessary to consider the defendants' plea based on Section 87 of the Act. I would therefore dismiss the appeal with costs.

[411] O'FARRELL, J.—The plaintiff in this case is the proprietor of certain godowns situated close to the foreshore within the limits of the port of Madras as defined by Section 3(2) of the Madras Harbour Trust Act II of 1886. The defendants are the trustees for the harbour, in whom the property both in the artificial harbour itself (as defined by Section 3 (3)

(1) (1898) 2 Ch. 614. (2) L.R. 4 Ch. App. 146 at p. 158.

of the Act) and in the foreshore within the limits of the port, are vested—see, as to the latter, Section 25 and Schedule A to the Act. The harbour was, as is well known, constructed by Government without statutory enactment and the Act of 1886 simply hands it over to the trustees, giving them full powers of maintenance and improvement. At the time when it was so handed over it is common ground that erosion of the foreshore adjacent, to the plaintiff's premises had set in as a consequence of the existence of the harbour. Subsequently, however, in exercise (it must be presumed) of their powers of improvement the defendants extended the groynes.

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It is not denied that the sea has now encroached on and beyond the foreshore and has caused damage to the plaintiff's property. In the letter of 14th April 1898, addressed to the defendants by the plaintiff's solicitors and filed as Exhibit A, the claim would appear to be based on the defendants' act in extending the northern arm or groyne without taking due precautions to counteract the injury to private property that would thereby result, but in the further notice sent on 11th May the words "maintaining and extending" are used and in the plaint what is charged is that the defendants "negligently and unlawfully and without taking due and sufficient precautions to prevent injury from being thereby occasioned to the plaintiff, took over and allowed to continue and maintained and extended harbour arms or groynes, which at the time of such taking over had caused and were causing and have since continued to cause an encroachment of the sea on the coast to the north of the said harbour whereby the said foreshore to the east of the plaintiff's premises has been submerged and washed away by the inroad of the sea and the sea has been let in on to the plaintiff's said premises and the damage mentioned in the fifth paragraph hereof has been thereby caused."

Paragraphs 4 and 6 of the plaint refer to a specific means which, it is alleged, the defendants might have adopted for the prevention of damage, *viz.*, the proper maintenance of a revetment or stone barrier already constructed by them on the foreshore. **[412]** The particulars of the grounds of claim furnished by the plaintiff after the settlement of issues also make mention of the defendants' failure to properly maintain the revetment as constituting the negligence complained of. Further the plaintiff's Counsel at the hearing appears to have distinctly admitted that the erosion complained of was the natural and necessary consequence of the construction of the harbour but that that consequence might have been prevented by remedial and preventive measures which it was the duty of the defendants to adopt.

The first and most important question we have now to decide is whether the learned Judge was right in his finding that the plaintiff had made out no cause of action, and I have been thus particular in setting out the pleadings and contentions of the plaintiff because it is upon them that the whole question turns. I think two things are clear from what I have previously said—first, that the foundation of the plaintiff's case is negligence and secondly, that the negligence is not anything done or omitted by the defendants (or their predecessors in title, the Madras Government) in the construction or maintenance of the harbour itself but the failure to take remedial or preventive measures to counteract the necessary results of such construction and maintenance. I do not think it is open to the learned Advocate-General now to argue that it lay upon the defendants to prove that the harbour had, in the first instance, been constructed or

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the groynes extended in the best and most skilful manner possible so as to effect the purpose intended without causing damage to private property. The plaintiff's case I take to have been that, however skilfully the work was carried out, it was inevitable that damage should ensue unless certain additional measures were taken, and the gist of his complaint is that these measures were not taken.

This being, as I conceive, the real matter at issue, the law to be applied is not doubtful ; as is, in fact, conceded by the learned Counsel for the respondents. It is best stated in the words of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1). His Lordship says :—"I take it, without citing cases, ... that no action will lie for doing al- that which the Legislature has authorised, if it be done without negligence, though it does occasion damage to any one ; but an action does lie for doing that which the Legislature [413] has authorized, if it be done negligently. And I think that if by reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." These observations sum up in a compendious form the principle involved in the cases of *Vaughăn* v. *The Taff Valley Railway Company* (2) and *Hammersmith, &c., Railway Company* v. *Brand* (3) and others of the same nature. I do not think, with the greatest respect for the learned Judge whose judgment we are considering, that he is right in drawing a distinction between nuisances caused by the mere existence of a railway or a harbour or the like and those which are the result of their daily user. In principle it seems difficult to see any reason for such a distinction and in fact, in one case which has been much commented upon at the bar (*Cracknell* v. *Mayor, &c., of Thetford* (4)), it was the "mere existence in a state of quiescence" of the staunches put down by the defendants which, in combination with the action of natural forces, caused the damage relied upon as the foundation of the suit. No such distinction as is now suggested was there set up, though it would have been clearly pertinent. I need not, however, say anything further on the point as the learned Counsel for the respondents has frankly conceded that if, by a reasonable exercise of the powers vested in the trustees, they could construct a sea-wall or revetment on the foreshore which would protect the plaintiff's property, they are bound to do so. His contention is that they are not authorized to construct any such sea-wall except for the purpose of protecting the harbour itself, and that to employ the public funds at their disposal for the protection of the plaintiff's property would be a breach of trust. He refers us to Sections 60 and 61 and also to Section 33 of the Act and relies upon *Cracknell* v. *Mayor, &c., of Thetford* (4) and *Geddis* v. *Proprietors of Bann Reservoir* (1) already cited. In the former case the corporation were found to be not liable, because they were held to have no power under the statute to remove the silt or cut the weeds except for the purposes of improving the navigation. In the latter case, the corporation were held to have such statutory powers and were, therefore, declared liable. In both cases the decision turned upon [414] the existence or non-existence of statutory powers. No question of common law powers arose in either case, because in the former the corporation were not the owners of the soil on which the weeds grew and the silt was deposited, and similarly in the latter they had a mere

(1) L.R. 3 App. Cas. 430 at p. 455.
(2) 29 L. J., Ex. 247; 5 H. & N. 679.
(3) L. R. 4 H. L. 171.
(4) L. R. 4 C. H. 629.

easement in the bed of the Muddock (see page 437 of the report). Now in the present case there is an important distinction; the defendants are the owners of the foreshore as I have already noted. As such owners they have, subject to any express or implied restrictions imposed by the Act itself, the power to erect sea-walls on the foreshore. The whole question is then narrowed to this: Is there anything in the Act which does restrict them? Section 60 says that they may execute such works as they may determine to be necessary for the purposes of the harbour. Section 61 says such works may include (and I would note in passing that the word "include" seems to imply that the enumeration is not intended to be exhaustive) various works, all obviously having direct reference to the purposes of the harbour, the one most pertinent to the present discussion being contained in the 6th sub-section. This runs "the construction of such break-waters and other works without the limits of the harbour as shall be expedient for the protection of the said harbour and all such other works and appliances as may be, in the opinion of the Board, expedient for carrying out the purposes of this Act." It may be conceded that the construction of a break-water for the protection of private property from erosion caused by the harbour is not exactly a work *ejusdem generis* with the others enumerated in the section; but ought we to conclude from this that it is necessarily prohibited by the Act? There is, as the learned Counsel admits, a duty cast upon the trustees to do the acts authorised by the Legislature with proper care and not negligently; to omit to construct works of prevention, if that can reasonably be done, he also admits is "negligence"; is it then to be inferred, without express words, that the trustees are prohibited by the statute from doing that which it would be otherwise their duty to do? I think not. I should require very strong words in the Act before I could assent to any such proposition. The same reasoning applies to Section 33 (6) which provides that the funds at the disposal of the trustees may be applied, *inter alia*, "generally for the "purposes of this Act." The purposes of the Act are to maintain and improve the harbour with reasonable regard to the rights of private individuals and without injury, **[415]** so far as such injury can be prevented, to their property. The construction of works to guard against injury which the trustees are bound to prevent is, therefore, strictly one of the purposes of the Act.

In the view that I take of this part of the case I have the misfortune to differ from the learned Officiating Chief Justice. I have had an opportunity of reading the judgment which he has just delivered, and have carefully reconsidered my own position with reference to the view therein expressed and the cases cited, and I see no reason to alter the opinion I originally formed. I did not, in the first instance, refer in detail to cases by which the dictum of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservior* (1) is borne out because I understood Mr. Ryan to admit not merely that the *dictum* was an accurate epitome of the authorities on the point, but that it applied to the facts of the present case. I understood him to say (and on this point I have a note taken at the time) that if the Board were authorized to construct sea-walls for the purpose of protecting private property, and if by reasonable exercise of such powers they could have obviated the damage to the plaintiff's property, they were bound to do so. His point was that the Board, on the construction of the Act, did not possess any such powers. That the learned Counsel

(1) L.R. 3 App. Cas. 430 at p. 455.

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was right in making this admission appears to me to be clear from a consideration of all the cases, notably the railway cases, referred to by Collins, L.J., in the case of *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1). In *Vaughan* v. *The Taff Valley Railway Company* (2), for instance, it was found—and the point was relied on in all the judgments—that the railway company had taken every precaution and adopted every means in their power which science could suggest to prevent their engines from emitting sparks. In that case it is clear that the defendant company took active measures to prevent injury. The supplying of a smoke cap to the chimneys of the locomotives, the securing of the ash-pan, the slowing down of the pace of the engines to the minimum point consistent with practical utility, were all active measures for the protection of private owners of property and were not only not required for the working of the railway but tended to prejudice its [416] efficiency. If the Company could have contended that it was under no duty towards the owners of adjoining property, I think it is inconceivable that the point would not have been taken. In *Geddis* v. *Proprietors of Bann Reservoir* (3), the House of Lords expressly decided that "where persons were incorporated by Act of Parliament for a particular purpose . . . . If the effecting of it may occasion (not only in the course of originally erecting the necessary works for the required purpose, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury." As Lord Hatherely remarked in that case (see page 450) "you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if we find that in carrying out your powers damage has been done by you the law will say that the powers which you can exercise shall be exercised for the prevention of mischief." I do not understand Lord Justice Collins in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1) to dissent from the dictum of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (3). He merely pointed out that it was applicable only to cases where an actual right has been invaded. The Water Company in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1) had laid their pipes at a certain depth below an uneven road which they knew the defendants had a statutory right to level. They paid nothing for the privilege. They had acquired no right to a particular thickness of soil above their pipes. In such circumstances, Collins, L.J., held that *Geddis* v. *Proprietors of Bann Reservoir* (3), did not apply. In other words, the defendants would not be bound to take active steps to prevent injury to a person having a mere privilege, as distinguished from an actual right.

It must be remembered, I think, that the immunity from actions for damage established by *Hammersmith &c, Railway Company* v. *Brand* (4), and other cases in respect of the promoters of works of public utility is itself a novel doctrine, which was forced upon the Courts by the manifest absurdity of applying the [417] principles underlying *Fletcher* v. *Rylands* (5) and similar cases to the growing industry of railways. The principle was not finally established without much opposition. The earliest case of *Reg.* v. *Pease* (6) was decided in 1832 and even so late as 1869 we find

(1) 1898, 2 Ch. 603.
(2) 29 L.J. Ex. 247; 5 H. & N. 679.
(3) L.R. 3 App. Cas. 430. at p. 455.
(4) L.R., 4 H. L., 171.
(5) 37 L.J. Ex. 161.
(6) 2 L.J. M.C. 26. 4.B. & Ad. 30.

no less an authority than Baron Bramwell prepared to hold that that case and similar cases such as *Vaughan* v. *The Taff Valley Railway Company* (1) were wrongly decided.

In regard to the cases cited by the learned Officiating Chief Justice relating to the "natural" user of lands I venture, with the greatest deference, to think that the construction of a harbour is not a natural user in the sense in which the word is employed in those decisions. I think the word as there used means "common or usual," "ordinary or every day" or the like. In *Fletcher* v. *Rylands*(2) the storage of water in a tank on the defendant's land was termed by Lord Cairns a "non-natural" use of the land and this is, I think, the sense in which the language used in the decisions cited by the Officiating Chief Justice must be understood. The attempted distinction is, I believe, generally conceded to be an unfortunate one, and is probably the chief reason why *Fletcher* v. *Rylands*(2) has been exposed to so much adverse criticism, notably in America.

As to the other point in the case, whether the defendants had the power to construct sea-walls for the protection of private property, I have little to add to what I have already said. If the defendants are—as I conceive they are—under a common law obligation to protect the owners of property (if that can be reasonably done) from injury caused by the existence of the harbour, that obligation can only be taken away by express words, which I do not find in the statute. As observed by Lord Cairns in *Hammersmith &c., Railway Company* v. *Brand* (3), "The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given, it affords a reason, though not a conclusive reason, for thinking that the intention of the Legislature was not that the thing should be done at all events, but that it should be done, if it could be done, without injury to others. What was the intention in any particular Act is [418] a question of the construction of the Act." The plaintiff is admittedly not entitled to compensation under the Act and I can find nothing in the Act to prohibit expenditure for such purposes as I have indicated. It is, no doubt, not specifically mentioned in the Act, but no more are other items of legitimate expenditure, *e.g.*, the payment of legal expenses incurred for the defence of actions brought against the Board.

With regard to what is a "reasonable exercise" of the defendants' powers, if any, to construct sea-walls, I would desire, in order to guard against misconception, to say that the expression must have regard to all the circumstances not only of the particular case but of similar cases likely to occur. If the result of a reasonable expenditure to protect the plaintiff's property will be to entail further expenditure which would be unreasonable (as, *e.g.*, the construction of protective walls through the entire length of the port) then even the original expenditure would become unreasonable. That, however, is a question of fact which I do not desire to prejudge.

The other point urged by Mr Ryan for the respondents is that they are in any case protected by the last clause of Section 87 of the Act which provides that neither the Board nor any of its officers or servants shall be liable in damages for "any act *bona fide* done or ordered to be done by them in pursuance of this Act." There was an issue on the point in the Court of

(1) 29 L.J., Ex., 247 5 H. & N., 679. (2) 37 L.J. Ex., 161.
(3) L.R. 4 H.L. 171.

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First Instance and it was decided against the defendants. I agree with Mr. Justice Shephard that this section has no reference to the present case. It applies, in my opinion, to cases where acts are done by the Board or its servants without legal authority or in excess of legal authority, but under the *bona fide* belief that they were acting by or within that authority. The words "*bona fide*" show this. They can have no meaning as applied to acts that are not merely believed to be, but really are, authorized by law. The words quoted are intended, I think, to confer an immunity similar to that afforded to Magistrates who act without jurisdiction, but in good faith and in a reasonable belief that they have jurisdiction.

In the result I would allow the appeal and as the suit has been decided on a preliminary point I would remand it for disposal on the merits with the remark that the question to be determined on the fourth issue is whether the damage complained of **[419]** could have been obviated or materially mitigated by a reasonable expenditure on the construction of sea-walls on the foreshore or on other remedial or precautionary works of a like nature.

Under Section 575 of the Code of Civil Procedure the appeal is dismissed with costs.

The appellant thereupon preferred an appeal under Section 15 of the Letters Patent which, in due course, came on for hearing before the Court as above constituted.

Hon. Mr. *E. Norton* and Mr. *K. Brown*, for appellant.—The property has vested in the Harbour Board under Section 25 of the Act. It is conceded that the harbour was erected by Government not under any statute but apparently to meet the needs of commerce. The arms of the harbour, having become vested in the Board, were extended by it and then the harbour was formed. One effect of the northern arm has been to cause the encroachments now complained of. Negligence is not charged in connection with the mode of construction, but it is complained that the encroachment is the result of the extension, and that no attempt has been made to stop the damage though the defendants knew it was being caused. Issues Nos. 5, 6 and 7 having been found in plaintiff's favour and no objections being filed, the only remaining issue is the first, as to whether there is a cause of action. A portion of the foreshore is also vested in the defendants, and some land above high water mark. The revetment which was extended by the defendants has since been abandoned. By that extension they must be taken to have acknowledged their liability to protect the property of other land owners. They, however, urge that the Madras Harbour Trust Act makes no provision for any expenditure beyond what is required for the construction and maintenance of the harbour, and that they have consequently no power to execute protective works. Such a provision was unnecessary, for the defendants must be held to be under the common law duty to carry out their works without injuring others. The absence of a clause in the Harbour Trust Act providing for payment of compensation by the defendants must be taken to leave defendants unexempted from the ordinary incidents of their common law liability. Had there been such a clause plaintiff's rights would have been limited to such as were given by it. The words in the 6th sub-section to Section 61 of the Act, " All works necessary **[420]** to carry out objects of the Act," are large enough to authorize the Board to construct and use their harbour so as not to injure the property of third persons. See Moore's 'History of the Foreshore,' 3rd edition, page 660, as to what constitutes acts of ownership on the foreshore.

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Hunter v. *Northern Marine Insurance Company* (1) does not show that a harbour is a natural mode of using land; nor does Bacon's 'Abridgment,' volume VI, 7th edition, page 402, cited in one of the judgments. The forming of a port may be a legitimate use, but it is not a natural one; moreover, here, not only the foreshore but the sea also has been used. There is no question of *jus regale*, or whether the Crown could have been sued if it had not handed over the harbour to the Trust. The Government has delegated its powers to defendants who must be taken to enjoy them subject to the ordinary common law liabilities. *King* v. *Commissioners of Sewers of Bognor* (2) (referred to in a judgment) does not apply. Plaintiff cannot protect himself as he has no foreshore. Defendants cannot plead the "act of God" as they have contributed to the result. The question is whether the act complained of is wrongful: and it is contended that it is, since it is the result of negligence. Even if the act was authorized by the Legislature, defendants were under the same liability to perform it with care: moreover, the harbour is not a protective work like those in *King* v. *Commissioners of Sewers of Bognor* (2); it is a mere commercial venture of Government and must be exercised with care and prudence, and not so as to impose hardship on others. The fact that Section 87 was inserted in the Act indicates that Government did not intend to give absolute immunity and unqualified protection, for to enjoy protection under that section there must be *bona fides*, which is a limitation. In *The Mersey Docks Trustees* v. *Gibbs* (3), Blackburn, J.'s opinion to the House of Lords, at page 107, shows that in the absence of express enactment, a corporation has the liabilities of a private individual. In *Attorney-General* v. *Tomline* (4), the contention in argument that it is the duty of the Crown to protect the public was upheld on appeal. Companies that undertake the construction of works are liable in damages if these works are improperly carried out. *Lawrence* v. *Great Northern Railway Company* (5), *Reg* v. *Pease* (6) and *Jones* v. [421] *Festimog Railway Company* (7). In the latter case there was no negligence. The real ground of the decision in *Reg.* v. *Pease* (6) is that from the nature of their authority the Legislature must be taken to have known that the permission given was to do an act that was unavoidably and necessarily a nuisance. *Glossop* v. *Heston and Isleworth Local Board* (8) was a case of injunction and was dismissed on that ground. There the defendants had taken over the nuisance complained of and had done no act, and they were charged with omitting to perform a duty imposed by statute. [He also referred to *Cracknell* v. *Mayor, &c., of Thetford* (9).] Here the Act gives the Board no right, even by implication, to maintain a nuisance, as the injury to others is neither necessary nor wholly unpreventible. He referred to *The Queen* v. *The Company of Proprietors of the Bradford Navigation* (10); *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners* (11); *Attorney-General* v. *Colney Hatch Lunatic Asylum* (12); per Lord Hatherley, L.C.; *Attorney-General* v. *The Mayor of Basingstoke* (13); *Attorney-General* v. *Council of Borough of Birmingham* (14); *Nutter* v. *Accrington Local Board of Health* (15); *National Telephone Company* v. *Baker* (16); *Rapier*

(1) L.R. 13 App. Cas. 717. (2) 6 L.J. K.B. 338. (3) L.R. I. H. L. 93.
(4) L. R. 14 Ch. D. 58. (5) L. R., 16 Q. B., 643.
(6) 2 L. J. M. C., 26; 4 B. A. Ad. 30. (7) L.R. 3 Q.B. 733.
(8) L.R. 12 Ch. D. 102.
(9) L. R. 14 C. P. 629. (10) 34 L.J. Q.B. 191. (11) 35 L.J. Ch. 93.
(12) L.R., 4 Ch. App., 146. (13) 45 L.J. Ch. 726. (14) 4 K. & J. 528.
(15) L.R. 4 Q.B.D. 375. (16) [1893] 2 Ch. 186.

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v. *London Tramways Company*(1); *Bolton* v. *Crowther*(2); *Jones* v. *Bird* (3); *Hammersmith, &c., Railway Company* v. *Brand* (4); *Vaughan* v. *The Taff Valley Railway Company*(5); *London and Brighton Railway Company* v. *Truman*(6), per Halsbury, L.C., at page 49. On the question of common law duty he cited *Clowes* v. *Staffordshire Potteries Waterworks Company* (7), per Mellish, L.J.; *Vernon* v. *Vestry of St. James, Westminster*(8); *Shelfer* v. *City of London Electric Lighting Company*(9).

Mr. *J. H. M. Ryan* and Mr. *Allan Daly*, for respondents.—No duty to erect protective sea-walls is to be found in the Act. The cases on common law liability lay down three propositions: (*a*) where the Legislature authorises an Act it is lawful: and being lawful, any damage flowing from it is *damnum absque injuria.* [422] *Brand* v. *Hammersmith, &c., Railway Company*(10), and *London and Brighton Railway Company* v. *Truman*(6); (*b*) but persons so authorised will be liable if they go beyond the powers given by the Legislature. *Hammersmith, &c., Railway Company* v. *Brand*(4) and *Metropolitan Asylum District* v. *Hill*(11); (*c*) whatever is done in pursuance of the authority must not be done negligently. *Geddis* v. *Proprietors of Bann Reservoir*(12), per Lord Hatherley, L.C. Here, there is no suggestion that the harbour trust has gone beyond its statutory powers; and so far from having done anything negligently it has done nothing; nor was it under any duty to protect plaintiff by the erection of independent works. *Vaughan* v. *The Taff Valley Railway Company*(15) and *Reg* v. *Pease*(13) are cited as showing that all possible precautions must be taken. But when that phrase is considered, it only means that the corporation must do what is reasonable; see *Harrison* v. *Southwark and Vauxhall Water Company*(14) per Vaughan Williams, J., who cites *Reg* v. *Pease*(13) and other cases: also *Simkin* v. *London and North-Western Railway Company* (15); *Hammersmith, &c., Railway Company* v. *Brand*(4) and *Vaughan* v. *The Taff Valley Railway Company*(5). So that neglignce must be taken in its literal sense and not as insurance against injury. *Hammersmith, &c., Railway Company* v. *Brand*(4) was one for compensation. In *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company*(16), North, J., held that the company had exceeded its powers. *Metropolitan Asylum District* v. *Hill*(11) turned on the question whether the Legislature had intended the Board to erect the hospital at a particular spot. The authority was general, and the Board selected a spot where the hospital was a nuisance, otherwise there would have been no liability. *Geddis* v. *Proprietors of Bann Reservoir* (12) is the only one in which a corporation has been held liable for negligence. There, the defendants were entrusted with the duty of regulating a supply of water; it was a recurring act and the case involved the question whether the corporation had the right to enter on the bed of the river Muddock to cleanse it. The finding was, in effect, that the defendants were under a duty to construct a channel, and having [423] chosen to utilise the Muddock, should have properly maintained it. Their act of allowing a flow of water to pass down the

(1) [1893] 2 Ch. 588.
(2) 2 B. & Cr. 703.
(3) 24 R.R. 79; 5 B. & A d., 837.
(4) L.R. 4 H.L., 171.
(5) 29 L.J. Ex. 247; 5 H. & N., 679.
(6) L.R. 11 pp. Cas. 45 at p. 49.
(7) L.R. 8 Ch. App., 125 at p. 139.
(8) L.R. 16 Ch. D. 449 at p. 464.
(9) [1895] 1 Ch., 287 at p. 298.
(10) L.R., 2 Q.B., 223.
(11) L.R., 6 App. Cas., 193.
(12) L.R., 3 App. Cas., 430.
(13) 2 L.J., M.C., 26; 4 B. & Ad., 30.
(14) [1891] 2 Ch., 409.
(15) L.R., 21 Q.B.D. 453.
(16) [1898] 2 Ch., 614.

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channel that was too great for its capacity, was held to be negligence. See per Lord Selborne at page 450. The decision shows that even if maintenance amounts to an "act," it is not actionable unless it is done in a negligent manner; moreover, the power to cleanse the bed of the stream was ancillary to the duty of the Board as imposed by statute. So, in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1), the defendants had power to lower the pipes, and the damage accrued from their not having done so. *Attorney-General* v. *Gaslight and Coke Company* (2) and *Harrison* v. *Southwark and Vauxhall Water Company* (3), per Vaughan Williams, J., show the broad distinction between the position of the Harbour board and the cases relating to Gas companies, for the Gas Clauses Act does not direct the companies to carry out their work regardless of nuisance arising as a consequence. Moreover, the word "harbour" must be construed as meaning the actual harbour and not all the land comprised in the port; see the definition in the Act, Section 3 (2), and consequently the Board has only power to make protective works for the harbour so defined. (He also referred to *Sanitary Commissioners of Gibraltar* v. *Orfila* (4) and *Municipality of Pictou* v. *Geldert* (5) as showing the difference between misfeasance and non-feasance.

Mr. *K. Brown*, in reply, contended that the distinction between misfeasance and non-feasance was not applicable to the present case, the defendants not occupying the positon of a highway authority. On this point he referred to *Sanitary Commissioners of Gibralter* v. *Orfila* (4); *Gibson* v. *Mayor of Preston* (6) following *Young* v. *Davis* (7): *Blackmore* v. *Vestry of Mile End Old Town* (8); *Withers* v. *The North Kent Railway Company* (9); *White* v. *Hindley Local Board* (10); *Hamilton* v. *St George, Hanover Square* (11); *Parsons* v. *St. Mathew, Bethnal Green* (12); and *Cowley* v. *Newmarket Local Board* (13).

[424] On 6th March 1900, the Court delivered the following judgments:—

JUDGMENTS.

BODDAM, J.—In this appeal, the only question argued was whether the plaintiff had by his plaint and particulars disclosed any cause of action against the defendants.

The defendants are the trustees of the Madras harbour, who were called into being by the Madras Harbour Trust Act, 1885, (Act II of 1886).

Prior to the date of this Act, the Government had erected in the port of Madras a harbour consisting of two groynes run out into the sea from the foreshore eastward. This became vested in the trustees of the harbour of Madras by the Madras Harbour Trust Act, 1885, (Act II of 1886), which received the Governor-General's assent on the 20th February 1886. The question turns upon the duties and obligation of the defendants to persons who are injured by the existence of the harbour and it is necessary therefore to examine the Act.

(1) (1898) 2 Ch. 603.
(2) L.R. 7 Ch. D. 217.
(3) (1891) 2 Ch. 409.
(4) L.R. 15 App. Cas. 400.
(5) (1893) A.C. 524.
(6) L.R. 5 Q.B. 218.
(7) 31 L.J. Ex. 250; 7 H. & N. 760.
(8) L.R. 9 Q.B.D. 451.
(9) 27 L.J., Ex. 417.
(10) L.R. 10 Q.B. 219.
(11) L.R. 9 Q.B. 42.
(12) L.R. 3 C.P. 56.
(13) (1892) A.C. 345.

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The preamble to the Act says.—"Whereas it is expedient to make "provision for the regulation, conservancy and improvement of the "harbour of Madras;" by Section 3 (2) "port" means the port of Madras within such limits as may, from time to time, be defined by the Governor in Council for the purpose of the Act by notification in the 'Fort Saint George Gazette,' and until a notification is so issued within such limits as may have been defined by the Government under the provisions of Act XII of 1875 (The Indian Ports Act).

The notification under this section appeared in the 'Fort Saint George Gazette' on the 4th June 1886 as follows:—

Notification No. 11.—Under Clause 2, Section 3 of the Madras Harbour Trust Act (II of 1886), the Right Honourable the Governor in Council hereby notifies that, from and after the 1st June next, the limits of the port of Madras for the purposes of the said Act will be as follow:—

To the north.—A line running due east from the pillar which marks the extreme north-western limit of the said port to ten fathoms water;

To the south.—A line running due east from the pillar which marks the extreme south-western limit of the said port to ten fathoms water;

[425] To the east.—A line running from north to south and connecting the easternmost points of the two before-mentioned lines, defining the northern and southern limits of the said port; and

To the west.—Within the limits of the artificial harbour a line marked by boundary pillars running from north to south and connecting the shore ends of the harbour groynes abutting on the municipal road, and without the limits of the artificial harbour a line running parallel to the water's edge between the northern and southern limits at 50 yards above high-water mark, spring tides, provided that, between a line running due east from the military boundary pillar near Messrs. Parry & Co.'s office on the north and the mouth of the Cooum river on the south, the western limit shall be the water's edge itself.

A plan exhibiting the boundaries as above defined has been prepared and deposited at the offices of the Quartermaster-General and the Master Attendant, where it can be inspected at any time during office hours.

By Section 3(3) "harbour" means "the artificial harbour at Madras "consisting of the enclosing groynes and the enclosed space and the "corresponding foreshore east of the beach road, and all buildings, struc-"tures or appliances provided by the Governor in Council or the Trust "Board for the purposes of the harbour and of the vessels using it, together "with the moorings therein laid down by the Governor in Council or the "trustees."

By Section 4 it is enacted that "the duty of carrying out the provi-"sions of this Act shall, subject to such conditions and limitations as are "hereinafter contained, be vested in a Board to be called 'the Trustees of "the Harbour of Madras' and such Board hereinafter referred to as 'the "Board' shall be a body corporate, &c." The Act then proceeds to deal with the constitution of the Board, its proceedings, officers and servants; then by Section 25 it says "on the issuing of ths second notification mentioned "in Section 2 of this Act, there shall vest in the Board the several pro-"perties specified in schedule A to this Act annexed, &c." Section 26 and

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the following sections authorise the Board, with the sanction of the Governor-in-Council, to acquire and hold moveable or immoveable property within the limits of the port or town of Madras. The mode of employing the income is governed by Section 33, which is as follows:—"Subject to any specific appropriation by the Legislature, the rents, income and other proceeds of any property [426] vested in the Board under this Act and acquired by them thereunder, and all moneys acquired by the Board under or by virtue of this Act, shall be applied by the Board as follows:—(*a*) the payment of officers and servants employed by the Board under this Act; (*b*) the remuneration of the chairman and the trustees; (*c*) the execution and maintenance of works undertaken; (*d*) the payment of any interest which is from time to time owing by the Board; (*e*) the repayment by instalments of moneys from time to time owing by the Board; and (*f*) generally for the purposes of this Act."

Then follow provisions for borrowing,—revenue and expenditure, power to levy and recover rates. Then by Section 60, "The Board may execute such works as they determine to be necessary or expedient for the purposes of the said harbour," and by Section 61 "such works may include—

"(*a*) wharfs, quays, docks, stages, jetties and piers within the harbour or on the foreshore of the harbour, with all necessary and convenient arches, drains, landing places, stairs, fences, roads, railways and approaches;

"(*b*) tramways, warehouses, sheds, engines and other appliances for conveying, receiving and storing goods landed, or to be shipped or otherwise;

"(*c*) laying down moorings for carrying out the purposes of this Act, and the erection of cranes, scales and all other necessary means and appliances for loading and unloading vessels;

"(*d*) reclaiming, excavating, enclosing and raising any part of the foreshore of the harbour which may be necessary for the execution of the works authorized by this Act or otherwise for the purposes of this Act;

"(*e*) the construction and application of dredges and other machines for cleaning, deepening and improving any portion of the harbour or foreshore;

"(*f*) the construction of such breakwaters and other works without the limits of the harbour as shall be expedient for the protection of the said harbour and all such other works and appliances as may be, in the opinion of the Board, expedient for carrying out the purposes of this Act."

Then later on comes Section 68 which says:—"If at any time the Board allow any work constructed by them or vested in them under this Act to fall into disrepair" . . . . "the [427] Governor in Council may cause such work to be restored or completed, or such repair to be carried out" and may recover the cost—and by Section 69 Government may in certain circumstances take possession and revoke the powers of the Board.

The only other part of the statute to which reference need be made is Schedule A, which specifies the property that vests in the Board. It is as follows:—

"The north and south arms of the harbour with the area enclosed therein and all the foreshore lying within the limits of the port as defined

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"in this Act excepting only, &c. . . . . . 2. The pier, the jetties "constructed and the moorings laid down by Government and any line "of railway constructed by the Government for the purposes of the har-"bour within the aforesaid limits."

At the time of this Act coming into force, there was, on the foreshore to the north of the harbour, a railway laid down on a revetment or stone barrier within the limit of the port as laid down by the notification in the 'Fort St. George Gazette' under Section 3 (2) of the Act between the sea and the plaintiff's land. This became vested in the defendants. It appears that the result of building the groynes constituting the harbour was to cause the sea to encroach on the land to the north of the harbour and this encroachment had been going on and was going on when the defendants' Board was first constituted. The defendants prior to 1891 extended the groynes of the harbour somewhat and in 1895 the result of the continuous encroachment of the sea was that a part of the railway and stone barrier between the plaintiff's premises and the sea was washed away and the sea encroached upon and injured the plaintiff's land and the buildings upon it.

The plaintiff now sues the defendants to recover damages for the injury so occasioned.

The cause of action as disclosed by his plaint and particulars appears to be maintaining and extending the groynes of the harbour as erected, when the defendants' Board was created, without taking steps to erect such buildings as would prevent the sea from encroaching upon and injuring the plaintiff's land. It is stated in paragraph 3 of the plaint that the arms or groynes of the harbour were causing the encroachment of the sea when the defendants took over the harbour and that the negligence of the defendants consisted in their maintaining and permitting to [428] continue the arms or groynes "without constructing sea-walls or other walls upon "the foreshore to the north of the harbour for the purpose of resisting the "said encroachment and protecting the said foreshore from the inroads of "the sea"; and the particulars filed by the plaintiff say :—"The defend-"ants acted negligently and were and are in default, in that they maintained "and permitted to continue the said arms or groynes without constructing "such sea-walls or other walls as would have efficiently resisted the said "encroachment and protected the foreshore to the north of the harbour "from the inroads of the sea" (particulars, paragraph 1).

In the second paragraph of the particulars, the plaintiff says the negligence consisted in, after having taken over the arms or groynes, "extending them and maintaining them so extended without constructing sea-walls, &c.," as in the first paragraph.

From this, it appears that the plaintiff's claim is that there was a duty cast upon the defendants, when they took over the harbour and when they extended the groynes, to insure the plaintiff from any encroachment by the sea on his land.

Paragraph 4 of the plaint does not allege any cause of action: it merely states that the defendants did not maintain their revetment or stone barrier—without suggesting that by so doing the encroachment would have been prevented; or take measures necessary to prevent the injury—repeating in effect the cause of action alleged in paragraph 3, *viz.*, that the defendants did not prevent the mischief.

The complaint of the plaintiff is therefore not of any act of commission, but merely of omission to take preventive measures such as would insure the plaintiff's land and premises from injury.

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This, it was urged, was a common law obligation imposed upon the defendants. It was not suggested, but on the contrary the plaintiff's counsel expressly stated that he did not allege any breach by the defendants of any statutory duty, but merely relied upon the plaintiff's common law right to be indemnified from injury caused by that which the defendants were in possession of under their statute and were responsible for maintaining and extending, namely, the groynes of the harbour, inasmuch as the groynes caused the encroachment of the sea and without them there would have been no encroachment and no injury to the [429] plaintiff. In other words, that the harbour was a nuisance, when taken over by the defendants, that they have continued the nuisance and that damage, having been thereby caused to the plaintiff, he is entitled to recover from the defendants. The plaintiff does not say that extending the groynes caused the nuisance, but merely that the nuisance existed and that the defendants have extended the groynes which caused the nuisance. He does not even say that in extending the groynes the nuisance was increased.

The question, therefore, is whether a public body, which under an Act requiring its continuance takes over that which by its existence is at any time liable to cause injury, is under a liability at common law to erect such works as will ensure all the world from the threatened injury; and if injury is caused to any one from the omission to erect such works whether damages may be recovered from that body.

The argument is based upon the statement of the law by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1), where he says :—"I "take it, without citing cases, . . . that no action will lie for doing that "which the Legislature has authorised, if it be done without negligence, "although it does occasion damage to any one ; but an action does lie for "doing that which the Legislature has authorised, if it be done negli-"gently. And I think that if by a reasonable exercise of the powers, either "given by statute to the promoters, or which they have at common law, "the damage could be prevented it is, within this rule, 'negligence' not "to make such reasonable exercise of their powers." Other cases also in which similar words appear were also cited. If these words are to be taken as meaning that in every case where a body created for the purpose of doing anything under an Act of Parliament has power to execute any works, irrespective of the purposes of its Act, which will prevent damages accruing, in consequence of carrying out the duties imposed upon it by the statute, it must execute those works or pay damages to any one who suffers injury, in consequence of its carrying out the duties imposed by the Act, it may be that the plaintiff may have a cause of action. The words as they stand are no doubt wide enough to cover the defendants or any other public body which has no other *rison d' etre* than to [430] maintain that which has been already erected, even if it has been guilty of no act of commission at all, but has merely omitted to do any thing to prevent injury from accruing, in consequence of the existence of the erection, which is the cause of the injury and which the public body is by the statute bound to maintain. I do not think the words either bear, or were intended to bear, any such construction. They were used in connection with the particular case then in question and must be considered and construed with reference to that case. There the defendants had discharged water down a

(1) L. R. 3 App. Cas. 430 at page 455.

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stream in greater quantities than in the then state of the stream it would carry and had thus caused it to overflow its banks so that the plaintiff's land was flooded. It was held that, as the defendants had power given them by their statute and it was a part of their duty under their Act to widen, deepen, cleanse and keep proper and sufficient conduits, &c., they had power and it was a duty imposed upon them to deepen and cleanse the stream in question, so as to be sufficient for the water carried into it; and having neglected that duty before sending water down it, they were liable for the damage caused. There also, as in all the other cases cited, except *Cracknell* v. *Mayor, &c., of Thetford* (1), the neglect was part and parcel of an act done in pursuance of the power given by the statute, *viz.*, sending water down the stream, without which no damage would have been done. Here nothing has been done which has caused the damage. The defendants have merely maintained that which caused the damage, *viz.*, the harbour groynes; and it is not suggested that the damage has been caused by any act of the defendants done in the course of maintaining it. It is not alleged that extending the groynes has caused the damage, for the encroachment of the sea was going on before that was done and the plaintiff does not say even that it was thereby increased.

It seems to me that the law applicable to acts of commission and omission may be stated thus:—

In the former case, if anything is done in pursuance of the powers given by statute, and in the doing of it the promoters are guilty of any negligence, the result of which is to cause damage to another, the promoters are liable and the definition given by Lord Blackburn is that which constitutes negligence in such a case. If, [431] however, the promoters do nothing except take possession of that which they are bound by their statute to take possession of and to maintain, there is no legal obligation imposed upon them to take active steps to prevent injury occurring from the existence of that which they have to maintain, unless the statute contains provisions directing or compelling them to do so. This is the effect of the decision in *Cracknell* v. *Mayor, &c., of Thetford* (1), where the defendants were empowered by their Act of Parliament to make navigable the river Brandon and to take tolls for its navigation. They erected certain staunches for improving the navigation, but these staunches produced the effect of collecting the weeds and soil so that the river overflowed its banks. There being no provision to compel or direct the defendants to cut the weeds or dredge the accumulated silt, unless it was necessary to do so for the purposes of the navigation, they were held not liable to an action for damage occasioned by the water overflowing, though it really arose from that accumulation. In commenting upon this case, Lord Hatherley (in *Geddis* v. *Proprietors of Bann Reservoir* (2)) says:—"If a company in the position of the defendants there, has done "nothing but that which the Act authorised—nay, may in a sense be said "to have directed—and if the damage which arises therefrom, is not owing "to any negligence on the part of the company in the mode of executing "or carrying into effect the powers given by the Act, then the person who "is injuriously affected by that which has been done must either find "in the Act of Parliament something which gives him compensation, or "he must be content to be deprived of that compensation, because "there has been nothing done which is inconsistent with the powers "conferred by the Act, and with the proper execution of those powers."

(1) L.R. 4 C.P. 629. (2) L.R. 3 App. Cas. 430 at p. 438.

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These words, I venture to think, are a more exact statement of the law as applicable to the case before us than the more general statement of the law as laid down by Lord Blackburn above referred to.

Much stress was laid upon the decision in *The Mercy Docks Trustees* v. *Gibbs* (1), as showing that acts of omission which result in damage give a good cause of action, but there the omission was in the performance of the duty imposed directly by the statute—a totally different case to the present case, where it is not suggested [432] that the defendants' statute imposes any duty upon the defendants to erect preventive works except for the security of the harbour. The case of *Attorney-General* v. *Tomline* (2) was also relied upon by the plaintiff's Counsel. He contended that the defendants were by maintaining this harbour removing the foreshore and therefore that the plaintiff has a cause of action against them. That case decides no such thing, and, if it did, it cannot in any way apply to the present case, for the defendants are not removing the foreshore. That is the consequence of the existence of the harbour, which the defendants have no power to remove, but, on the contrary, are obliged to maintain.

It was further contended on behalf of the plaintiff that the harbour is a nuisance, and that, in the absence of express words in the statute authorising a nuisance and giving compensation to any person thereby affected, it must be held that the plaintiff has a right at common law to recover damages for any injury caused by the maintenance of the nuisance, and *Jordesan* v. *Sutton, Southcoates and Drypool Gas Company* (3); *Metropolitan Asylum District* v. *Hill* (4); *Clowes* v. *Staffordshire Potteries Waterworks Company* (5) and other cases were cited in support of this contention. In these cases, the statutes contained no compulsory powers to do what the defendants had done. The defendants were told that they might do certain things, but the statutes contained no authority directing them to do those things, if the things themselves constituted a nuisance. There being no compulsory powers given to do what they had done, they were held to be in the position of ordinary persons, who are entirely responsible for their acts. The *ratio decidendi* being that powers given in matters of this sort must be strictly followed and are not to be extended in favour of those on whom they have been conferred. The principle upon which these cases turn is, as I understand it, that though a statute may confer a power to do an act, the promoters have an option as to how they will exercise that power and, if the power is not compulsory, they need not do it at all. If the power is compulsory, it lies upon the promoters to show that they could not do it in any way other than they have done it. If they prove that, then, unless compensation is provided by the Act, [433] persons injured by the act done have no remedy. These cases do not, in my opinion, apply to the present case for two reasons. In the first place, the defendants have done no act in pursuance of any powers given to them, which has caused injury to the plaintiff. They have merely omitted to take precautionary measures to prevent injury occurring as a consequence of the existence of the harbour; and, secondly, if maintaining the harbour as erected and extending the groynes can be said to be doing an act in pursuance of the powers conferred by their statute, they had no option, but were compelled to maintain and improve the harbour as it

(1) L.R. 1 H.L. 93. (2) L.R. 14 Ch. D. 58. (3) (1898) 2 Ch. 614.
(4) L.R. 6 App. Cas. 193 at p. 198. (5) L.R. 8 Ch. App. 125 at p. 139.

1900 MARCH 6. existed, when it came into their possession, irrespective of any consequences which might be caused by the existence or extension of the harbour.

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23 M. 389 = 9 M.L J. 270.

It is obvious from the analysis of the Act given at the commencement of this judgment that the purpose of the Act is the "regulation, "conservancy and improvement of the harbour of Madras." The harbour of Madras existed at the time of the passing of the Act and was then causing the encroachment of the sea on the north of the existing harbour. The definition clause shows that the harbour, the groynes (which cause the damage), the enclosed space and the corresponding foreshore as well as the buildings, structures and appliances provided, existed (already) for the purposes of the harbour. Section 4 imposes upon the defendants the duty of carrying out the provisions of the Act. By Section 25, there is vested in the defendants the properties set forth in Schedule A consisting of "the north and south arms of the harbour" with the area enclosed therein and all the foreshore lying within the limits of the port. Section 33 indicates how they are to expend their income (*a*) for the execution and maintenance of the works undertaken and (*b*) generally for the purposes of the Act. Their powers are limited by Section 60 to executing such works as they determine to be necessary and expedient for the purposes of the said harbour and Section 61 sets out what the works "may include" and it is nowhere indicated that they have power to do away with the groynes or enter upon any fresh works or expend any funds except for the purposes of the harbour and for carrying out the purposes of the Act, which is, as I have said above, to regulate, conserve and improve the existing harbour. They are, therefore, bound by their statute to maintain it and improve it. It is not said that they have done [434] anything else or that they could have done it in any other way than they have done. All that is alleged is that they have not executed such works for the protection of the foreshore between the plaintiff's land and the sea as would prevent the sea from encroaching upon the plaintiff's land. It is not suggested that such a work was necessary for the purposes of the harbour or was necessary or useful for carrying out the purposes of the Act, but only that it is required for the protection of the plaintiff's land. Moreover, the Act provides that (Section 68) "if at any time the Board allow any work constructed by them or "vested in them under this Act to fall into disrepair," the Government may step in and restore or complete the work, and by Section 61 power is reserved to the Government to interfere and retake possession and revoke the power of the Board, if the works are not being properly carried out and maintained.

In these circumstances, it seems to me that the defendants had no option, but were compelled by the statute to maintain the groynes and improve the harbour, as it existed when it came into their possession. If the damage to the plaintiff is the consequence of the existence of the harbour as a harbour and as it existed when the defendants took it over, he has no cause of action against the defendants for omitting to protect him from any consequences resulting from the existence of the harbour. If any stress is laid—though in fact no stress was laid—upon the extension of the groynes of the harbour, then I am of opinion that, in extending the harbour groynes, the defendants were not guilty of any negligence. The extension did not cause any nuisance and, even if it did, there was no duty or obligation upon the defendants to protect the plaintiff from any consequences that might result from their extension.

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Moreover, I am of opinion that there was no obligation upon the defendants to maintain the revetment or stone barriers carrying the railway on the foreshore, which lay between the sea and the plaintiff's land. The fact that they had power to maintain it under their Act is not sufficient to impose a duty upon them to do so, and unless it was required for the purposes of the harbour and for the purposes of the Act, there was no duty upon them to maintain or strengthen it (compare *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (1). It was for [435] the plaintiff to have alleged this if he relied upon it, and he has not done so. Moreover, he has not even alleged that, if defendants had maintained it or strengthened it, his land would thereby have been protected. The cases cited, where it was held that no action lay for non-feasance, apply only to highways and have no application to the present case.

For these reasons, I am of opinion that the decision of Mr. Justice Shephard is right, and that the plaintiff has disclosed no cause of action against the defendants, and I would dismiss this appeal with costs.

BENSON, J.—I entirely concur in the judgment of Boddam, J., which I have had the advantage of perusing.

The cause of action alleged by the plaintiff is the omission of the Harbour Board to erect such works as would have protected him from the injury resulting from the encroachment of the sea which took place in 1895.

The harbour was constructed by Government prior to 1886, and in that year erosion of the foreshore was in progress in consequence of the existence of the harbour, though it had not then reached the plaintiff's land. The Harbour Board was created by statute in that year expressly for the purpose of protecting, maintaining and improving the harbour, and it was given adequate powers to carry out works for that purpose. The nature of the works that might be carried out and the objects on which expenditure might be incurred are specified in much detail, but no provision is made for executing works for the protection of persons liable to be injured by, or in consequence of, the existence of the harbour, or for compensating them for any injury actually sustained. There is not, and, indeed, there cannot be, any contention that the statute imposes any liability on the Board to execute such works as the plaintiff demands. The contention for the plaintiff is that the common law imposes a liability on the Board, and as the statute does not, in express terms, exempt the Board from liability or limit its liability, the common law attaches the same liability to the Board that it would attach to a private person who caused any injury to his neighbour by erecting or maintaining any work on his own property. I do not think that any of the cases which have been cited in the argument are sufficient to sustain this proposition. Counsel for the plaintiff relies chiefly on the *dictum* [436] of Lord Blackburn in the case of *Geddis* v. *Proprietors of Bann Reservoir* (2), but that *dictum* must be understood with reference to the facts of the case then under discussion. In that case, the defendants had sent water down a channel in such quantity that it overflowed the banks and injured the plaintiff's land, and the defendants were held liable. Their liability, however, was due to the fact that, under their statute, they were empowered, and were, therefore, under an obligation to maintain channels of sufficient capacity to carry off the water and their act in discharging so much water without cleansing and

(1) [1898] 2 Ch. 603.

(2) L.R. 3 App. Cas. 430 at p. 455.

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deepening the channel was an act done negligently in execution of the powers conferred upon them. In the present case it is not contended that the Board has done an act negligently. The complaint is that the Board has done nothing, has taken no active steps to prevent the sea from encroaching on the plaintiff's land.

The statute under which the present defendants act, makes no provision for the execution of such works as the plaintiff says they ought to have executed for his protection.

As to the defendants' alleged failure to maintain the revetment of the railway, it was not their duty under the statute to maintain it, unless it was expedient to do so for the purpose of maintaining or protecting the harbour, but this is not alleged.

The principle, therefore, which underlay the decision in *Geddis* v. *Proprietors of Bann Reservoir* (1) is not applicable to the present case.

Neither in *Geddis* v. *Proprietors of Bann Reservoir* (1), nor in any other case that has been cited at the bar was the statutory body held liable to execute works other than those contemplated in their statute in order to insure the rest of the world against injury which might result from doing the very thing which the statute enjoined, provided the thing enjoined was itself done without negligence and in the manner enjoined by the statute.

The facts in the case of *Cracknell* v. *Mayor, &c., of Thetford* (2) were essentially similar in character to those now before us. In that case, the defendants were empowered to make a river navigable and in so doing they placed stanchions in the bed of the river whereby silt was accumulated and weeds grew which caused the water of the river to overflow and injure the plaintiff's land. The [437] defendants were held not to be liable, since they only did what was necessary in order to render the river navigable and it was not shown that they could have done so in any other way which would not have caused the injury, and there was no provision in their Act which directed or allowed them to clear away the weeds and silt unless that were necessary for the purpose of improving the navigation of the river. In referring to that case, Lord Hatherley laid down what appears to be the law applicable to the present case in these words :—"We must "look carefully not into all the individual cases, but into the class of decided "cases turning upon the point whether or not a company, authorized by "Act of Parliament to execute a work that in its operations may do "damage to others, has exceeded the powers it possessed, or whether the "company has negligently exercised those powers which had been granted "to it . . . If a company in the position of the defendants there, "has done nothing but that which the Act authorized—nay, may in a "sense be said to have directed—and if the damage which arises there-"from, is not owing to any negligence on the part of the company in the "mode of executing or carrying into effect the powers given by the Act, "then the person who is injuriously affected by that which has been "done must either find in the Act of Parliament something which "gives him compensation, or he must be content to be deprived of "that compensation, because there has been nothing done which is "inconsistent with the powers conferred by the Act, and with "the proper execution of those powers" (*Geddis* v. *Proprietors of Bann*

(1) L.R. 3 App. Cas. 430 at p. 455. (2) L.R. 4 C. P. 629.

Reservoir (1)). That appears to be the whole law applicable to the present case. The Harbour Board has done nothing but that which the statute authorized and directed it to do, *viz.*, to maintain and improve the harbour. The Board has not in maintaining and improving the harbour done any act negligently or acted in any manner in excess of, or inconsistently with, the powers conferred by the statute. The fact that the foreshore near plaintiff's land was vested in the defendants for the purpose of carrying out their duties under the Act, *viz.*, for maintaining, protecting, improving the harbour, could not impose on them a duty (protecting the plaintiff) not provided for or contemplated by the Act. The plaintiff must therefore find something in the statute [438] which gives him compensation, or he must be content to be deprived of that compensation, for he cannot obtain compensation by way of action against the defendants who have done no wrong in carrying out the duties imposed on them by the statute.

I am therefore of opinion that the decision of Shephard, J., is right and I would dismiss this appeal with costs.

DAVIES, J.—On the plaintiff's case as put, I am of the same opinion. Had the plaintiff alleged that the revetment or the stone barrier referred to in paragraphs 2 and 4 of his plaint was a protective work erected by Government in connection with the construction of the harbour for the purpose of protecting the foreshore where his property was and that it was made over to the defendants as such, I think he would have shown an undoubted cause of action against the defendants for negligence in not maintaining it, if he had thereby suffered loss. But that is not the plaintiff's real case. I observe that at the original trial Mr. Justice Shephard states that the non-maintenance of that revetment was not treated in the argument before him as a substantive cause of action. What the plaintiff then required and requires now is not merely the maintenance of such protective works as were in existence when the Board of Trustees was incorporated, but the improvement of those works, and the construction of others for the same purpose. That this is his case appears from the plaint read with its subsequent particulars as set forth by Mr. Justice Boddam and from the remarks of Mr. Justice O'Farrell, who, on the plaintiff's appeal, proposed to remand the suit for determination as to "whether the damages "complained of could have been obviated or materially mitigated by a "reasonable expenditure on the construction of sea-walls on the foreshore "or on other remedial or precautionary works of a like nature." Now assuming in plaintiff's favour that as a fact there was in existence one particular work, which was intended for the protection of his property and which the trustees were bound to maintain, then, to put the plaintiff's case at the highest, all that could be urged on his behalf would be that that obligation implied the further obligation on the trustees to protect his property from injury in every possible way. The obvious answer to such argument would be that the liability of the trustees, in the absence of any statutory duty cast upon them to insure plaintiff from loss, was confined to the maintenance of the particular work they took over, and, if there was any general [439] obligation to protect the plaintiff's property, it lay on the Government, who constructed the harbour, the Legislature not having imposed it on the trustees. To these observations, I have merely to add that, without repeating the facts or reviewing decided cases, which have been fully dealt with by

(1) L.R. 3 App. Cas. 430 at p. 438.

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my learned colleagues, I quite agree with them that the judgment of Mr. Justice Shephard should be affirmed and this appeal dismissed with costs.

Messrs. *Barclay, Orr & David*—Attorneys for appellant.

Messrs. *H. C. King & John Josselyn*—Attorneys for respondents.

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23 M. 439 = 9 M.L.J. 8.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

CHIDAMBARAM CHETTI AND ANOTHER (*Plaintiffs Nos.* 3 *and* 2), *Appellants v.* MINAMMAL AND OTHERS (*Defendants*), *Respondents.** [2nd November, 1898.]

Religious endowments—Trustee's title barred by adverse possession as against his predecessor—Limitation.

The holder of the office of trustee in a temple succeeded to that office in 1893. His predecessor had remained in office for over twelve years but had never sued for the recovery of certain lands. A suit being now brought to recover the said lands on the ground that they provided the emoluments of the office of meikaval in the temple.

Held, that the suit was barred by limitation, the adverse possession held during the previous office-holder's time barring his successor.

SUIT to recover lands which provided the emoluments of the office of meikaval in a temple of which first plaintiff had been and third plaintiff was, at the time of suit, the manager, and second plaintiff the meikavalgar. Plaintiffs contended and it was so found by the District Munsif and Subordinate Judge that second plaintiff had succeeded to the office of meikaval in 1893 and that the cause of action had arisen since that date. Defendants pleaded limitation, and the District Munsif found that second plaintiff and his predecessors had been out of possession and that the defendants [440] and their alienees had held adverse possession for a period of upwards of sixty years before suit. He held (following *Radhabai* v. *Anantrav Bhagvant Deshpande* (1)), that the claim was barred. On this point the Subordinate Judge, on appeal, said :—" The limitation, no doubt, begins to run from the date of second plaintiff's succession to the office in December 1893, and a period of twelve years has not elapsed since that date. But it must be remembered that, according to the contention of the first defendant, the land in litigation has not been in the possession of office-holders for seventy years. If this is supported by evidence, then the institution of this suit within ten years from the date of appointment of the second plaintiff will not revive a claim barred even before his predecessor-in-office was appointed." He held that the possession of defendants was proved and upheld the ruling that the suit was barred.

Plaintiffs Nos. 3 and 2 preferred this second appeal on the ground, among others, that, upon the finding of the Subordinate Court, the plaintiff's claim should have been decreed.

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* Second Appeal No. 2059 of 1897 against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Appeal Suit No. 145 of 1897 affirming the decree of V. T. Subramania Pillai, District Munsif of Tirumangalam, in Original Suit No. 622 of 1895.

(1) 9 B. 198.

V. Krishnasami Ayyar and *Ranga Ramanujachariar*, for appellants. 1898
Narayana Rao, for respondent No. 1. Nov. 2.

APPEL-LATE CIVIL.

23 M. 439= 9 M.L.J. 8.

JUDGMENT.

The land in dispute is claimed to be attached to the office of meikaval, in the temple of which the third plaintiff is the trustee and as a person whose duty it is to see that an emolument, such as the land in question is stated to be, is not improperly severed from the office, or the interest possessed by the temple in such property prejudiced otherwise by the way in which it is dealt with, the said plaintiff must be held to possess sufficient interest in the subject of the suit to allow of his joining as plaintiff.

The next question is whether the suit is barred by limitation. There can be no doubt that it is. Though the present holder succeeded to the office in 1893, yet his predecessor, who was entitled to recover possession of the land on the ground now relied on by the plaintiffs, remained in office for over twelve years, but failed to sue for the property. The adverse possession thus held by the respondents during the last office-holder's time clearly bars his successors too. This view, the soundness of which is shown **[441]** in the elaborate judgment in *Radhabai* v. *Anantrav Bhagvant Deshpande* (1), haas been acted upon in several cases in this Court. *Mahomed* v. *Ganapati* (2), as we understand it, does not lay down a rule to the contrary. Whether *Velu Pandaram* v. *Gnansambanda Pandara Sannadhi* (3) is quite reconcilable with the rule stated above is doubtful, but as we are informed that the appeal preferred against that decision to the Judicial Committee (4) is likely to be heard shortly, it is not necessary to pursue the point further.

The second appeal fails and is dismissed with costs.

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23 M. 441.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

DORASINGA TEVAR (*Plaintiff No.* 1), *Appellant v.*
ARUNACHALAM CHETTI (*Defendant*), *Respondent.**
[19th October, 1899.]

Breach of contract—Agreement to discharge a debt due by debtor to a third party—No time fixed for performance—Failure to perform within a reasonable time—Cause of action—Measure of damages.

Defendant agreed to discharge a debt due by plaintiff to a third party, secured by a mortgage of a village which was held by plaintiff on lease and which had been sub-let by him to defendant after the mortgage to the third party had been granted. The agreement provided that if the defendant failed to discharge the debt he should be liable to plaintiff for any damage which the latter might sustain. No time was fixed for the performance by the defendant of this obligation, and he in fact, failed to perform it for a period of nearly three years, whereupon this suit was brought:

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* Appeal No. 48 of 1899 against the decree of T. Varada Rao, Temporary Subordinate Judge of Madura (East), in Original Suit No. 41 of 1898.

(1) 9 B. 198. (2) 13 M. 277. (3) 19 M. 243.

(4) The judgment of the Privy Council has since been reported in 23 M. 271—*Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*.

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Held, that the agreement was not a mere contract to indemnify; that defendant was bound to discharge the debt within a reasonable time, and that his failure to do so during three years was a breach of the contract, notwithstanding the fact that the third party had not enforced his claim against the plaintiff. The measure of damages payable in consequence of such breach would be the amount of the debt which defendant had undertaken to discharge.

[F., 34 M. 479=7 Ind. Cas. 269=8 M.L.T. 188=(1910) M.W.N. 302; 5 M.L.T. 247; Appr., 21 M.L.J. 983 (989)=10 M.L.T. 300=(1911) M.W.N. 227; R., 34 A. 429 =9 A.L.J. 534=14 Ind. Cas. 244; 10 Ind. Cas.320 (323)=22 M.L.J. 207=10 M.L.T. 496; D., 23 T.L.R. 133.]

BY an agreement, dated 12th August 1895, the defendant undertook as follows:—"Regarding the hypothecation debt-bond executed [442] by you (first plaintiff) for Rs. 1,000 in favour of Aru Ramanathan Chetti of Thevakottai, and the documents executed in my favour for Rs. 12,000 on the 9th instant in the shape of a promissory note for Rs. 3,000 and a deed for Rs. 9,000, I shall pay to the said Ramanathan Chetti the said principal amount with interest thereon from the said date, get back the hypothacation debt-bond executed by you, and give it (to you); and I shall credit in the promissory note and deed executed to me by you (the amount due) out of the lease amount of the Kalari Maghanam leased out to me by you, and shall give you back the said two documents. If I do not accordingly pay the principal and interest of the hypothecation debt-bond executed by you to the said Ramanathan Chetti, get back the document, and give it to you, I myself shall remain responsible for the principal amount and interest of the said document and you can consider this itself as the document therefor. Out of the lease amount of the Kalari Maghanam, I shall credit Rs. 3,000 every fasli, for four faslis in the two documents executed to me, without charging interest thereon, and I shall give back the said two documents."

In 1898, plaintiff filed this suit against defendant, alleging default on the part of defendant in the performance of the acts undertaken to be performed by him in the said agreement, and praying that the defendant should be directed to pay plaintiffs the Rs. 12,000 due to the said Ramanathan Chetti which defendant had undertaken to pay, together with interest thereon. Plaintiffs contended that the cause of action had arisen on the date of the said agreement. Defendant denied that plaintiffs had any cause of action and an issue was framed raising that question. The Subordinate Judge, referring to the agreement, said:—"There is nothing to show that defendant undertook to pay the said sum to the plaintiffs if he committed default in the matter of discharging Ramanathan Chetti's debt. The allegation in the plaint that the defendant undertook to discharge Ramanathan Chetti's debt at once on the 9th August 1895 is not supported by the Varthamana Kaduthasi. Furthermore, no time is fixed within which the defendant should execute his part of the contract. This is not a suit for dissolution of the contract between the plaintiffs and the defendant caused by the breach of the defendant in which case plaintiffs might claim such damages as they have sustained by its breach. There is no allegation in the pleadings that [443] Ramanathan Chetti has sued the plaintiffs for the recovery of the debt due to him or that the plaintiffs have themselves discharged the debt. Nor is this a suit for recovery of compensation after putting an end to the contract. The plaintiffs do not seek to obtain a decree for specific performance or an injunction to enforce the promise made by the defendant. Therefore it is unnecessary now to consider whether that form of relief can be afforded

or not. Finally, this is not a suit to recover Rs. 12,000 due to the plaintiffs by the defendant under the sub-lease executed to his favour on the 9th August 1895. It is contended for the plaintiffs that the position of the defendant is that of a bailee or a bearer of money belonging to the plaintiffs. There is nothing in the contract itself or authority in law for the proposition advanced. It was further contended that inasmuch as the time for the performance of the contract is not determined by the contract itself, the rule of law gives the creditor or obligee an immediate right to sue as in the case of goods sold without any specific credit, of money lent generally or of money lent under an agreement that it should be payable on demand. But this question can only arise when a suit properly framed for enforcement of the contract is filed. I am of opinion that the plaintiff's suit, as at present framed, is not maintainable inasmuch as there is nothing in the contract to show that in default of paying Ramanathan Chetti the debt due to him by the plaintiffs, the defendant undertook to pay the amount to the plaintiffs directly. Plaintiffs' suit must be and is hereby dismissed with costs."

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Plaintiff No. 1 preferred this appeal.

Sundara Ayyar and *Seshachariar*, for appellant.

K. Srinivasa Ayyangar, for respondent.

JUDGMENT.

The Subordinate Judge held that, according to the proper construction of Exhibit A the contract on which the suit is based, no cause of action had accrued on the date of the suit and dismissed the suit without going into the other questions raised by the parties. Now, under the contract in question the defendant undertook to discharge a debt due by the plaintiff to one Ramanathan Chetti secured by a mortgage of a village held by the plaintiff on lease and sub-leased by him to the defendant after the mortgage to the Chetti was granted. No time was fixed within which the defendant was to pay off the incumbrance which he undertook to discharge. It must, therfore, be held that he was **[444]** bound to pay within a reasonable time. The defendant, however, failed to do so, though nearly three years had expired between the date of Exhibit A and the institution of the suit. It is clear, therefore, that the defendant must be held to have broken the contract, notwithstanding that Ramanathan Chetti had not enforced his claim against the plaintiff. We are unable to agree with the contention that Exhibit A is merely a contract to indemnify. The provision in the concluding part of the intrument, no doubt, provides that, if the defendant fails to pay Ramanathan Chetti, the defendant will be liable to the plaintiff for any damage which he may sustain thereby. But this provision cannot detract from the alsolute promise to pay Ramanthan Chetti contained in the beginning of the document and as that promise was not performed, it would follow that there was a breach for which plaintiff is entitled to recover damages unless the defendant has some other defence to the suit. The cases of *Lethbridge* v. *Mytton*(1), *Carr* v. *Roberts*(2), *Lossemore* v. *Radford*(3), *Hodgson* v. *Wood*(4), and *Ashdown* v. *Ingamells* (5) are clear authorities in favour of the contention that the measure of damages to which the plaintiff is entitled is the sum payable by the defendant to Ramanathan Chetti. We think we should

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(1) 2 B. & Ad. 772. (2) 5 B. & Ad. 78. (3) 9 M. & W. 657.
(4) 33 L. J. Ex. 76. (5) L R. 5 Ex. D. 280.

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follow the rule laid down by these authorities in preference to the view suggested in 'Sidgwick on damages,' volume II, Section 789; especially as the Courts in this country can, in one and the same proceeding, give effect to any equitable considerations which in the special circumstances of a case render it necessary to attend to in the interest of persons in the position of the defendant here. No doubt as the plaintiff has not himself paid Ramanathan Chetti, it would be right and proper that, if damages be eventually awarded to the plaintiff, provision should be made in the decree to protect as far as practicable the interests of the defendant as a party who would be affected by Ramanathan Chetti's proceedings against the village of which the defendant is sub-lessee subject to the mortgage. What such provisions should be it is unnecessary to consider now.

With these observations, we must reverse the decree of the Subordinate Judge and direct the suit to be restored to the file and disposed of according to law. The costs will abide and follow the result.

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23 M. 445=10 M.L.J. 61.

[445] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Michell.

PERUMBRA NAYAR AND OTHERS (*Plaintiffs*), *Appellants v.* SUBRAHMANIAN PATTAR AND OTHERS (*Defendants Nos.* 2, 1 and 3), *Respondents.** [24th October, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 562, 564—*Ex parte decision in Court of first instance after hearing plaintiffs' evidence—Order by appellate Court reversing decree and remanding suit for decision after hearing further evidence—Validity of such an order.*

One of three defendants failed to appear at the final hearing of a case at the Court of a District Munsif, and the other two, though they appeared, adduced no evidence. The District Munsiff after hearing witnesses for the plaintiffs, passed a decree in their favour, as prayed. The absent defendant applied, unsuccessfully, under Section 108 of the Code of Civil Procedure, that the decree might be set aside, and then appealed to the Subordinate Judge, who reversed the decree and remanded the suit for decision after taking such further evidence as the said defendants or other parties might produce. On its being contended that, under Sections 562 and 564 of the Code of Civil Procedure, the Subordinate Judge had no power to remand the suit for re-trial:

Held, that notwithstanding Sections 562 and 564 an Appellate Court has inherent power, in such a case, not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case.

[F., 30 M. 54=16 M.L.J. 479=1 M.L.T. 268; 91 P.R. 1904=5 P.L.R. 1905; 138 P.R. 1908; R., 37 B. 289 (291)=14 Bom. L R. 1154=17 Ind. Cas. 891; 6 C.L J. 547 (553)=12 C.W.N. 590; D., 23 M. 447; 28 M. 437=15 M.L.J. 236.]

SUIT to recover possession of a forest. Before the District Munsif, eight witnesses were examined and various exhibits filed for the plaintiffs. The three defendants put in written statements but only the first and third appeared, and they adduced no evidence. The vakil who had been retained

* Civil Miscellaneous Appeal No. 35 of 1899 against the order of O. Chandu Menon, Subordinate Judge of South Malabar, in Appeal Suit No. 605 of 1898, remanding Original Suit No. 146 of 1897 on the file of the District Munsif of Nedunganad for re-trial.

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by the second defendant at the first hearing said that he had no instructions. The Munsif decreed as prayed. The second defendant applied under Section 108 of the Code of Civil Procedure that the *ex-parte* decree against him might be set aside, but this was refused. He then appealed to the Subordinate Judge, who reversed the decision of the Munsif on the ground that it had been formed without taking the second defendant's evidence, and sent the case back for adjudication on the merits after [446] taking such evidence as second defendant or the other parties might produce.

Against that order the plaintiffs preferred this appeal, on the ground that the Court had erred in reversing the decree of the Court of First Instance and remanding the suit for a fresh decision when it had not been disposed of on a preliminary point; and that the order was in contravention of Sections 562 and 564 of the Code of Civil Procedure.

Appu Nedungadi, for appellants.

Sundara Ayyar, for respondents.

JUDGMENT.

The appellants, vakil contends that the Lower Appellate Court had no power under Sections 562 and 564 of the Civil Procedure Code to remand the suit for re-trial, and that therefore the order appealed against is wrong. It is true the remand in this case was not made on grounds which come within the language of Section 562, Civil Procedure Code, which provides for a case where there has been a decision upon a preliminary point which is reversed by the Appellate Court. But we think that notwithstanding those sections an Appellate Court has inherent power in a case such as the present not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case. For it has that power on an appeal against an order passed on an application under Section 108 of the Civil Procedure Code refusing to set aside an *ex-parte* decree and it can hardly be supposed therefore that if on an appeal against such an *ex-parte* decree it considers that the decree ought to be set aside and a re-trial had it has not the same power. We are of opinion therefore that the order of the Subordinate Judge, which does not purport to be under Section 562 or any other particular section of the Civil Procedure Code, was within his powers. The appellants' vakil sought in the course of his argument to raise the contention that the Lower Appellate Court could not go into the question whether the *ex-parte* decree of the Munsif ought to be set aside, because the order of the Munsif made subsequently to his decree and refusing to allow second defendant's application under Section 108, Civil Procedure Code, was not appealed against. But this point was not raised in the grounds of appeal to this Court, nor before the Lower Appellate Court and we cannot permit it to be raised now. The appeal therefore fails and is dismissed with costs.

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APPELLATE CIVIL.

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[447] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Michell.

SESHAN PATTAR AND OTHERS (*Plaintiffs*), *Appellants v.* SESHAN PATTAR AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.** [30th October, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 562, 568, 569—*Additional evidence by Appellate Court—Invalidity of order reversing decree of Lower Court on account of exclusion of evidence.*

A trial took place in the Court of a District Munsif, who heard evidence, decided issues and passed a decree. On an appeal being preferred the Subordinate Judge reversed the decree and remanded the suit for re-trial on the ground that certain documentary evidence which had been tendered by a defendant had been excluded, and plaintiffs' witnesses who had been cited in the list had not been wholly examined. On an appeal being preferred against that order:

Held, that Section 562 of the Code of Civil Procedure was inapplicable to such a case; and that the proper and only legal course for the Subordinate Judge to take under the Code of Civil Procedure was to act either under Section 568 or Section 569, by himself taking the evidence which he considered to have been wrongly excluded, or to direct the District Munsif to take it.

Perumbra Nayar v. *Subrahmanian Pattar* (I.L.R. 23 Mad. 445), distinguished.

[R., 30 M. 54=16 M.L.J. 479=1 M.L.T. 268 (F.B).]

SUIT for the return of a sum advanced by plaintiffs in respect of goods not supplied, and damages for the non-delivery. The District Munsif decreed in plaintiffs' favour. The defendants preferred separate appeals to the Subordinate Judge, first defendant complaining that certain evidence tendered by him at the hearing had not been taken. It appeared also that the plaintiffs' witnesses cited in the list had not been wholly examined. The Subordinate Judge, considering that he was unable to dispose of the cases unless the evidence were taken by the Lower Court, set aside the judgment and ordered the Munsif to receive all the evidence and pass a decision in the suit.

Plaintiffs preferred this appeal.

Anantakrishna Ayyar, for appellants.

Subrahmania Sastri and *Appu Nedungadi*, for respondents.

JUDGMENT.

[448] In this case the Subordinate Judge reversed the District Munsif's decree and remanded the case for re-trial, simply on the ground that certain documentary evidence, which first defendant desired to produce, was excluded by the District Munsif, and plaintiffs' witnesses cited in the list were not wholly examined. It was not the case that any issue which ought to have been framed had not been framed, or that any issue framed had not been tried. There had been a trial and adjudication by the District Munsif on the evidence taken and the issues had been decided and decree passed. Section 562 of the Civil Procedure Code was obviously inapplicable to this case. The proper and only legal course under the Civil Procedure Code for the Subordinate Judge to take was to act

* Civil Miscellaneous Appeal No. 130 of 1898 against the order of O. Chandu Menon, Acting Subordinate Judge of South Malabar, in appeal suit No. 360 of 1898, reversing the decree and remanding original suit No. 356 of 1897 on the file of the District Munsif of Temelprom.

either under Section 568 or Section 569 of the Civil Procedure Code by himself taking the evidence which he considered to have been wrongly excluded or directing the District Munsif to take it. This is not a case to which the decision in *Perumbra Nayar* v. *Subrahmanian Pattar* (1), cited to us by the respondents' vakil (in which this Court held that where a decree passed in a suit tried *ex parte* is appealed against, the Appellate Court has the same power to reverse the decree and order a re-trial of the suit as it has in an appeal against an order rejecting an application under Section 108 of the Civil Procedure Code) applies. Nor can we accede to the contention of the respondents' vakil that the action of the Subordinate Judge in this case was a mere irregularity within the meaning of Section 578 of the Civil Procedure Code. We must therefore allow this appeal and reverse the order of the Subordinate Judge appealed against, and direct that the appeal to him be restored and disposed of by him according to law. Costs will abide and follow the result.

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23 M. 449=10 M.L.J. 77.

[449] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

VYTHILINGAM PADAYACHI (*Defendant*), *Appellant* v.
SITHARAM AYYAR (*Plaintiff*), *Respondent.**
[15th, 18th and 19th December, 1899, and
23rd January, 1900.]

Transfer of Property Act—Act IV of 1882, Section 135 (d)—" Judgment of a comptent Court "—" Actionable claim "—Suit by assignee of a foreign judgment—Consideration smaller than amount of judgment-debt—Decree for whole amount.

The assignee of a judgment for Rs. 12,297 passed against the defendant by the Supreme Court of Mauritius sued in a Court in British India to recover the amount of the judgment with interest. Defendant, amongst other defences, contended that the transfer was not supported by consideration; and the Subordinate Judge, finding as a fact that only Rs. 5,500 had been paid therefor, held that the foreign judgment was an actionable claim within the meaning of Section 135 of the Transfer of Property Act, and decreed in plaintiff's favour for that amount only, with interest. On appeals being preferred to the High Court:

Held that the plaintiff was entitled to recover the whole amount of the judgment. *Semble* the word "judgment" in Clause (*d*) of Section 135 of the Transfer of Property Act includes a foreign judgment.

SUIT to recover Rs. 12,297, with interest, due under a decree passed by the Supreme Court of Mauritius against the defendant and in favour of one Nagammal, who had transferred the same to plaintiff. Plaintiff alleged that the husband of the said Nagammal had traded in partnership with defendant in Mauritius, having invested Rs. 8,000 in the business; that upon his death his widow Nagammal sued defendant for her husband's capital and profits and obtained the judgment for Rs. 12,297, now sued upon, which was transferred to plaintiff, the defendant being notified of the transfer. Defendant denied that Nagammal's husband brought capital to the firm, and said that by his fault prior to his death the firm lost large quantities of goods and became insolvent in consequence, its

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* Appeals Nos. 54 and 76 of 1899 against the decree of T. Ramasami Ayyangar, Subordinate Judge of Kumbakonam, in original suit No. 10 of 1897.

(1) 23 M. 445.

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liabilities and those of the partners individually being liquidated with the assets. He further pleaded that the judgment of the Supreme Court of Mauritius was not binding on him as it was not passed on the merits of the case; that it was procured by fraud; and that the transfer was not supported by consideration [450] and that the suit had been launched as speculative litigation. The Subordinate Judge found that the judgment had been passed upon the merits; that there was no fraud; and that the assignment was supported by consideration to the extent of only Rs. 5,500. The sixth issue was, "if it be proved that plaintiff has paid only a portion of the consideration mentioned in the assignment, whether he can sue for anything more than that having regard to Section 135 of Act IV of 1882?" On this he said:—"The judgment sued upon in this case was passed by the Supreme Court of Mauritius, and it is nothing more than a simple money bond in India, and, as such, it is an actionable claim within the meaning of Section 135 of the Transfer of Property Act. According to the Full Bench ruling in *Nilakanta* v. *Krishnasami* (1), plaintiff is entitled to recover from defendant only Rs. 5,500, the actual price for the assignment with interest thereon and incidental expenses. It is argued for the plaintiff that the Clause (*d*) of Section 135 of the Transfer of Property Act renders the provision of that section inapplicable to the assignment of the foreign judgment, and that plaintiff is therefore entitled to realize the whole amount of his claim. I think the argument is not sound. If the word 'judgment' in the Clause (*d*) was intended to include judgments of foreign Courts the Legislature would have expressly so stated. Foreign judgments are merely simple contracts for the purpose of transfer in British India. The Transfer of Property Act was passed for British India. In the Act so passed, the Legislature could not have used the word 'judgment' in the sense that it should include foreign judgment. Clause (*d*) of Section 135 is, I think, applicable to cases in which the original creditor had, before making the transfer, obtained a judgment upon the actionable claim, or had prosecuted the claim up to the stage at which the Court was ready to pronounce judgment. As a debt which has become the subject of a decree is no longer an actionable claim, the word 'decree' is avoided, and the word 'judgment' has been used in Clause (*d*) of Section 135 so as not to include foreign judgments. If the word judgment is intended to include foreign judgments, then Section 135 is inapplicable to transfers of foreign judgments, and the assignee in such cases will be entitled to recover the entire amount of his claim. In *Sivaraman Chetti* v. *Iburam Saheb* (2), it [451] has been held that a British Court can disallow an item of claim allowed by the foreign Court. It is clear from this that a foreign judgment is not looked upon in British India as a judgment, but only as a simple contract. If it is a simple contract the Clause (*d*) would not apply." He decreed in plaintiff's favour for Rs. 5,500 with interest from the date of transfer to that of realization.

Plaintiff and defendant each preferred appeals.

Sundara Ayyar (*Ramachandra Ayyar* with him), for defendant-appellant:—Defendant is a British subject domiciled in India, though he was trading in Mauritius. On that ground I contend that the Mauritius Court had no jurisdiction, and its decision is not binding on the defendant. It is submitted that the judgment was not passed on the merits (though the Subordinate Judge finds that it was) and proceeded

(1) 13 M. 225. (2) 18 M. 327.

more like an order for contempt of Court. A judgment passed as a penal process is not one on the merits of the case. The fact that there are so many conditions to be fulfilled under Section 14 of the Code of Civil Procedure shows the uncertainty; and the question arises whether that section contemplates Courts that are competent and foreign. Moreover, this judgment is an actionable claim under Section 135 of the Transfer of Property Act, and plaintiff is not entitled to recover under it more than he paid. In Section 135, the words "Civil Court" do not mean a Civil Court of a foreign country. Throughout the whole chapter "Court" must be taken to mean "Municipal Court" and not a foreign one. Compare the use of the word in Section 130 which supports that view. The transaction is such that a Court of Justice will not go into it. *Hawksford* v. *Giffard* (1) shows that a foreign judgment is only evidence of a debt, and not conclusive or enforceable here. Judgments in this country are enforced merely because they are judgments, *i.e.*, on themselves, and the Courts do not look into the merits. They accept them as conclusive and as only removeable if obtained by fraud. But foreign judgments are only evidence of a debt, and are examined to see if they are in accord with natural justice. They may be treated as a species of estoppel from denying a debt, or as evidence of an obligation. The Courts compel a defendant to obey such an obligation if proved, but they do not accept the judgment as conclusive of it. It is further submitted that the judgment is opposed to public policy and **[452]** should not be enforced. The transaction was champertous, *James* v. *Kerr* (2). Though it is the technical law of England regarding champerty, the principle exists here that persons must not intermeddle with the litigation of others. *Fischer* v. *Kamala Naicker* (3); *Grose* v. *Amirtamayi Dasi* (4); *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(5); and though *Siva Ramayya* v. *Ellamma*(6) shows that mere inadequacy of consideration is not necessarily champertous, here the amount paid by plaintiff is very small; moreover, other payments he was bound to make were only contingent. He had to do certain things if he succeeded; which amounts to an interest in the litigation. Injury to others is another element of champerty, *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (5). The test of champerty is—was it plaintiff's object to acquire an interest in property or an interest in mere litigation, or were the promises to be performed only if the litigation succeeded. *Tara Soonduree Chowdhrain* v. *The Court of Wards* (7) shows that the litigation need not necessarily be unrighteous to establish champerty. See *Chunni Kuar* v. *Rup Singh* (8), and *Grose* v. *Amirtamayi Dasi* (4). Though no single test is comprehensive, the nature of litigation, motive, &c., may be taken together as evidence of it. [SUBRAHMANIA AYYAR, J., referred to *Walmsley* v. *Walmsley* (9).]

Mr. *W. Barton* (Mr. *K. Brown* and *Kuppusami Ayyar* with him), for plaintiff-respondent.—With reference to Section 135 of the Transfer of Property Act, the section deals with an actionable claim, but a decree is not an actionable claim, *Afzal* v. *Ram Kumar Bhudra* (10). If a foreign judgment is an actionable claim, it cannot be governed by Section 135 at all, because of Clause (*d*) the word judgment there being equally applicable to a foreign judgment. Regarding the contention that the sale to

(1) L.R. 12 App. Cas. 122. (2) L.R. 40 Ch. D. 449. (3) 8 M.I.A. 170.
(4) 4 B.L.R. O.C. 1. (5) 4 I.A. 23 = 2 C. 233 (249).
(6) 22 M. 310. (7) 20 W.R. C.R., 446. (8) 11 A, 57.
(9) 3 J. & L. 556. (10) 12 C. 610.

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plaintiff was champertous, the conditional nature of the agreement of sale to plaintiff does not make it so. The agreement really amounted to a novation. It is submitted that plaintiff was entitled to recover the whole amount sued for.

JUDGMENT.

The plaintiff, as the assignee of a judgment passed by the Supreme Court of Port Louis in Mauritius in favour [453] of one Nagammal for Rs. 12,297 against the defendant, brought this suit for the recovery of the amount with interest. The defendant contested the claim and the questions raised at the trial were :—(1) Was the judgment one passed on the merits? (2) Was it obtained by fraud? (3) Was the plaintiff entitled to recover the amount due under the judgment without reference to the price actually paid by him for obtaining the assignment? and (4) What amount, if any, was so paid?

The Subordinate Judge decided the first question in the affirmative and the second and third questions in the negative. As to the fourth he found that the plaintiff had paid Rs. 5,500.

He gave a decree for that sum with interest on a part thereof and for the expenses incidental to the assignment.

The plaintiff and the defendant appeal against the decree in so far as it is against each.

It will be convenient to take the appeals together and deal with the questions raised in order.

It was first urged for the defendant that the Court in Port Louis had no jurisdiction to enterain the suit instituted by Nagammal. But, assuming that the defendant was originally not subject to the jurisdiction of that Court, he having appeared in the suit without raising the plea of want of jurisdiction and contested it on other grounds, he must be held to be precluded in the present suit from relying on the present objection.

The next contention on behalf of the defendant was that the Subordinate Judge was in error in holding that the judgment sued upon had been passed on the merits. The important point which arose on the merits before the Port Louis Court was as to the liability of the defendant to account to Nagammal in respect of his management of the business carried on by him in partnership with certain others, of whom Nagammal's deceased husband Nagappan was one. That that point was fully considered and directly decided is manifest from the record of the proceedings exhibited in the present case. And as to the actual relief granted by the judgment in question the amount made payable thereby was not, as suggested for the defendant, in the nature of a penalty inflicted for contumacy on the defendant's part, but awarded as the amount which, in the special circumstances of the case, the Court was entitled to take as due to Nagammal. For, the defendant having failed to file accounts connected with his management [454] as ordered by the Court and it having been admitted that Rs. 8,000 had been paid by Nagappan for his share of the capital, it was open to the Court to presume that that amount at least was repayable to Nagappan's representative. Compare *Walmsley* v. *Walmsley* (1). The contention under consideration is therefore unsustainable. And as there is absolutely no ground for suggesting that there was any fraud in obtaining the judgment, it must be held to be valid and

(1) 3 J. & L. 556.

supportable on the merits also even if it be a judgment into the merits of which it is open to the Courts of this country to enter on the ground that the foreign Court which passed it was, as urged for the defendant, not a Court of Record established by Letters Patent from Her Majesty or any predecessor of Her Majesty—a point which it is unnecessary to consider.

Passing now to the assignment under which the plaintiff claims, the first question for determination is whether the transaction is opposed to public policy in the manner explained by the Judicial Committee in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1). It was not suggested that the plaintiff had obtained the assignment from Nagammal by fraud or undue influence. Nor could it be rightly argued that the transaction was entered into for injuring the defendant by stirring up unrighteous litigation, inasmuch as the right transferred by the assignment had, after contest, been established before a judicial tribunal. The fact that the assignee undertook to make certain payments to the assignor and others only in the event of his recovering the money due by the defendant under the judgment would by itself hardly warrant the plaintiff being looked upon as a mere gambler in litigation. The assignment cannot, therefore, be held to be void.

The second important question is whether the assignee is entitled to the whole amount decreed by the Mauritius Supreme Court or only to that which he had paid, if any. This question was argued as though it depended solely on the construction to be placed on Clause (*d*) of Section 135 of the Transfer of Property Act. It was argued for the assignee that the Clause (*d*) is equally applicable to foreign judgments while on the debtor's side it was argued that the Court in Section 130 and in Section 135, Clause (*d*), must refer only to Courts in British India, and if the judgment be not one of a Court in British India, the assignee is entitled under **[455]** the former part of Section 135 only to the amount paid by him together with incidental expenses. In contending thus it seems to have been assumed by both sides that the provisions of the Transfer of Property Act with reference to transfer of actionable claims would be applicable to assignments of the kind here.

The chapter on actionable claims and especially Section 135 in it has given rise to many conflicting decisions. It is not clear, when a claim had been adjudicated upon by a Court of competent jurisdiction, whether the right under the judgment is an actionable claim. However, we are bound to start from the position laid down by the Full Bench in *Nilakanta* v. *Krishnasomi* (2) that the right under a judgment of a Court in British India is an actionable claim. It would seem to follow *a fortiori* that the judgment of a foreign Court is also an actionable claim.

So far as we are aware, there does not seem to be any express decision determining the rights and liabilities of the parties in a case like the present, *i.e.*, of an assignee of a judgment obtained elsewhere but assigned in this country. The question is not free from difficulty. Now, looking for a moment at the right acquired by Nagammal under the judgment of the Mauritius Supreme Court and considering it as standing in this country on no higher footing than a contractual right with a corresponding obligation on the defendant, it is not clear, when the right was assigned in this country, what the law is which governs the assignment not only between the assignor and the assignee but also between the assignee and

(1) 4 I.A. 23=2 C. 233.

(2) 13 M. 225.

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the debtor. While the views of continental jurists are in themselves divided (see Bar's 'Private International Law,' 608 and 609, 2nd edition), the trend of judicial opinion in England seems to be that the validity of the assignment must be regulated by the law of the *lex situs* of the debt and the liabilities of the debtor by the law governing the contract between him and the creditor. See Dicey's 'Conflict of Laws,' rule 141, page 533. In the case of judgment-debts, so far as any locality can be ascribed to them, they are generally deemed to be incurred in the place where the judgments were passed and where they would be executed, and consequently the law of that place must regulate the liabilities of the judgment-debtor, wherever the assignment might have been made and the debtor cannot seek to lessen his [456] liability, as it cannot be increased, by recourse to the law of the place of assignment. In this view, the law of Mauritius would apply and the defendant would be bound to pay the whole amount as decreed by the Supreme Court at Mauritius.

However this may be, we shall assume that the provisions of Section 135, Transfer of Property Act, apply to a case like the present. It is difficult to see how, even then, the defendant can escape his liability to pay the full amount of the judgment-debt. Now the ground on which a judgment of a foreign Court is enforced in this country is that a duty or obligation is imposed upon the defendant to pay the sum adjudged which the Courts of this country are bound to enforce. And considering that judgments of foreign Courts cannot be re-opened here on the merits except in certain cases, nor examined except for certain specified reasons, they are, in the absence of any such reasons, conclusive of the merits of the cause of action and of all facts of which a domestic judgment would be conclusive. Such being the effect of foreign judgments under the rules of private international law, we have to see whether, when such a judgment is assigned in this country, there is anything in the Transfer of Property Act which will relieve the debtor from paying more than the price paid by the assignee of the judgment; in other words, anything to minimise the effect of foreign judgments. It is true that ordinarily legislation of a country is territorial. But there is also a rule of interpretation that the statute of a country must be so interpreted and applied as not, in the absence of express and clear language to the contrary to run counter to the recognised rules of international law, and all general terms must be narrowed in order to avoid such a construction (see Maxwell on the 'Interpretation of Statutes,' 3rd edition, page 200). If the words, however, are wide enough and the giving effect to them in their wide sense would be in harmony with rules of international law, there seems to be no reason why the words should not be given such effect. It would follow, therefore, that 'judgment' in clause (*d*) may well include foreign judgments.

Moreover, the foundation on which the rule embodied in section 135 rests, *viz.*, the preventing of commerce in litigation to the detriment of the debtor, is inapplicable to the present case. The partnership was entered into in Mauritius and the business was carried on there. When the suit was brought in the Supreme [457] Court of Port Louis by Nagammal claiming her husband's share in the partnership property the defendant contested it and did everything to defeat the claim of Nagammal, and a valid judgment was passed by the Supreme Court on consideration. Having taken the chance of a judgment in his favour, the defendant cannot now, by flying to this country evade the payment of the judgment-debt whether it is to the judgment-creditor or to his assignee. There is nothing oppressive or inequitable to the debtor in calling upon him to pay the full amount

of the judgment-debt. We would, therefore, hold that the assignee is entitled to the whole amount.

As, however, this case may not stop here, and, in case the above view is overruled, it would be necessary to go into the fourth issue, *i.e.*, as to the amount actually paid by the assignee, we would state our conclusion as to it also. The only item as to which there is any evidence apparently reliable is the sum of Rs. 2,000 recited in the deed of assignment as paid to Nagammal. As the evidence of the attesting witness called by the defendant himself implies that the said sum was understood to have been paid, the Subordinate Judge seems to be warranted in accepting the testimony of the plaintiff's witnesses who speak to this payment. But as to the item of Rs. 3,500 which also was found by the Subordinate Judge to have been paid, the evidence is altogether meagre and unsatisfactory. Chinnasami Nayak, who is said to have received the money, is the only one that speaks to the payment. His statement that his deceased brother had advanced Rs. 3,000 to Nagammal can hardly be believed, considering that the promissory note said to have been executed by Nagammal's brother in connection with such advance has neither been produced nor its non-production accounted for. And the fact that the vouchers which Chinnasami Nayak says he gave to the plaintiff with reference to the alleged payment have been kept back by the plaintiff throws grave doubt upon this part of his case. That all the sums, other than Rs. 2,000, which the plaintiff agreed to pay under the assignment, inclusive of the Rs. 3,500 in question, were, according to the real understanding come to at the time of the assignment, to be paid by him only in the event of his recovering the money from the defendant, is shown by the evidence of Nagammal herself who was manifestly supporting the plaintiff. It is consequently highly improbable that the plaintiff would **[458]** have paid or made himself unconditionally responsible for any of these sums as now alleged on his behalf. He must, therefore, be held to have paid only the sum of Rs. 2,000 paid to Nagammal and the sum of Rs. 200 which was no doubt disbursed by him on account of the cost of the stamp paper, &c., in connection with the assignment.

Having regard, however, to the view already stated with reference to the contention founded on Section 135, Clause (*d*), Transfer of Property Act, we modify the decree of the Lower Court by awarding to the plaintiff Rs. 12,297, with interest thereon at 6 per cent. per annum from the date of the plaint to the date of payment, allowing, so far, the plaintiff's appeal with costs. We dismiss the defendant's appeal with costs.

1900
JAN. 26.

APPEL-
LATE
CIVIL.

23 M. 458=
10 M.L.J. 39.

23 M. 458=10 M.L.J. 39.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

MURUGESA CHETTI (*Defendant No.* 1), *Appellant v.* ANNAMALAI CHETTI AND ANOTHER (*Plaintiff and Defendant No.* 2), *Respondents.** [19th, 20th, 21st and 22nd December, 1899, and 22nd, 23rd, 25th and 26th January, 1900.]

Civil Procedure Code—Act XIV of 1882, *Section* 17—*Suit on a foreign judgment—"Carrying on business" within the jurisdiction—Business carried on by the managing member of a Hindu family—"Principal and agent" with reference to Section* 17 *of Civil Procedure Code—Application of Civil Procedure Code to non-resident foreigner.*

Plaintiff having obtained judgment against defendant in a suit on a bond in the Civil Court at Pondicherry, sued him on the said judgment in a District Court in British India. The date of the foreign judgment was 20th March 1896, and that of the suit in British India, 9th October 1896; but in the meanwhile, namely, on 20th July 1896, defendant had been declared an insolvent in Pondicherry, and a syndic had been appointed to take charge of and administer his property. The ground of jurisdiction relied on by plaintiff was that defendant was carrying on a business within the jurisdiction of the District Court, the said business being conducted by his cousin; and that, the cousin being the manager of a Hindu family, the presumption was that the business was carried on with the consent of the defendant as well as for his benefit:

Held, that the District Court had no jurisdiction to entertain the suit. Inasmuch as defendant and his cousin had, as a fact, become partially divided **[459]** prior to the commencement of the business, and as there was no evidence of his consent, the presumption contended for could not arise. But even if the facts had been otherwise, and the defendant had been entitled to claim an interest in the business on the ground that it was carried on by one who was the managing member of his family at the time, defendant would not be "carrying on business" within the meaning of Section 17 of the Code of Civil Procedure. To bring a principal within the operation of Section 17, the person acting as the agent within the jurisdiction should be an agent in the strict and correct sense of the term.

Semble, that a member of a joint family who actually consents to a trade being carried on within the jurisdiction on his behalf, or by his conduct puts himself in the position of a joint trader, carries on business within, though he may live outside, the jurisdiction.

By Section 443 of the Code de Commerce the effect of an adjudication of insolvency in French territory is to deprive the insolvent of the possession and management of his property, which is entrusted to a syndic, against whom alone all suits in respect thereof must be brought:

Held, that though the debt of an insolvent might not be extinguished by such a declaration of insolvency, so as to exempt him from future liability in respect of property which he might subsequently obtain, no suit could be brought against him in French territory, and, for that reason, outside French territory, so long as the adjudication of insolvency remained in force. *Quelin* v. *Moisson*, (1 Knapp., 265*n*), followed.

Whether Section 17 of the Code of Civil Procedure should be construed so as to exclude from its operation non-resident foreigners even though they carry on business in British India through agents; and, if such construction be inadmissible, whether the said section of the Indian Legislature should be held with reference to such foreigners to be *ultra vires*—*Quære.*

[Confirmed on appeal, 26 M. 544 (**P.C.**)=5 Bom. L.R. 494=7 C.W.N. 754=30 I.A. 220=13 M.L.J. 287=8 Sar. P.C.J. 523; **R.**, 34 M. 247 (248)=7 Ind. Cas. 417=8 M.L.T. 120.**]**

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* Appeal No. 21 of 1899 against the decree of W. F. Grahame, District Judge of South Arcot, in original suit No. 17 of 1896.

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SUIT to recover a sum of money upon a French judgment. Plaintiff alleged that he had instituted a suit against defendants in the Pondicherry Civil First Tribunal or Court in respect of a bond executed to him by first defendant at Pondicherry, in French territory, on 4th January 1896; and for the balance that remained due on 20th February 1896, as per the accounts of dealings between the parties; that the proceedings in the said suit had been conducted by the French Civil Court according to law, and in the end a decree had been passed, on 17th March 1896, directing that defendant should pay plaintiff Rs. 13,968-5-3, being the balance due on the bond, with interest thereon; and Rs. 688-8-0 being the balance as per the settlement of accounts, also with interest thereon, and costs. Plaintiff further alleged that proceedings had been conducted by the French Court to execute the said decree and to collect the said amount, and that a certificate had been issued by the French Court on 27th June 1896 to the effect that defendant had no sufficient funds in French territory for the collection of any portion of the said decree amount. He alleged that [460] first defendant was collecting the incomes of extensive landed properties belonging to him in Cuddalore and other places in British India and within the jurisdiction of the Court in which the suit was filed; and that he was also carrying on a money-lending business in the said places. At the trial, evidence was adduced to show that first defendant had been carrying on an oil business with his cousin, one Kandasami. The cause of action was described as having arisen at Pondicherry on 17th March 1896, the date of the decree of the French Court.

First defendant contended that the Court had no jurisdiction to entertain the suit and that it was not maintainable, that no part of the cause of action had arisen within the Court's jurisdiction and that defendant had never resided there or carried on trade or worked either by himself or through his agent, or collected income within such jurisdiction. Defendant described himself as a permanent resident of Pondicherry, which was French territory: and claimed that he was not in any way subject to the Court's jurisdiction. He further stated that his properties had been delivered to a receiver and that plaintiff would have been entitled only to a dividend, according to justice administered in French Courts, like other creditors holding simple debt bonds. He also said that the decree had been passed on 17th March 1896, *ex parte*, on a promissory note fraudulently obtained by plaintiff; and that the firm of which defendant was a member had been declared bankrupt on 20th July 1896, the insolvency dating as from 8th January 1896. He claimed that according to French law all transactions entered into by an insolvent debtor and all decrees obtained against him from a date ten days prior to the 8th January 1896 had become null and void; and that this suit, which was based on the French decree, which had become null and void, should be dismissed. The second defendant, the receiver of the first defendant's properties, set up a like defence as to the effect of the insolvency under the French law.*

[461] The District Judge decreed in favour of the plaintiff. Issues were framed as follows:—" (i) Is this Court prevented from entertaining

* Article 443 of the 'Code de Commerce' is as follows:—"Le jugement declaratif de la faillite emporte de plein droit, á partir de sa date, dessais issement pour le failli de l'adm inistration de tous ses biens, même de ceux qui peuvent lui échoir tant qu'il est en état de faillite.—A partir de ce jugement, toute action mobiliére ou immobiliére ne pourra étre suivie ou intentée que contre les syndics.—Il en sera de méme de toute voie d'exécution tant sur les meubles que sur les immeubles.—Le tribunal, lorsqu'il le jugera convenable, pourra recevoir le failli partie intervenante."

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the suit by reason of the cause of action not having arisen and defendant not being resident or carrying on business within its jurisdiction? (ii) Did or did not the defendant reside or carry on business within the jurisdiction of this Court on the date when cause of action arose? (iii) Was the French judgment on which the suit has been brought, according to French law null and void on the date of suit, and is the present claim based on the French judgment therefore not sustainable in this Court? (iv) Is it open to the defendant to raise the contention in this suit that the promissory note on which the French judgment was passed was obtained from the defendant by the plaintiff fraudulently? (v) And if so, was the promissory note obtained by the plaintiff from the defendant fraudulently? (vi) What is the relief, if any, that the plaintiff is entitled to?"

The first two issues were alone contested before the District Judge who, in the course of his judgment, said :—"It is not denied that at the time when this suit was instituted first defendant and his cousin Kandasami were undivided, or that the family owned a considerable quantity of immoveable property in the jurisdiction of this Court, of which one-half belonged to first defendant. It was also not denied that a trade in oil was carried on in Cuddalore Old Town, but it was contended that that trade belonged exclusively to first defendant's cousin Kandasami and that first defendant had absolutely no concern in it. It has not been argued that first defendant may not be or is not entitled to a share in the profits of that oil trade. In argument by first defendant's pleader it seemed to me that he failed to make out that first defendant was not entitled to a share in the profits of the oil trade, but he contended that even if first defendant was entitled to a share in the profits that fact, if a fact did not prove that the trade was carried on for his benefit or by his cousin as his agent. I must hold that if he has been or is entitled to a share in the profits of that trade, first defendant must be held to have carried on a trade within the meaning of Section 17, Civil Procedure Code." He held on the evidence that first defendant did carry on business within the jurisdiction of the Court at the tlme when the suit had been instituted even if he did not himself at any time personally take any part in carrying on that business, [462] and that the evidence showed that first defendant did personally sometimes take a part in carrying on the business, and that at other times the business was carried on by his cousin Kandasami, who must be held to be the agent of first defendant with reference to first defendant's share of the business. He relied on *Muthaya Chetti* v. *Allan* (1) and *Girdhar Damodar* v. *Kassigar Hiraga* (2).

Defendant No. 1 preferred this appeal.

The Acting Advocate-General (Sir *V. Bhasyham Ayyangar*), *V. Krishnasami Ayyar*, *Desikachariar* and *S. Srinivasa Ayyangar*, for appellant.

Hon. Mr. *E. Norton*, *Seshagiri Ayyar*, *Sundara Ayyar* and *Tirunarayanachariar*, for respondent No. 1.

V. Krishmasami Ayyar.—The suit is one *in personam* against defendant, the cause of action being a decree of a French Court. Section 14 of the Code of Civil Procedure contemplates that the suit may be brought on the principal judgment or on the original cause of action. The explanation shows that. See also Explanation VI to Section 13. The judgment could, however, be pleaded in bar to a suit on the original cause of action, so the

(1) 4 M. 209. (2) 17 B. 662.

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alternative is in practice ineffective. Apart from Section 14, it would be competent for a defendant to plead what the section lays down, *i.e.*, that the judgment was obtained by fraud, or not obtained on the merits, or not in accordance with the rules of international law. These rules in Section 14 are adopted by the Legislature, and they must be taken in their widest sense as applicable to both parties. The jurisdiction of the Court depends on Section 17 of the Code; plaintiff claims it on the ground that defendant carries on business in the jurisdiction, but he fails to prove it. *Madhu Soodun Chowdhry* v. *Cochrane* (1) shows that when the cause of action arises in a Court other than that in which suit is brought, plaintiff must show how the case is within the Court's jurisdiction. The evidence of the plaintiff here shows that a business was being carried on for the family. One Kandasami, who is said to be the managing member of defendant's family, was carrying on a business, and it was alleged that since defendant was a member of Kandasami's family he was "carrying on business," within the meaning of the [463] section. But plaintiff should have shown that defendant himself carried on business or resided within the jurisdiction; and he has not done so. Even supposing Kandasami Chetti was the managing member of defendant's family and was carrying on a business and using family funds, so that defendant had an interest in the bueiness, it is submitted that that would not bring defendant within Section 17. A manager dealing with family property is not an agent acting on behalf of the other members, but is a principal, *Chalamayya* v. *Varadayya* (2). The facts do not bring defendant within the cases decided under Section 17 with reference to carrying on business through an agent. Defendant's adjudication as a bankrupt having effect as from 8th January 1896 he could no longer be the owner of any business—as it would have vested in his syndic under the French law. At the date of this suit, first defendant was a bankrupt. Regarding the vesting of a bankrupt's property in his syndic, see Westlake's 'Private International Law,' rule 134, page 152, as to the effect in England, and page 142 as to the effect of continental bankruptcies. Also Dicey's 'Conflict of Laws,' rule 108, page 444; and Foote's 'International Law,' page 308. In the case there cited, Lord Romilly considered the domicile as important, but here the first defendant had French domicile—or at any rate he permanently resided in Pondicherry, which amounts to domicile. *Folliott* v. *Ogden* (3) and *Sill* v. *Worswick* (4) shows that since personal law follows the person, the English Courts always recognise foreign assignments in insolvency. See Phillimore's 'International Law,' volume IV, page 616; also *In re Artola Hermanos* (5). The judgment of the Court of the domicile is what is looked to. It is conceded that first defendant did not begin a new business after his insolvency; and whatever interest he might have had in the existing business prior to insolvency must have passed to his syndic. See *Rangayya Chetti* v. *Thanikachalla Mudaly* (6). Under Section 17, the cases show that where a defendant carries on business by agents he must have an effective control over it to come within the section. In *Chinnammal* v. *Tulukannattammal* (7) (decided under Clause 12 of the Letters (Patent defendant sold paddy in Madras by an agent who [464] sold it from carts. It was held not be a carrying on business within the jurisdiction. See also *Subbaraya Mudali* v. *The Government* (8), *Muthaya*

(1) 6 C.L.R. 417. (2) 22 M. 166. (3) 1 Bl. H. 124 (131).
(4) 1 Bl. H. 665 (690). (5) L.R. 24 Q.B.D. 640 (649).
(6) 19 M. 74. (7) 3 M.H.C.R. 146. (8) 1 M.H.C.R. 286.

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Chetti v. *Allan* (1), and *Chundee Churn Dut* v. *Eduljee Cowasjee Bijnee* (2) relating to the same words in the Small Cause Courts Act. Also *Khimji Chaturbuj* v. *Sir Charles Forbés* (3) and *Kessowji Damodar Jairam* v. *Khimji Jairam* (4). *Girdhar Damodar* v. *Kassigar Hiragar* (5), which is apparently inconsistent, does not apply. Where a man carries on business by clerks or agents over whom he has effective control, no doubt he is liable under the section, but where a managing member carries on a business and possibly does so in spite of the wishes of other members of the family, he cannot be properly called an agent. Moreover, it is submitted that Section 17 does not refer to foreigners at all, and only relates to persons in British India and regulates whether they are to sue in one Court or another. By international law a person subjects himself to jurisdiction either by domicile or residence—and Legislatures must be taken to legislate solely with reference to matters within their territorial limits. (*Gurdyal Singh* v. *Raja of Faridkot* (6).) I ask leave to file a certificate showing the French Nationality of the defendant. [Mr. *Norton* objected on the ground (1) that the identity of the person mentioned therein was not shown; (2) that under Section 568 of the Code of Civil Procedure no substantial reason had been shown for the admission of new evidence; and (3) under Section 74 of the Evidence Act.] [The certificate was filed.] Rule 13 of Dicey's 'Conflict of Laws' shows that permanent residence is presumptive evidence of domicile. *Queen-Empress* v. *Natwarai* (7), *Gurdyal Singh* v. *Raja of Faridkot* (6) shows that domicile or residence at the time of action gives jurisdiction. *Nalla Karuppa Settiar* v. *Mahomed Iburam Saheb* (8) shows that the words "carry on business" only refer to British subjects by reason of the rule referred to, namely, that Legislatures legislate only with regard to their own subjects; and their legislative enactments must be construed and regarded only from that point of view; though, of course, if a Legislature **[465]** expressly disregards that rule of international comity, its Courts will be found to follow what is enacted. In *Bhujbal* v. *Nanheju* (9), residence was the ground of the jurisdiction. *Macleod* v. *Attorney-General for New South Wales* (10) shows that the rule of construction of legislative enactments should be that they should be construed as conforming with international law. It is submitted that Sections 16, 17 and 18 do not confer jurisdiction upon the Courts. That is done by Section 11. Sections 16, 17 and 18 only deal with the distribution of jurisdiction amongst the Courts of British India. And in construing Section 17 one must do so by the light of the well-recognised rule of international law. [SUBRAHMANIA AYYAR, J.—Suppose a man resides in every sense outside of the jurisdiction and comes daily to the jurisdiction, would you contend that he would be able to sue and not liable to be sued?] That is so, but a plaintiff submits to jurisdiction by filing his suit. *Le Mesurier* v. *Le Mesurier* (11), *Fritz Olner* v. *Lavezzo* (12), and *In re Queensland Mercantile and Agency Company* (13) show that such sections as 16 and 17 relate only to the distribution of jurisdiction and do not confer jurisdiction. Moreover, statutes must be construed so as not to conflict with international law. *Russell* v. *Cambefort* (14) is no longer law, because the rule upon which it was decided has been altered, but the principle of the decision remains. It

(1) 4 M. 209. (2) 8 C. 678 (685). (3) 8 B.H.C.R. 102.
(4) 12 B. 507. (5) 17 B. 662. (6) 22 C. 222 (236, 238).
(7) 16 B. 178 (181). (8) 20 M. 112. (9) 19 A. 450.
(10) [1891] A.C. 455. (11) [1895] A.C. 517. (12) 10 C. 878.
(13) (1892) 1 Kh. 219 (226). (14) L.R. 23 Q.B.D. 526.

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was a case of service out of the jurisdiction, and Cotton, L.J., points out that though an Act can give jurisdiction to a Court as against British subjects, it cannot apply to foreign subjects; and the Court also holds that enactments of Legislatures should be construed according to rules of international law. *St. Gobain, Chauny and Cirey Company* v. *Hoyermann's Agency* (1) (a decision passed on the same point after the rule was altered) follows Cotton, L.J., in the previous case. See also *Comber* v. *Leyland* (2), *In re Busfield* (3), *In re Anglo-African Steamship Company* (4) and *Hewitson* v. *Fabre* (5). The cases cited show that no foreigner is subjected to jurisdiction excepting by residence or domicle. They were decided on the rules of English Courts **[466]** relating to service out of jurisdiction, but are applicable by analogy. Further, it is submitted that the Indian Legislature had no power to legislate in conflict with the rule of international law referred to. Section 22 of the Indian Councils Act, 1861 (24 & 25 Vict., cap. 67), relates only to persons within Indian territories, and the Amending Act (32 & 33 Vict., cap. 98) extends its application to native Indian subjects. So the Indian Legislature has no power to legislate for persons resident outside: and Ilbert's 'Government of India,' pages 442 to 444 and 451 and 452 shows that the operation of Acts of the Indian Legislature is restricted to persons within British India. In *Empress* v. *Burah* (6), the question was dealt with whether the Indian Legislature was a delegate of the English powers, and it was said that such powers were limited to Acts of Parliament alone, and that the Indian Legislature is not a delegate of British Parliament. Dicey's 'Conflict of Laws,' Chapter V, rule 45, page 237, shows there is no jurisdiction when a defendant is not in England at the time of service of writ—subject to exceptions—one of which (exception 3 at page 43) is when a person is domiciled in England. The list of exceptions in Dicey is exhaustive and the present case does not come within it. See also Piggot on 'Foreign Judgments,' pages 233 and 234—*Ram Ravji Jambhekar* v. *Pralhaddas Subkarn* (7), *Cookney* v. *Anderson* (8) as to Order xlviii-A, rule 11, and *MacIver* v. *Burns* (9), also on that rule. As to the bankruptcy, it is contended that the judgment in Pondicherry is rendered void by reason of the bankruptcy which superseded it —Westlake's 'International Law,' page 281, Section 240; Code de Commerce, Articles 442, 443. By Article 443 a bankrupt forfeits all his goods and everything must be done by his syndic. An expert on French Law need not be called to give evidence under the Evidence Act. As defendant paid since date of suit 17½ per cent. of his debts he became discharged according to the French Law. By Article 443 defendant could not be sued at the date of the suit.—Pigott on 'Foreign Judgments,' page 341, citing *Quelin* v. *Moisson* (10). Bankruptcy is a complete discharge of debts contracted prior to it—Bar's 'International Law,' page 1036, Section 490. In **[467]** conclusion it is submitted:— (1) There was no carrying on business within the meaning of the section. (2) Even if Kandasami carried on a business, it was not with family funds and so not binding on first defendant. (3) Even if with family funds—Kandasami was not an agent. (4) All the affairs of defendant were vested in his syndic and so no suit lies. (5) Section 17 must be considered in the light of international law and can apply to

(1) [1893] 2 Q B. 96 (101). (2) [1898] A C. 524.
(3) L.R. 32 Ch. D. 123. (4) L.R. 32 Ch. D. 348. (5) L.R. 21 Q.B.D. 6.
(6) 4 C. 172 (180). (7) 20 B. 133. (8) 32 L.J. Ch. 427.
(9) [1895] 2 Ch. 630. (10) 1 Knapp, 265*n*.

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foreign subjects only if there is residence or domicile. (6) There has been a discharge and so no suit lies.

Hon. Mr. *E. Norton.*—The promissory note was dated 4th January 1896. Suit was brought by plaintiff by writ of adjournment on 17th January 1896. Decree was passed on 20th March 1896 and on 23rd March 1896, defendant executed an assignment of Rs. 17,000 to his cousin Kandasami at Cuddalore for the conduct of a charity. That was the whole of his property in Cuddalore. The bankruptcy in Pondicherry could not have the effect of passing the property in his immoveable property situated in British India, *Cockerell* v. *Dickens* (1). The right to sue was suspended by the bankruptcy, but not extinguished. Though defendant was a bankrupt in Pondicherry, there was nothing to prevent creditors from going into foreign territory to get the bankrupt's property there, *e.g.*, in British India. Plaintiff's position is precisely within Baron Parke's statement that a declaration or fiat in bankruptcy does not pass property in the bankrupt's immoveables situated outside the jurisdiction of the Court making it—*Selkrig* v. *Davies* (2). [DAVIES, J.—That might be a good argument if your suit were against immoveable property.] I am entitled to proceed *in personam.* [SUBRAHMANIA AYYAR, J.—You cite it as showing that the right to sue that was taken away was the right to sue in French territory and not the right to sue as to immoveables abroad.] Yes. Plaintiff's debt against defendant exists in its entirety and is not curtailed or extinguished, so far as the rights of our tribunals are concerned, though no doubt the debt was curtailed if not extinguished in French territory. The French proceedings do not profess to have interfered with the jurisdiction of our Courts: nor does the French Code permit. *Ellis* v. *M'Henry* (3) shows that a discharge of a debt is a discharge throughout the world if it **[468]** extinguishes the debt. My contention is that the French Law does not do that. If *Quelin* v. *Moisson* (4) is an authority *Cockerell* v. *Dickens* (1) would not have been decided as it was. Section 11 of the Limitation Act shows that a remedial law of a foreign country is not treated as curtailing or extinguishing a debt in this country, *i.e.*, the Law of Limitation would be Indian Law if a Frenchman came and sued in Madras on a foreign debt. In *Edwards* v. *Ronald* (5), the English discharge was held to be a discharge in Calcutta because the English statute is paramount and governs the dependencies. So in *Ellis* v. *M'Henry* (3) the discharge in England was held to be a discharge in Canada. But a Frenchman's debt is never discharged by bankruptcy in his own country. (He referred to Code Civile, 1265, 1270, Liv. III, Tit. III.) Section 443 of the French Code de Commerce shows that after the declaration of bankruptcy, suits must be brought against the syndic. See Wharton's 'Conflict of Laws,' Section 799, as to the effect of bankruptcy on foreign assets. The bankrupt still retains his right to dispose of property in foreign lands—that is settled in France and Germany. Also Section 805, as to when foreign bankrupts may sue. Defendants must go the length of arguing that a French bankruptcy has general, namely, extra-territorial effect. The effect of Wharton's rule is that it is desirable to confine territorial jurisdiction to territorial limits, on a review of all the authorities, and this contradicts the ruling in *Quelin* v. *Moisson* (4). Taylor on 'Evidence,' volume I, Section 5,

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(1) 3 Moo. P.C. 98 (107). (2) 2 Dow. 230 (245).
(3) L.R. 6 C.P. 228. (4) 1 Knapp. 265*n*. (5) 1 Knapp. 259.

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shows that questions of foreign law must be proved as facts and cannot be noticed by foreign Courts and that a decision of one tribunal on a point of foreign law is not to be relied on by other Courts, but must be proved again. So in Wharton's 'Conflict of Laws,' Sections 771 and 772. Proof of foreign law must be given. [SUBRAHMANIA AYYAR, J. referred to Section 38 of the Indian Evidence Act.] The Court may look at books and foreign decisions relating to the matter. I maintain that the decision in *Quelin* v. *Moisson* (1) was one *ad hoc*, relating only to that case and the question there said to be proved must be proved again. Section 443 of the French Code takes away the right of action only in French territory as to such property as vests in the syndic and **[469]** does not affect ex-territorial moveables. Wharton says it is not decided that the moveable property in foreign territory vests in the trustee. Regarding immoveables in foreign territory, it is conceded that they do not pass to the syndic. Regarding moveables, it is a moot point. It is submitted that the Court cannot take another decision like *Quelin* v. *Moisson* (1) as a guide, the question of fact having to be proved in each case. Our Courts are bound by the same rules as English Courts and as to them see Taylor on 'Evidence,' page 50, 9th edition. I thus distinguish *Quelin* v. *Moisson* (1). On the same point see *Selkrig* v. *Davies* (2). Section 443 of French Code only refers to when bankruptcy is pending. By the comity of nations the rights of trustees are recognised by foreign countries where the foreign law is analogous to ours. The French Law is not analogous—Wharton's 'Conflict of Laws,' Section 799. A bankrupt still retains his capacity to dispose of his property in foreign countries notwithstanding bankruptcy. Sections 484, 485 and 486 of the French Code show that the syndic is a mere custodian, and there is nothing in them corresponding to our vesting order. They involve a mere incapacity with administration by the Court. Regarding rule 108 in Dicey to the effect that "assignment in a foreign country operates as an assignment of the bankrupt's property in England," rule 115 shows that a grant of letters of administration of a deceased in a foreign country is local and of no effect in England. I cite that by analogy. The Courts of British India are entitled to claim jurisdiction over a foreigner who trades through an agent, and that is not inconsistent with international law. See Story's 'Conflict of Laws,' Sections 760 and 765. [SUBRAHMANIA AYYAR, J.—The English cases seem to draw a distinction between circumstances in which actual process can be served, and those in which only notice of intended process can be given.] The broad proposition is stated that an action will not lie against a non-resident foreigner. That is what I contest. See Dicey's 'Conflict of Laws' at top of page 254, exception 7. That is an invasion of the principle that England repudiates jurisdiction. The proposition cannot be supported. In *Girdhar Damodar* v. *Kassigar Hiragar* (3), Starling, J. (at page 669) differentiates most of the cases cited **[470]** against me on the same grounds as I distinguish them. The remedy is against the property of the defendant if absent, and against his person if present. As Starling, J., points out, it is a question rather of proper service of writ—not of whether England repudiates jurisdiction. *Russell* v. *Cambefort* (4) shows how all these cases should be differentiated. *St. Gobain, Chauny and Cirey Company* v. *Hoyermann's Agency* (5), proceeds on the same

(1) 1 Knapp. 265N. (2) 2 Dow. 230, (245). (3) 17 B. 662 (669).
(4) L. R. 23 Q. B. D. 526. (5) (1893) 2 Q. B. 96. (101).

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principle. *Indigo Company* v. *Ogilvy* (1), shows that the refusal to entertain jurisdiction is not based on international law, in English cases, but on procedure. That case depended really on absence of leave to sue. In *Worcester City and County Banking Co.* v. *Ferbank Pauling & Co.* (2), Davey, L.J., shows that England does not decline jurisdiction on the ground that a defendant is a non-resident foreign subject, but on the ground that he is non-resident merely. A plaintiff's right to sue in India is based on the Indian law. I do not accept the contention that the English law applies. England claims jurisdiction over contracts no matter where made, subject to certain rules of procedure. Parties in British India base their jurisdiction on the Civil Procedure Code. *Parvathi* v. *Mannar* (3). Lastly, a foreign judgment is in itself a cause of action, and upon such a foreign judgment creditors can claim execution on property within the jurisdiction. The effect of a suit on a judgment is to give it execution. A defendant against whom a judgment has been obtained impliedly undertakes to pay it in terms of the judgment, wherever his property may be.

JUDGMENT.

The suit, out of which this appeal arose was brought on a foreign judgment, obtained in the Court at Pondicherry, on a promissory note, executed by the appellant, in favour of the plaintiff-respondent—in Pondicherry. The date of the foreign judgment sued upon is 20th March 1896, and this suit was instituted on the 9th of October 1896. Meantime, that is, on 20th July 1896, the appellant was declared an insolvent in Pondicherry and a syndic was appointed to take charge of, and administer, his property. The present suit was contested by the appellant, but the District Judge decreed in favour of the plaintiff. The main questions raised in appeal are that the District Judge had no **[471]** jurisdiction to entertain the suit and that, even if he had, the suit was not maintainable against the appellant at the time it was brought. There is no doubt that the parties are French subjects domiciled in French territory. The ground on which the plaintiff contended that the District Court of South Arcot at Cuddalore had jurisdiction over the appellant was that he carried on business within its jurisdiction (Section 17 of the Code of Civil Procedure). The business carried on, according to the plaint, was a money-lending business, but at the trial, no attempt was made to support this. Our attention was drawn to Exhibit E, which, no doubt, shows that certain mortgages were obtained by Kandasami, the appellant's cousin, for the joint benefit of himself and the appellant between the years 1892 and 1896. This is quite insufficient to establish that there was any money-lending business carried on by them at all, but certainly there was none to prove that any such business was carried on at the time of the institution of the suit, the date of the last mortgage in Exhibit E being January 1896. At the trial, the business, which, it was contended, the defendant was carrying on, was a business in oil conducted along with the above said Kandasami. The only two witnesses who had any knowledge of the business done by Kandasami at Cuddalore virtually disprove the allegation that the appellant took any part in the trade. The vague statements of some of the witnesses, that the appellant sometimes visited Cuddalore, cannot be relied on as showing that he carried on business there, Cuddalore being in close proximity to Pondicherry and being a place where

(1) (1891) 2 Ch. 31. (2) (1894) 1 Q. B. 784 (790). (3) 8 M. 175.

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the appellant had immoveable property. The ground upon which the District Judge has found that the appellant was carrying on business at Cuddalore, and one of the grounds which was urged in appeal on behalf of the plaintiff, was that Kandasami was the manager of a Hindu family and, therefore, it must be presumed that the business was carried on with the consent of the appellant and for his benefit also ; but no such presumption can arise in this case, having regard to the fact that the appellant and Kandasami had already been divided with regard to their moveable property and were in litigation in regard to the division of their immoveable property. The oil business, on which the plaintiff relies, was commenced in 1894, two years after the partial division had been effected, and it is, therefore, unlikely that the appellant would have consented to such a business being carried on as a [472] joint business. Nor is there any sort of evidence that he did. On the contrary, the conduct of the parties concerned is absolutely inconsistent with the view that the oil business was a business in which the appellant had a joint interest. No reference appears to have been made to the oil business in the insolvent proceedings as a business in which the appellant was interested, and also, in the action taken subsequently by the syndic in regard to the realization of the assets, the oil business was not included. Again, in the final partition proceedings between the appellant and Kandasami, this business was not dealt with as part of the joint family property. Further, the accounts connected with that trade and produced before the Court stand in the name of Kandasami only. These circumstances negative the view that the appellant had any interest in the oil trade, much less that he assisted in carrying it on. Even if it were otherwise, and if the appellant would have been entitled to claim an interest in the oil business on the ground that it was carried on by one who was the manager of his family at the time, it would not warrant our holding that the appellant carried on business within the meaning of Section 17 of the Code of Civil Procedure, inasmuch as the person acting as agent within the jurisdiction should, in our view, be an agent in the strict and correct sense of the term, so as to bring the principal within the operation of the said Section 17, Code of Civil Procedure, as interpreted by this Court. We do not, however, wish to be understood as saying that a member of a joint family, who actually consents to a trade being carried on on his behalf or by his conduct puts himself in the position of a joint trader, would, while he was living outside the jurisdiction, not be carrying on business within the jurisdiction. Such is not the present case, as we have already stated. We are, therefore, unable to agree with the District Judge in holding that he had jurisdiction over the appellant, and the suit must consequently fail. We must hold that the suit fails also on the second ground urged on behalf of the appellant.

Upon the facts already stated, it is clear that the Pondicherry Court was a Court competent to adjudicate the appellant an insolvent, so as to bind all the creditors, the plaintiff being one of them. The effect of such adjudication, in French territory is admittedly that the insolvent is deprived of the possession and management of his property and that the same is entrusted to a [473] syndic against whom only all suits in respect thereof must be brought (Section 443, Code de Commerce*) : in other words, the liability of the insolvent to be sued is taken away for the time being. It may be true, as argued by the learned counsel for the plaintiff, that unlike

* *Vide* 23 M. 460 N.

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as in some other countries the debt of the insolvent is not extinguished by the declaration of his insolvency, so as to exempt him from future liability in respect of any property, which the insolvent may obtain subsequently. But it is clear that so long as the adjudication of the insolvency remains in force, no suit could be brought against him in French territory. Such being the insolvent's position in French territory, it must be held to be the same outside that territory in a case such as this. The decision of the Privy Council in *Quelin* v. *Moisson*(1), which was a case on all fours with this is a direct authority in support of the above view. We are unable to accede to the suggestion made by the learned counsel for the plaintiff that the authority of that case has in any way been impaired by subsequent decisions or otherwise; on the contrary, that case has been cited with approval in *Ellis* v. *M'Henry*(2) where Bovill, C.J., observes, at page 234, "there is no doubt that a debt or liability arising in any "country may be discharged by the laws of that country, and that such a "discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an "effectual answer to the claim, not only in the Courts of that country, but "in every other country." The present case is clearly the case of a liability being taken away, and it is not a matter connected with mere procedure, as was urged for the plaintiff. With the decisive authority of *Quelin* v. *Moisson* (1), which is binding upon us, we are not called upon to consider or discuss the other authorities cited on either side. In the view we have taken of these two main grounds of appeal it is unnecessary for us to go into the other questions raised on behalf of the appellant, namely, whether Section 17 of the Code of Civil Procedure should be construed so as to exclude non-resident foreigners from its operation, even though they carry on business in British India through agents, and, if such construction be inadmissible, whether the said section of the Indian Legislature should be held to be *ultra vires*, **[474]** with reference to such foreigners, and also the question whether the District Judge was right in holding that it was not competent for him to enter into the merits of the foreign judgment, on which this suit is based.

The result is, the decree of the Lower Court must be reversed and the suit dismissed with appellant's costs throughout.

(1) 1 Knapp. 265 N.

(2) L.R. 6 C.P. 228 (234).

23 M. 474=10 M.L.J. 258.

1899 Nov. 3. — APPELLATE CIVIL. — 23 M. 474=10 M.L.J. 258.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

MUNISAMI NAIDU (*Plaintiff*), *Appellant v.*
KRISHNA REDDI (*Defendant*), *Respondent.**
[3rd November, 1899.]

Rent Recovery Act (Madras)—Act VIII of 1865, *Sections* 9, 51—*Refusal by tenant to accept patta—" Cause of action "—Period within which summary suit must be brought.*

On 17th June 1897 a landholder tendered a patta to a tenant who, on the same day, refused to accept it. On 5th August 1897 the landholder brought a suit to enforce its acceptance :

Held, that the suit was brought in time.

SUIT to enforce acceptance of patta. The patta was tendered on 17th June 1897 ; it was refused by the tenant on the same day ; and suit was brought on 5th August 1897. The Acting Head Assistant Collector ordered the patta to be accepted, with some modifications. He held that the suit was not barred by limitation inasmuch as it had been brought within thirty days of the cause of action. On the question of limitation the District Judge, on appeal, held that the cause of action had arisen on the tenant's refusal to accept the patta, and as the suit had not been brought within thirty days from that date it was barred.

The plaintiff preferred this second appeal.

Seshagiri Ayyar, for appellant.—It is submitted that the District Judge is wrong in holding that the cause of action arises **[475]** the moment the patta tendered is not accepted. The object of the Legislature is to give the tenant an opportunity to reconsider his position. He has one month in which to decide. It is his final decision, after the month has elapsed, that the section contemplates. The very limited time given to a tenant by Section 9 should not be curtailed. The words " for one month after demand " denote a refusal which continues up to the end of the month. *Papamma* v. *Subbanna* (1) favours my contention. In cases of doubt, a liberal construction should be adopted so as to extend the period of limitation. See *Latifunnessa* v. *Dhan Kunwar* (2) and *Gnanasammanda Pandaram* v. *Palaniyandi Pillai* (3). Section 51 of the Rent Recovery Act provides that the suit should be brought within thirty days of the cause of action. Under Section 9, the cause of action does not arise till one month after demand is over. I submit that this suit was brought in time.

Sundara Ayyar and *Subbayya Mudaliar*, for respondent.—The cause of action arises the moment that the tenant refuses the patta. If the liberal construction contended for is placed on the section, numerous causes of action may arise within the month. *Papamma* v. *Subbanna* (1) does not decide the particular point, which was not necessary for the determination of that case. No doubt a liberal construction should be placed upon statutes of limitation, but it must also be a reasonable one. It is not what?a

* Second Appeal No. 1535 of 1898 against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Appeal Suit No. 35 of 1898 reversing the decision of J. W. Hughes, Acting Head Assistant Collector of North Arcot, in Summary Suit No. 577 of 1897.

(1) 22 M. 318. (2) 24 C. 382. (3) 17 M. 61.

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tenant might have done that determines the cause of action. The question is whether the refusal was not within the rights of the tenant and whether the cause of action did not arise on the refusal.

Seshagiri Ayyar in reply.—If the Legislature intended that the refusal alone was to be looked to, the words "for one month after demand" are meaningless.

JUDGMENT.

BODDAM, J.—The only important question raised in this appeal depends upon the construction of Sections 9 and 51 of the Rent Recovery Act (Act VIII of 1865).

The appellant tendered a patta to the respondent on the 17th June 1897, which the respondent on the same day refused to accept. On the 5th August 1897 the appellant brought his suit under the Rent Recovery Act to enforce the acceptance of patta. The Acting Head Assistant Collector, after varying the patta in some particulars ordered the defendant to accept it, holding that [476] the suit was not barred by limitation. On appeal, the District Judge overruled all the objections to the patta except with regard to the rights as to indigo as settled by the Acting Head Assistant Collector, but dismissed the suit on the ground that it was barred, having been brought more than thirty days after the respondent's refusal to accept the patta. He held that the landlord's right to sue arose upon the tenant's refusal to accept the patta, and that the landlord had only one month from the date of the refusal to bring his suit. In other words that the cause of action arose *eo instanti* upon the refusal.

Section 9 of the Rent Recovery Act (so far as is material) says, "when "a tenant shall, for one month after demand, have refused to accept a "patta, it shall be lawful for such landholder to proceed by summary suit "before the Collector to enforce acceptance of the patta," and Section 51 says, "summary suits under this Act must be brought within thirty days "from the date of the cause of action."

The question therefore is, when does the cause of action arise? Is it upon the refusal by the tenant to accept the patta or at any other time, and if at any other time, at what time? This must depend upon the wording of Section 9.

I am of opinion that the cause of action does not arise upon the tenant's refusal *eo instanti*. In order to place that interpretation upon the section, it would be necessary to strike out the words "for one month after demand" and read the section without them. This cannot be done. Effect must be given to the whole of the section, for unless it were intended that these words should have some effect they would not have been inserted. Neither can it be read as meaning anything different to what it says. The words are perfectly clear and unambiguous and must be construed as meaning what they say. They say that a landlord may proceed by summary suit if the tenant shall have refused for one month after demand. The landlord therefore is not entitled to proceed by summary suit until the tenant has refused and until a month has elapsed from the date of the demand made by the landlord. He has no cause of action by summary suit until a month after his demand has been made, no matter when the tenant refused to accept a patta.

The object of the section is to give the tenant a *locus penitentiæ*. It gives him a clear month from the date of the demand to deter-[477] mine whether or not he will accept the patta, and even if he did, on demand

being made, refuse to accept the patta, the landlord is not allowed to proceed against him by summary suit until he has had an opportunity of reconsidering the matter and, if he should think fit to do so, of changing his mind. The cause of action does not arise until that period has elapsed and the landlord then must bring his suit within thirty days.

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The decision in *Papamma* v. *Subbanna* (1) was to this effect and I think is right. The case was not decided until after the judgment appealed from. I would therefore allow this appeal and reverse the decree of the District Judge except in so far as it relates to indigo, and remand the appeal for disposal of the objections of the tenants raised in the appeals other than those relating to indigo with reference to the observations of the High Court in *Venkatappa Naidu* v. *Munisami Naidu* (2). Costs in the Lower Appellate Court and in this Court will be provided for in the revised decree.

SUBRAHMANIA AYYAR, J.—The question raised in this case is not altogether free from difficulty. The language of Section 9 of the Rent Recovery Act, on the proper construction of which the point turns is, however, somewhat peculiar and seems to require us to hold that a landholder is not at liberty to sue a tenant to compel the latter to accept a patta until thirty days from the date of the tender of the patta has expired, even where the tenant has at the time of the tender expressed his unwillingness to accept the patta. If that was not the intention of the Legislature it is not easy to see why the words " when a tenant shall for one month after demand have refused to accept " were introduced in the section. If, as suggested for the respondent, the Legislature meant to lay down that a landholder is entitled to bring a suit to enforce the acceptance of a patta as soon as the tenant communicates his unwillingness to take the patta and when he does not do so, on the expiry of a month from the date of the tender, there was nothing to prevent such meaning being made plain.

I therefore concur in the order proposed by my learned colleague.

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23 M. 478 = 10 M.L.J. 98.

[478] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

KUNHI MOOSSA (*Defendant No.* 2), *Appellant v.* MAKKI AND OTHERS (*Plaintiff and Defendants Nos.* 1, 3 *and* 4), *Respondents.** [22nd November and 14th December, 1899.]

Civil Procedure Code—Act XIV of 1882, *Section* 276—*Kanom granted during a subsisting attachment—Subsequent discharge of judgment debt, and other later attachments—Claim for rateable distribution—Effect of discharge in rendering first attachment inoperative as against all creditors.*

A kanom was executed by the karnavan of a tarwad in plaintiff's favour for valuable consideration for the discharge of judgment-debts decreed against the tarwad. On or before the date of the said kanom plaintiff's father had placed

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* Second Appeal No. 1840 of 1890 against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 306 of 1898, affirming the decree of U. Babu Rao, District Munsif of Cannanore, in Original Suit No. 581 of 1897.

(1) 22 M. 318. (2) Second Appeal No. 201 of 1898 (unreported).

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under attachment the properties covered by the kanom deed in execution of one of the said decrees; but the claim having been satisfied no Court-sale followed. While the said attachment was still subsisting, and at a date later than that of the kanom, first defendant and other judgment-creditors applied for and obtained orders for the attachment of the same properties. On plaintiff suing to establish the validity of his kanom, it was contended that in consequence of the said attachment first defendant would be entitled to rateable distribution, under Section 295 of the Code of Civil Procedure, and that this was a claim enforceable under the attachment within the meaning of Section 276:

Held, that the kanom was valid. The attachment subject to which the kanom had been granted ceased to be operative both as regards the attaching creditor and the other judgment-creditors when the judgment-debt was discharged, and there could be no sale by the Court and no right on the part of the other creditors, in the circumstances, to apply for such a sale.

[F., 35 B. 516 (525) = 13 Bom. L.R. 977; 23 M. 380 = 15 M.L.J. 202.]

SUIT to declare the validity of a kanom right of Rs. 900 on certain properties under a deed, filed as Exhibit A in the suit, and executed to plaintiff by his karnavan, third defendant. Plaintiff alleged that the property was the jenm of his and third defendant's tarwad, of which third defendant was the karnavan; that it was held by tenants; that it had been attached in execution of a decree obtained in a civil suit by first defendant against third defendant's predecessor, who was removed from the karnavastanam by suit; that a claim preferred by plaintiff was rejected **[479]** and the property had been purchased by second defendant. First defendant contended that the kanom deed had been executed collusively and without consideration and without adequate tarwad necessity at a time when the property was attached for more decrees than one. The District Munsif found that the kanom deed was *bona fide* and had been executed for consideration; and in this he was upheld by the District Judge.

The second issue was whether the kanom deed had been executed while there was an attachment on the property, and if so, whether it was void. The District Munsif set out the facts as follows:—"The plaint kanom mortgage-deed (Exhibit A) recites that third defendant received from plaintiff Rs. 900 in cash on the date it bears, *viz.*, 24th November 1896, for payment of the judgment-debts decreed in original suits Nos. (Tellicherry Munsif Court's file) 305 of 1886, 441 of 1887, 228 of 1890, 60 of 1891, and 276 of 1893 against the mortgagor's tarwad. It is admitted that on or before the date of the said mortgage, Exhibit A, plaintiff's father had had placed under attachment the plaint properties covered by the said deed (Exhibit A) in execution of the decree in original suit No. 228 of 1890 just mentioned. But this attachment was not followed by the usual judicial sale, because plaintiff's father says he received the amount of his decree from third defendant on 29th November 1896. While this attachment at the instance of plaintiff's father was still subsisting, but after the date of the plaint mortgage, Exhibit A, first defendant and some other judgment-creditors applied for and obtained orders for attachment of the same properties on and after the 27th November 1896. The actual attachment must have been effected between that date and 14th December 1896 on which date the petition for attachment was struck off the file. In June 1897, plaintiff intervened with his claim petition praying this Court that the sale prayed for by the first defendant might be held subject to his (plaintiff's) mortgage, Exhibit A. This Court rejected the claim mainly on the ground that the mortgage appeared to have been executed twelve days before the actual attachment and that the applicant, the judgment-debtor's anandravan, had not shown that he paid off any of

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the judgment-debts. The Court inferred thence that the mortgage was probably a collusive transaction. It is admitted that the attachment at the instance of first defendant was effected some twelve days after the date of the [480] kanom, Exhibit A; and hence that is not the attachment which avails defendants Nos. 1, 2, and 4 to avoid the deed, Exhibit A. They contend that if the attachment which was put at the instance of plaintiff's father had been followed by a Court-sale and money realized thereunder, the first defendant would have been entitled under Section 295 to a rateable share therein. This potential or inchoate interest in the possibly realizable assets, they contend, entitle the first defendant to be ranked as possessor of a 'claim enforceable under the attachment' within the meaning of Section 276, Code of Civil Procedure. They quote *Sorabji Edulji Warden* v. *Govind Ramji* (1). Mere attachment of a land by one judgment-creditor does not invest another money decree-holder with any kind of right or interest in the attached property. To invest him with such right and interest, assets must have been realized in such shape as to admit of rateable distribution. Before reduction into that shape the debtor may pay off the attaching creditor and render the attachment ineffectual. When he does so, as third defendant did in this case, the private alienation cannot be objected to. See Telang, J.'s observations at page 109 of the case quoted above. In this view it follows that there was no legally subsisting attachment on the plaint property on the date of the mortgage-deed, Exhibit A." He declared the plaint mortgage to be valid and binding as against defendants Nos. 1, 2 and 4. The second defendant appealed to the District Judge who upheld the decree.

Defendant No. 2 preferred this second appeal.

J. L. Rosario (*Ryru Nambiar* with him), for appellant.—Section 276 of the Code of Civil Procedure prohibits private alienations of attached property and enacts that such alienation "shall be void against all claims enforceable under the attachment." Under the corresponding section in the Code of 1859, Section 240, such an alienation was "null and void." This section was interpreted by the Privy Council in *Anund Loll Doss* v. *Jullodhur Shaw* (2) to mean "null and void as against the attaching decree-holder," and the Indian Courts followed this ruling. Section 276 of the Code of 1882 must mean something more than the claim of the attaching decree-holder, or the word "claims" would not have been used. The claim of the attaching decree-holder is one [481] of the claims enforceable under the attachment, whatever the others may be. Decree-holders who have applied for execution of a decree against the same judgment-debtor, before his property has been brought to sale, are entitled to share rateably in the proceeds,—Section 295 of the present Code. This is a new provision. Under the Code of 1859 the first attaching creditor was entitled to be paid in full, and any balance left was divided rateably among the subsequent attaching creditors. Under Section 295 of Act XIV of 1882 all decree-holders have equal rights, whether they have attached the property or not. In *Lakshmi* v. *Kuttunni* (3), it was held that any of such decree-holders could object to the confirmation of a sale under Section 311, and the judgment there lays down that the attaching decree-holder could not stop the sale, even if he were paid off in full. In *Mohant Megh Lall Pooree* v. *Shib Pershad Madi* (4), it was held that a

(1) 16 B. 91 (95, 109).
(2) 14 M.I.A. 543.
(3) 10 M. 57.
(4) 7 C. 34.

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sale of properties of a judgment-debtor could not be stayed after the amount due to the attaching decree-holder was realized, but must go on till the amount due to all decree-holders entitled to share under Section 295 was realized or till the property was exhausted. In *Durga Churn Rai Chowdhry* v. *Monmohini Dasi* (1), the High Court appears to have taken the view that the Legislature intended to include the claims of decree-holders entitled to share under Section 295 by reason of the words "all claims enforceable"; but that that intention was not carried out. In *Sorabji Edulji Warden* v. *Govind Ramji* (2) Telang, J., held that claims of decree-holders entitled to share under Section 295 are "claims enforceable under the attachment" within the meaning of Section 276. He holds, however, that if the attaching decree-holder is paid off before the sale, the claims of the other decree-holders must fail. It is difficult to understand how, if such claims are included in "all claims" under Section 276, they can fail without the consent of such decree-holders. If the latter have a claim, it cannot fail because of the action of some other person.

Karunakara Menon, for respondent No. 1, contended that inasmuch as the attaching decree-holder had been paid off the claim of the appellant failed. He relied on Telang, J.'s observations in *Sorabji Edulji Warden* v. *Govind Ramji* (2) as being conclusive.

JUDGMENT.

[482] SUBRAHMANIA AYYAR, J.—The question in this case is as to the validity of the kanom obtained by the first respondent when the land compromised in the instrument of kanom was under attachment in execution of a decree against the party who granted the kanom.

Now there is no doubt that the invalidation of a private transfer, made pending an attachment of the property transferred, only results from a subsisting attachment.

In the present case, however, the attachment subject to which the kanom was granted ceased to be operative, in so far as the attaching creditor was concerned, on the third respondent discharging the judgment-debt due to that creditor. *Ramdham Mitter* v. *Kailas Nath Dutt* (3) and per Mitter, J., in *Anandalal Das* v. *Radhamohan Shan*(4), and on principle it follows that with reference to the other judgment-creditors also, who, had the attachment resulted in the realization of assets, would have been entitled to a rateable distribution, the attachment became inoperative. If authority in support of this view were necessary, reference might be made to the opinion of Telang, J., in *Sorabji Edulji Warden* v. *Govind Ramji*(2). And the view is in no way inconsistent with the observation of Kernan, J., in *Lakshmi* v. *Kuttunni*(5) to the effect that an attaching creditor could not stay the sale even if he were paid in full after the other decree-holder had applied to the Court for execution. That is no doubt true where, as was the case in the instance before Kernan, J., the attachment continues to be in force and effective. For in such circumstances the Court having the control of the proceedings in execution should doubtless, at the instance of the creditor, who, though not the attaching creditor, is entitled under Section 295 of the Code of Civil Procedure to a rateable distribution, sell the attached property if necessary. But whereas in the present case the

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(1) 15 C. 771.
(2) 16 B. 91 (109).
(3) 4 B. L. R. (A.C.) 20.
(4) 2 B.L.R. (F.B.) 49 (73).
(5) 10 M. 57 (59).

efficacy of the attachment has, by a payment out of Court, become exhausted, there can be no sale by the Court and no right to apply for such a sale. 1899 DEC. 14.

The decision appealed against is right. The second appeal fails, and I would dismiss it with costs.

APPELLATE CIVIL.

BENSON, J.—I concur.

23 M. 478= 10 M.L.J. 98.

23 M. 483=10 M.L.J. 117.

[483] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

THANDAVARAYA PILLAI AND OTHERS (*Defendants Nos.* 1, 4 *and* 5), *Appellants v.* SUBBAYYAR AND ANOTHER (*Plaintiff and Defendant No.* 3), *Respondents.**
[6th and 7th November, 1899.]

Religious endowment—Devastanam committee—Dismissal of dharmakarta by three out of five members of committee without meeting—Legality of such dismissal.

The dharmakarta of a temple was suspended and dismissed from office in the following manner: one member of the devastanam committee consisting of five initiated an enquiry, received petitions and took evidence, submitting the results of his enquiry to two other members successively, the three signing an order calling upon the dharmakarta to present himself at the office for the purpose of an enquiry into certain charges laid against him. No date was fixed for the enquiry, and the two remaining members of the committee took no part in the proceedings. The dharmakarta took no notice of the order, whereupon the same three committee-men signed and issued another resolution dismissing him from his post. This resolution was sent to the other two members of the committee, but was not signed by them;

Held, that the dismissal was illegal. The dharmakarta, being the holder of an office, could only be removed from it by the corporate act of the committee generally. The acts of a corporation (to which the committee might be likened) must be performed at a meeting convened after due notice to all the members of the body; and though there might be exceptions to that rule, a case in which the matter to be decided involved the rights of third parties and a decision to their prejudice was one in which the rule should be enforced.

[R., 15 M.L.J. 185.]

SUIT by the dharmakarta of certain temples under the control of the devastanam committee of Musiri against three members of that committee, defendants Nos. 1 to 3, and two managers, defendants Nos. 4 and 5 (appointed by the committee to succeed the plaintiff). Plaintiff charged defendants Nos. 1 to 3 with having unlawfully dismissed him and asked for an injunction restraining them from interfering with his management of the devastanam and for damages. The District Munsif decreed in plaintiff's favour [484] as prayed, on the ground that the order dismissing plaintiff was not properly passed by the committee and was of no effect. The procedure adopted by the devastanam committee in the suspension and dismissal of the plaintiff is described fully in the judgment. Defendants Nos. 1, 4 and 5 appealed to the District Court, the third defendant being made a party by the Court, but not appearing. The District Judge, without deciding whether this method constituted a legal course of business, held the order of suspension to be invalid, because it was not submitted to every member of the committee. He held that plaintiff was justified in resisting it and could not be dismissed for so doing. He

* Second Appeal, No. 1530 of 1898, against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in appeal suit No. 141 of 1897, modifying the decree of A. David Pillai, District Munsif of Srirangam, in original suit No. 377 of 1894.

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held that the order of dismissal was illegal and that the decree in so far as it restored plaintiff to his office was right. He also held that the Munsif's Court had jurisdiction to entertain the suit.

Defendants Nos. 1, 4 and 5 preferred this second appeal.

Sundara Ayyar, for appellants.

V. Krishnasawmi Ayyar and *R.A. Krishnasami Ayyar*, for respondent No. 1.

JUDGMENT.

We are clearly of opinion that the points of jurisdiction taken by the appellants' vakil cannot be maintained. The suit does not relate to immoveable property, and there is nothing to show that the valuation is wrong. The only question to be decided is whether, upon the facts found, the decision of the District Judge is justified. We have to consider the question not with reference to the substance of the charges made against the plaintiff, but with reference to the manner in which the enquiry was conducted and the resolution of dismissal arrived at. What happened apparently was this:—one member of the committee initiated some sort of enquiry, received petitions and, it is said, took some evidence. The result of bis work was submitted to two other members of the committee successively, and the three thereupon signed the yadast of 31st October 1893. By that yadast the plaintiff is required to present himself at the office for the purpose of an enquiry into certain charges laid against him. No date is fixed for the enquiry, and it is not pretended that the other two members of the committee took any part in passing the order.

The plaintiff took no notice of this order, and thereupon another resolution of the 8th July 1894 was issued, signed by the same three members of the committee who signed the previous yadast. The other two members, it is found, had the resolution sent to [485] them, but did not sign it. Now it is quite clear that the plaintiff, being the holder of an office, can only be removed from the office by the corporate act of the committee. Generally the acts of a corporation, to which the committee may be likened, must be performed at a meeting convened after due notice to all the members of the body. There may be exceptions from this rule, but the case in which the matter to be decided involves the rights of third parties, and a decision to their prejudice is eminently one in which the rule should be enforced. The fact that no case can be pointed out where a different procedure has been adopted and approved goes strongly to show that this view is the correct one. The object of the meeting, of course, is to bring together the party to be affected and the person entitled to take part in the decision, so that the decision may be arrived at after a full and fair discussion, the party affected having an opportunity of putting before all his judges his view of the case. It is obvious that this object cannot be attained if the business is transacted by a mere circulation of the papers. In the present case it is clear that there was nothing in the nature of a judicial enquiry. If there was any enquiry at all, which is doubtful, there was certainly no enquiry by the committee as a body. Admittedly there was no meeting, and as there was no meeting the plaintiff had no proper opportunity of defending himself. We cannot regard the yadast as a sufficient direction by the committee to appear and answer the charges made against him. The yadast did not proceed from the committee, and it gives no date for the proposed enquiry. On this ground we uphold the decree of the Lower Appellate Court and dismiss the appeal with costs.

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[486] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

VENKATAKRISHNAMMA AND ANOTHER (*Plaintiff and his Legal Representative*), *Appellants v.* ANNAPURNAMMA AND OTHERS (*Defendants*), *Respondents.** [25th October and 10th November, 1899.]

Hindu Law—Adoption by widow—Assent of a majority of sapindas—Presumption of bona fides—*Degree of relationship of sapindas to husband of adopting widow.*

A widow having survived her son, (who died unmarried and issueless), succeeded to his estate, and made an adoption with the assent of three out of the four of her late husband's sapindas who were living at the time and who had been divided from the deceased and from each other. The fourth sapinda, who had refused his consent (apparently without giving reasons for such refusal), now impugned the adoption on the ground that the consent of all existing sapindas was necessary to render it valid, at all events when all stood in the same degree of relationship to the husband of the adopting widow, as was the case here:

Held, that the assent of every existing sapinda in such a case was not necessary: and that that of a majority would suffice.

Collector of Madura v. *Moottoo Ramalinga Sathupathy*, (12 M.I.A. 397), and *Parasara Bhattar* v. *Rangaraja Bhattar*, (2 M. 202) referred to and considered.

Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on *bona fide* grounds. If, however, it be shown that the majority gave or withheld their assent from improper considerations such assent or dissent will be of no avail to the party relying on it. Any distinction based upon the degree of relationship as to whose assent is or is not essential becomes immaterial.

[R., 26 M. 627(635); 31 M.366=18 M.L.J.309=3 M.L.T. 355.]

SUIT for a declaration that an adoption of second defendant by first defendant was invalid. One Lakshminarasu died, leaving a widow and a son. The son subsequently died unmarried and issueless, leaving his mother heir to his estate. The mother, first defendant, then adopted second defendant, with the assent of three out of four of the said Lakshminarasu's sapindas who were living at the time, and were divided. The fourth sapinda, who now impugned the validity of the adoption, while admitting [487] that the consent of the other three sapindas had been obtained, alleged that it had been obtained for a consideration; also that the consent of all existing sapindas was necessary, at any rate when all stood in the same degree of relationship to the husband of the adopting widow, as was the case here. It did not appear that he had given any reason for refusing his consent. The suit was dismissed by the District Munsif whose decree was upheld by the District Judge.

Plaintiff preferred this second appeal.

Sundara Ayyar, for appellant No. 2.

Kuppusami Ayyar, for respondents Nos. 1 and 2.

JUDGMENT.

SUBRAHMANIA AYYAR, J.—The dispute in this case relates to the validity of the second defendant's adoption by the first defendant, the

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* Second Appeal, No. 1472 of 1898, against the decree of M. D. Bell, District Judge of Godavari, in appeal suit No. 325 of 1897, affirming the decree of S. Pereira, District Munsif of Ellore, in original suit No. 260 of 1894.

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widow of one Lakshminarasu, the adoption having been made after she had succeeded to the estate of her son, who died unmarried, and with the assent of three out of four of Lakshminarasu's sapindas who were divided and existing at the date of the adoption.

The Lower Courts upheld the adoption, being satisfied that there was nothing in the circumstances in which the adoption took place, and the sapindas assented, to show that the widow and those sapindas acted otherwise than properly and *bona fide* in the matter.

The present appeal was preferred by the sapinda (since deceased and hereinafter referred to as the appellant) who did not assent to the adoption and who stood in the same degree of relationship to Lakshminarasu as those who gave their assent. In support of the view urged on his behalf that the adoption was invalid the argument was as follows :—The assent of all the sapindas existing at the time of the adoption being essential, the non-assent of one of them, the appellant, rendered the adoption invalid. Even assuming that the assent of every sapinda is not required by law the degree of relationship to the husband of the adopting widow must determine whose assent is essential, and where all the sapindas are of the same degree of relationship then the assent of all is necessary. At any rate the appellant's refusal to give his consent must be shown by the defendants to have been influenced by improper considerations.

Now, even in the case of an undivided family, when a widow of a member thereof makes an adoption without the authority of [488] her husband or the assent of her father-in-law, it cannot be taken to be the settled law that the assent of all the then surviving members of the coparcenary is absolutely necessary. No doubt in the Ramnad case (*Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1)), the Privy Council say that the consent of all would probably be necessary. But the tenor of their Lordships' observations shows that they were not expressing a decided opinion on the point. Be this as it may, there can be no doubt that in a case like the present where an adoption is made by a widow of a divided man, and the assent to be obtained is that of sapindas divided from him and from each other, the assent of every existing sapinda is not a *sine qua non*. This was expressly stated by the Privy Council in the Ramnad Case (*Collector of Madura* v. *Moottoo Ramalinga Sathupathi*(1), at page 442 of the report, and from the observations made later on in the same page it would seem to follow that where a majority of the sapindas give their assent to the adoption, such assent will be sufficient. That seems also to have been the view of Sir Charles Turner, C.J., and Innes, J., in *Parasara Bhattar* v. *Rangaraja Bhattar* (2) cited for the appellant, where they say, "The Ramnad case (*Collector of Madura* v. *Mootoo Ramalinga* "*Sathupathy* (1)) perhaps decided no more than that an adoption was "valid when the assent of the majority of the sapindas was accorded; "see *Arundadi Ammal* v. *Kuppammal* (3), but it has never been decided "that an adoption is absolutely invalid by reason of the consent of less "than the entire body of sapindas having been obtained to it."

It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on *bona fide* grounds. If, however, it be shown that the majority give or withhold their assent from improper considerations, such assent or dissent will be

(1) 12 M.I.A. 397 (442). (2) 2 M. 202. (3) 3 M.H.C.R. 283.

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of no avail to the party relying on it. If the above view is correct it would further follow that any distinction, based upon the degree of relationship, as to whose assent is or is not essential becomes immaterial.

The question, then, that remains is whether the defendants were bound to show that the appellant's refusal was due to improper [489] considerations. On the contrary, it would follow from what was stated above that it would be for the appellant to establish that the assent of the sapindas who consented to the adoption was not given *bona fide*. But *Parasara Bhattar* v. *Rangaraja Bhattar* (1), already referred to, was relied on as an authority in favour of the appellant's contention. The point actually decided by that case, in so far as we are here concerned, would seem to be that when the reasons for a sapinda's refusal to consent are expressed at the time the consent is sought and are improper, the sapinda cannot rely on such refusal as affecting the validity of the adoption made with the assent of others properly given. Supposing, however, that the observations in that case really go further, still they cannot be held to help the appellant, having regard to the peculiar circumstances appearing here. Now the objection under discussion not having been raised in the Lower Courts, the reasons which induced the appellant to withhold his assent have not been investigated or considered by the Lower Courts; nor does it appear that the appellant, either at the time he was asked to assent or subsequently, communicated to the first defendant what the reasons for his refusal were.

And throughout these proceedings also, he has failed to allege why he did not give his assent. In such circumstances it is difficult to understand what burden of proof lay on the second defendant in the matter. Of course the reason why a sapinda refuses to assent is peculiarly within his own knowledge and the widow seeking the assent cannot compel the person declining to give it to disclose the reasons for the course he adopts. Consequently she, as well as the person adopted by her, must in a case like this be held completely absolved from the duty of proving what they might be obliged to establish in cases where the grounds for the refusal to assent are duly made known. And it would seem only reasonable to say that when a sapinda refuses to assent but withholds his grounds for such refusal, he must be held to be precluded from relying on the refusal as in any way affecting the adoption. The propriety of this view will be clearer still if we remember the reason of the rule which compels a widow, desirous of making an adoption but possessing no authority from her husband in regard to it, to obtain the assent of his sapindas. The [490] reason is the presumed incapacity of women for independent action in such a matter. And as the position of the sapindas in cases like this is, according to the Judicial Committee, similar to that of a family council that has to decide upon the expediency of substituting an heir by adoption to the deceased husband on a fair consideration of the question, (*Venkata Krishna Rau* v. *Venkata Rama Lakshmi* (2)), a sapinda who, like the appellant, refuses to give his reasons for the opinion why such an heir should not be substituted while other sapindas decide otherwise, cannot be held to exercise properly the discretion confided to him. His opinion against the adoption must be put entirely out of consideration as capricious or prompted by undue considerations.

The decision of the Lower Courts is right. The second appeal, in my opinion, fails, and I would dismiss it with costs.

MOORE, J.—I concur.

(1) 2 M. 202. (2) 4 I.A. 1 (14).

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23 M. 490 = 10 M.L.J. 240.

23 M. 490 = 10 M.L.J. 240.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SAMIYA MAVALI (*Defendant No.* 7), *Appellant v.* MINAMMAL (*Plaintiff*), *Respondent.** [7th, 8th and 13th November, 1899.]

Court Fees Act—Act VII of 1870, *Section* 7, *IV* (*c*)—*Fee payable on appeal—Suit for declaratory decree—Possibility of valuing subject-matter—Original valuation by plaintiff.*

A plaintiff was granted a decree, (which was affirmed on appeal to the Subordinate Court), declaring a sale deed invalid on the ground that it had been obtained by fraud, coercion, undue influence and without consideration. The suit had been originally valued by plaintiff at Rs. 800, but by an order of the Munsif's Court that figure was altered to Rs. 2,000, the amount mentioned in the deed. One of the defendants preferred a second appeal to the High Court, where a question arose as to the amount of duty payable on such appeal:

Held, that Section 7, IV (*c*), of the Court Fees Act applied, and that the valuation given by the plaintiff was the valuation to be accepted.

[491] Whether the reference to an appeal in the sub-section applies to a case in which the subject-matter of the appeal is not co-extensive with the subject-matter of the suit.—*Quaere.*

Karam Khan v. *Daryai Singh*, (5 A. 331), considered.

[Diss. ,6 C.L.J. 427 = 11 C.W.N. 705 ; R., 27 M. 480 = 14 M.L.J. 343 ; 2 L.B.R. 266 ; D., 19 P.R. 1908 = 129 P.L.R. 1908 = 38 P.W.R. 1908.]

SUIT to set aside a registered sale deed executed by plaintiff to defendants Nos. 1 to 3, on the ground that it had been obtained by fraud, coercion, undue influence, and without consideration or necessity. Defendants Nos. 4 to 7 were impleaded as persons claiming title under defendants Nos 1 to 3. The valuation of the suit, as originally fixed by the plaintiff, was Rs. 800, but by an order of the Munsif's Court that figure had been altered to Rs. 2,000, the amount mentioned in the sale deed which it was sought to set aside. The District Munsif declared the document to be invalid and decreed in plaintiff's favour. Defendants Nos. 2 and 7 appealed to the Subordinate Judge, who affirmed the decree of the Court below.

Defendant No. 7 preferred this second appeal.

The appeal first came on for hearing with reference to the question as to the amount of stamp duty payable.

V. Krishnasami Ayyar and *Subbayya Mudaliar*, for appellant.

Sundara Ayyar, for respondent.

The Court made the following

ORDER.

Two points have been taken with reference to the Court-fee stamp payable in this case.

It is said that the subject matter in dispute is one, the money value of which it is not possible to estimate, and it is said that the decree for

* Second Appeal, No. 1581 of 1898, against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in appeal suit No. 405 of 1897, affirming the decree of T. R. Kuppusami Ayyangar, Acting District Munsif of Tiruvadi, in original suit No. 498 of 1895.

which the plaintiff asks is a declaratory decree only without any consequential relief. 1899 Nov. 13.

On this latter point we are referred to *Karam Khan* v. *Daryai Singh* (1) in which it seems to have been ruled that a suit like the present for the cancellation of a document is a suit for a declaration and not a suit in which substantive relief is asked for. APPELLATE CIVIL

The report of the case is extremely brief, but, if it was intended to hold that the law, as understood before the Specific Relief Act came into force, was altered by Section 39 of that Act, we are unable to agree with the decision. On the other question, as to the possibility of valuing the subject-matter, there are several **[492]** cases of this Court, deciding that a valuation is possible *Naraina Putter* v. *Aya Putter* (2) and *Parathayi* v. *Sankumani* (3). 23 M. 490 = 10 M.L.J. 240.

The only question is which provision of the Act applies to the case.

We think Section 7, IV (*c*), must be taken to apply. The case is, therefore, one in which the valuation given by the plaintiff is the valuation to be accepted. It is suggested that in the seventh defendant's appeal he may depart from that valuation although the subject-matter is identical. This construction of the Act would lead to such anomalies that we are unable to accept it.

The reference to appeal in the last paragraph but one of the sub-section may well apply to the case in which the subject of the appeal is not co-extensive with the subject-matter of the suit ; in which case it would be unjust that the party appearing should be bound by the original valuation.

In the present case, the plaintiff valued the subject-matter at Rs. 800 and we direct the Court-fee stamp to be paid accordingly on or before Monday next.

JUDGMENT.

The appeal coming on again for hearing (after due payment of stamp duty), the Court (SUBRAHMANIA AYYAR and BENSON, JJ.) dismissed it on the merits.

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23 M. 492.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

KANNAM NAIDU AND ANOTHER (*Plaintiffs*), *Appellants* v. LATCHANNA DHORA AND ANOTHER (*Defendants*), *Respondents.**
[14th November, 1899.]

Madras Hereditary Village Offices Act (Madras)—Act III of 1895, *Section* 5—*Attachment of growing crop.*

By Section 5 of the Madras Hereditary Village Offices Act, the emoluments of village offices are not to be liable to attachment :

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* Civil miscellaneous second appeal No. 34 of 1899 against the decree of F. Murray, District Judge of Ganjam, in appeal suit No. 268 of 1898, affirming the order of N. Lakshmana Rao, District Munsif of Chicacole, on miscellaneous petition No. 404 of 1898 (original suit No. 733 of 1897).

(1) 5 A. 331. (2) 7 M.H.C.R. 372. (3) 15 M. 294.

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23 M. 492.

[493] *Held*, that an attachment bya decree-holder of a crop growing on certain lands in a zamindari, which were the inam service lands held by the judgment-debtor as a village servant, had been rightly set aside.

PETITION filed on behalf of a defendant in a suit to set aside an attachment, which had been made by the decree-holder therein, of the standing paddy crop raised on the Bisarangi Doratanum service inam lands. Bisarangi was stated to be the Doratanum service inam village of the petitioner, who claimed that neither the lands nor the standing crop raised thereon were liable to be attached by reason of Section 5 of Madras Act III of 1895. The District Munsif directed the release of the crop attached ; and his order was affirmed by the District Judge as follows :—" This is an appeal against the Munsif's order releasing from attachment certain crops on Doratanum service inam lands in Parlakimedi estate. The ground of appeal is that that Court was wrong in holding that Section 5 of Madras Act III of 1895 applies to the property attached, as the lands are enfranchised. The decision of the Munsif is however correct; the Government has clearly ordered that all Doratanum service inam lands in the Parlakimedi estate are to remain unenfranchised so as to constitute emoluments of village servants, and they therefore come within the Act quoted."

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

V. Krishnasami Ayyar, for respondent.

JUDGMENT.

The expression " land " may, we think, be taken to include growing crops and to hold that it does not would seriously affect the object of the Act (Madras Act III of 1895). The object seems to be to protect the source of the village officer's income in his hands till it is actually realised either by reaping of the crops when the inam consists of land, as is the case here, or by collection of the fees when the inam takes the form of fees.

We must dismiss the appeal with costs.

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23 M. 494 = 10 M.L.J. 206.

[494] APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

GODAVARI SAMULO AND ANOTHER (*Defendants Nos.* 10 *and* 18), *Appellants v.* GAJAPATI NARAYANA DEO AND OTHERS (*Plaintiff and Defendants Nos.* 1 *to* 9, 11 *to* 17, *and* 19 *to* 32), *Respondents.**
[23rd October, 1899.]

Appeal—Execution proceedings—Order made in the course of execution proceedings and not appealed against—Right to raise the question as to its propriety in the appeal against the final order.

A decree having, in 1894, been passed in favour of the plaintiff in a suit against a number of defendants for the recovery of land with mesne profits, the amount

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* Civil miscellaneous appeal No. 30 of 1898 against the order of J. G. D, Partridge, Acting District Judge of Ganjam, in execution Petition No. 48 of 1896 in the matter of original suit No. 8 of 1894.

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of such mesne profits was ordered to be fixed in execution. In 1897, an order was passed declaring that all the defendants were liable jointly and severally for such mesne profits, which order was not appealed against. Later in the same year a commissioner was appointed to ascertain the amount of the said mesne profits, and in due course a final order in execution was passed by the District Court. At the time when the last-mentioned order was passed, certain of the defendants desired to re-open the question of their joint liability, but were not permitted to do so:

Held, that even assuming that the order declaring the defendants to be jointly and severally liable was one from which an appeal could have been preferred,—as to which there might be some doubt,—it was a determination of one of the questions which had to be determined before the particular application for execution could be finally disposed of; and the question of the propriety of the order was one that need not be at once raised by appeal, but could be raised in the appeal against the final order.

Caussanel v. *Soures*, (23 M. 260), referred to.

[R., 34 M. 228 = 6 Ind. Cas. 239 = 20 M.L.J. 805 = 8 M.L.T. 72 = 1910 M.W.N. 226.]

IN a suit to recover a village from a number of defendants with mesne profits, a decree was passed as prayed in the year 1894, the amount of mesne profits being ordered to be fixed in execution. On 10th March 1897 the District Court passed an order declaring that the defendants were liable jointly and severally therefor, which order was not appealed against. In July 1897 a commissioner was appointed to ascertain the amount of the said mesne profits, and in October of that year the District Court passed a final order in execution in pursuance of the commissioner's report. At the time when the last-mentioned order was passed, certain of the [495] defendants desired to re-open the question of their joint liability, but were not permitted to do so.

Defendants Nos. 1 to 9, 11 to 17 and 19 to 32 preferred this appeal on the ground that the proceedings in the original suit showed that it was not intended to hold all the defendants jointly and severally responsible.

Sundara Ayyar, for appellants.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*), for respondents.

JUDGMENT.

The first question is whether the decree makes all the defendants jointly liable for the whole of the mesne profits. We think, having regard to the judgment, that this is not so. The fourth issue distinctly raises the question as to the amount recoverable from each, and in deciding that issue the District Judge says the amount of profits will be reserved for decision in execution and nothing more. This tends to show that the question whether each was liable to pay the whole or a part was not before his mind. Moreover the conduct of the parties throughout these proceedings shows that they have considered the question as undetermined by the decree.

The next question raised is whether there can now be any appeal as to the liability of the defendants to pay the mesne profits jointly and severally. An order having been made in March 1897 in these proceedings and not having been appealed from, it is argued that it cannot be gone into upon appeal on the final order passed in execution, as it is a decree which could have been appealed against. We are not prepared to say without further consideration that this decision was a determination of a question arising in execution and relating to the execution of the decree so as to have been appealable in itself apart from the final order. Even,

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however, assuming that it could have been appealed against, it appears to us to be the determination of one of the questions which had to be determined before the particular application for execution could be finally disposed of. No authority has been cited to show that in such a case the party affected by such partial determination is bound at once to appeal and is not entitled to wait for the final decision and raise the question of the propriety of the order in appeal against that decision. By analogy with cases in ordinary decrees where parties are at liberty to appeal against a preliminary order, *e.g.*, for accounts, &c., or to raise the question [496] in the appeal against the final decree, we see no reason why a similar course should not be permissible in cases such as this. If the question of balance of convenience is to be considered, it is all in favour of the view we take. Our attention has been called to *Caussanel* v. *Soures* (1), but it is doubtful if that is reconcilable with the case of *Sankaralinga Mudaly* v. *Ratnasabhapati Mudali* (2). However that may be, the reasoning upon which that case goes does not apply to the present case.

On the merits we think clearly the appellants are not liable for the mesne profits of more land than they have had possession of respectively. No reason is given for holding that they are all jointly and severally liable for the mesne profits of the whole of the lands in question, and as throughout it is admitted that they each severally held separate portions of the lands mentioned in their written statements, they can only be held liable for the mesne profits in respect thereof.

We must, therefore, modify the order of the Lower Court and make the tenth defendant liable for Rs. 680, and the eighteenth defendant for Rs. 160 instead of the amount mentioned in the order. The appellants are entitled to be paid their costs by the first respondent in this and the Lower Appellate Court.

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23 M. 496.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Benson.

MANICKA MUDALIAR AND ANOTHER (*Plaintiffs*), *Appellants v.* GURUSAMI MUDALIAR AND ANOTHER (*Defendants*), *Respondents.**
[27th October, 1899.]

Civil Procedure Code—Act XIV of 1882, Section 626—Order for review—Omission to record reasons for granting—Validity of order.

An order intended to operate as an order for review is not invalidated by an irregularity in its form by reason of which it purports to be an order made on an application to set aside a decree and restore a suit for trial.

The provision in Section 626 of the Code of Civil Procedure that a Judge granting an application for a review "shall record with his own hand his reasons [497] for such opinion," is directory and an order is not necessarily invalidated by the fact that the reasons are not recorded, though there may be cases in which it is necessary in the interests of justice that the reasons should be recorded, and in such cases the record would be essential to the validity of the order.

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* City Civil Court Appeal No. 8 of 1899 against the decree of P. Srinivasa Rao, City Civil Judge, Madras, in pauper original suit No. 344 of 1897.

(1) 23 M. 260. (2) 21 M. 324.

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SUIT for a declaration that a certain mortgage was null and void. The first defendant did not appear. The second defendant was represented and applied for an adjournment, which was not granted. The Judge of the City Civil Court made the declaration prayed for. The second defendant then presented a petition praying that the decree might be set aside and the suit restored on the ground that he had been misled by a third party as to the engagement of an attorney to represent him at the hearing. It was accordingly ordered "that the judgment pronounced herein on the 12th July 1898 be set aside as against second defendant; that the suit be adjourned to 2nd November 1898 for trial: and that the second defendant (petitioner) do pay the plaintiffs' costs and pleaders' fees." On the suit again coming on for trial, it was dismissed.

Plaintiffs preferred this appeal.

Sivagnana Mudaliar, for appellants.

Mr. *Joseph Satya Nadar*, for respondent No. 2.

JUDGMENT.

The Lower Court, in the first instance, passed a decree in favour of the plaintiffs. The Court subsequently made an order on the application of the second defendant (the second respondent) which the said respondent contends was in substance an order for review and was valid as an order for review. Upon the re-trial under this order the Lower Court dismissed the plaintiffs' suit. On the appeal to us the plaintiffs, as they are entitled to do under Section 629 of the Civil Procedure Code, first object to the admission of the application for review, and secondly, appeal against the decree passed in the re-trial dismissing their suit.

As regards the objection to the admission of the application for review, the order made upon the application was no doubt irregular in form. The order made in form purports to be an order made on an application to set aside a decree and restore a suit for trial. There can be no question, however, that the Court intended the order to operate as an order for review, and the order, as an order for review, is not in our judgment invalidated by this formal irregularity.

It has been urged on behalf of the plaintiffs (appellants) that, treating the order as an order for review, the requirements of [498] Section 626, Civil Procedure Code, which confers the jurisdiction to review, have not been complied with in two respects. First, it is said that the Judge has not recorded with his own hand his reasons for his opinion that the application should be granted. As a matter of fact, the Judge made the order without recording any reasons. In our judgment the words requiring the Judge to record his reasons are directory and an order is not necessarily invalidated by the fact that the reasons are not recorded. There may no doubt be cases in which it is necessary in the interests of justice that the reasons should be recorded, and, in such cases, it might well be held that the record of the reasons is essential to the validity of the order. The present, however, is not such a case. In the case (*Gyanund Asram* v. *Bepin Mohun Sen* (1)) the Court, on the particular facts of that case, held that an order for review was bad on the ground that the reasons of the Judge were not recorded. This decision is not an authority for the proposition that a hard-and-fast rule must, in all cases, be enforced.

(1) 22 C. 734.

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Secondly, it is said that the requirements of Section 626 (*b*) of the Civil Procedure Code have not been complied with. The proviso in question relates to the granting of the application on the ground of the discovery of new matter on evidence. But, under Sections 623 and 626 of the Civil Procedure Code, the Courts have power to grant the application for any sufficient reason. On the facts of the present case we think there was sufficient reason apart from the ground specified in Section 626 (*b*), Civil Procedure Code, for granting the application.

We accordingly overrule the objection to the admission of the application for review.

As regards the merits, it lay upon the plaintiffs to establish affirmatively that the Rs. 300 were advanced by the second defendant to the first defendant for an immoral purpose. The plaintiffs' evidence entirely fails to establish this and there was evidence on behalf of the second defendant to show that the money was advanced for family purposes.

We think the mortgage cannot be impeached and we accordingly affirm the judgment of the Lower Court and dismiss the appeal with costs.

The appeal being an appeal *in forma pauperis*, the Court fees incidental to the appeal will be payable out of the plaintiffs' estate.

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[499] APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Benson.

PONNAMMAL (*Plaintiff*), *Appellant v.* SUNDARAM PILLAI AND OTHERS (*Defendants*), *Respondents.**
[25th January, 1900.]

Evidence Act—Act I of 1872, *Section* 74 (1) (*iii*)—*Document purporting to be a certified copy of a will taken from the Protocol of record in Ceylon—No proof that it had been made from or compared with the original—Inadmissibility of document.*

In support of a claim instituted in a Court in British India for a share in her deceased father's estate, plaintiff tendered in evidence a document which purported to be a certified copy of a will executed by her late father at Colombo, where he was said to have been at the date of the execution of the alleged will. The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence. It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office. No evidence was tendered before the Subordinate Judge that the copy had been made from and compared with the original. On the question of the admissibility in evidence of the said document :

Held, that it was inadmissible ; that it was not a public document within the meaning of Section 74 (1) (iii) or (2) of the Evidence Act, and that in the absence of evidence that it had been made from and compared with the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable.

Whether Section 35 of the Evidence Act applies to an entry in a public register or record kept outside British India—*Quære.*

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* Appeal No. 30 of 1899 against the decree of T. Varada Rao, Temporary Subordinate Judge of Madura (East), in original suit No. 4 of 1898.

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SUIT to recover a half share in certain property with mesne profits and for an account. Plaintiff said that her deceased father Chinnathambia Pillai had had four wives, the first being the mother of first defendant, the second the mother of second defendant, and the third the mother of plaintiff; that her father had gone from Sivaganga to Colombo with plaintiff's mother about fifty years previously, remaining there about twenty-five years and acquiring extensive property. The third paragraph of the plaint was as follows :—" The said Chinnathambia Pillai returned from Colombo to his native place Sivaganga at the close of 1872. Before his return to India, he gave plaintiff and defendants Nos. 1 and 2 **[500]** each one-third share of the moveable and immoveable properties he possessed then under a will which he had executed on 28th February 1872." Chinnathambia Pillai died at Sivaganga in 1889. Plaintiff asked to be given possession of one-third of his property, with mesne profits and for an account. Most of the defendants were impleaded in consequence of their laying claim to or being in possession of some of the properties. In support of her case at the Subordinate Court a document purporting to be a certified copy of the will referred to in paragraph 3 of the plaint was tendered in evidence by the plaintiff, and filed as Exhibit A. The document bore an endorsement, purporting to be signed by the Assistant Registrar-General for Ceylon, to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office and that the same was issued to a person named. A number of issues were framed, the second relating to the genuineness of the will. On this the Subordinate Judge said—" Exhibit A has not been, in my opinion, properly proved. It purports to be a true copy of the last will and testament made from the file and record in the office of the Assistant Registrar-General of Ceylon. I do not think that it comes under the category of public documents. Public records, kept in British India, of private documents, are public documents within the meaning of Section 74. But it does not seem that public records, kept in a foreign country, of private documents, can be called public documents. Even if Exhibit A is considered to be a public document, it wants the certificate of a notary public and of a British Consul or diplomatic agent that the copy is duly certified by the officer having the legal custody of the original (Section 78, Clause 6). It has not been argued before me that Exhibit A is admissible under Section 82 of the Evidence Act. Taylor on 'Evidence' enumerates the particular documents which are, in England or Ireland, admissible without proof of authentication. It does not appear that copies of wills come under any one of the classes mentioned by Taylor. I, therefore, hold that Exhibit A is not admissible in evidence."

In the result he held that the will was not genuine, and dismissed the suit.

The plaintiff preferred this appeal on the ground, among others, that Exhibit A was a public copy, and should have been held admissible in evidence.

[501] *Sundara Ayyar* and *Anantakrishna Ayyar*, for appellant.—It is submitted that the document (Exhibit A) is admissible in evidence as proof of the will made by plaintiff's father in favour of plaintiff, on three distinct grounds; first, it is a public document and comes within either Section 74 (i) or (iii) of the Evidence Act. It is a record of the public officers, judicial or executive, of a part of Her Majesty's dominions, to wit, Ceylon. The appellant now produces before this Court a fresh copy of the

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will, bearing a certificate signed by the Governor of Ceylon that the copy of the will was signed by the Assistant Registrar-General of Ceylon. Secondly, Section 65 of the Evidence Act applies. The original will is deposited with the Registrar-General of Ceylon and so is in the possession of a person out of the reach of and not subject to the process of the Courts in British India. The duly certified copy now produced is therefore admissible in evidence. Thirdly, Section 35 of the Evidence Act applies. That section is not confined to entries in a public register or record kept in British India. It is general in its terms and applies to entries in public records whether kept in British India or not. There is no doubt that this will was entered or registered in a public register or record by a public servant in the discharge of his official duty. That is the effect of the certificate now produced. The will was certified and attested (as the copy filed shows) by a notary public, who also states with the certificate that the will was signed by the testator and by the said witnesses thereto, all of whom were known to him, in the presence of one another. On these grounds it is submitted that the will is duly proved.

V. Krishnasami Ayyar, for respondents Nos. 1 to 8, 12, 15 and 18.—Exhibit A is not a public document. A will is a private document and it is only records of private documents kept in British India that are deemed to be public documents. Section 75 of the Evidence Act enacts that all other documents are private documents. Record of a will kept in Ceylon is not a public document. It is only in the case of public documents that duly certified copies are admissible as secondary evidence. But here, Exhibit A is not a public document. So, plaintiff cannot rely on secondary evidence. Moreover it is only entries in a public register kept in British India that can be proved by a certified copy. Section 35 of the Evidence Act applies only to British India. It is submitted that it does not apply to cases of entries in public registers kept outside British India.

[502] *Ayya Ayyar*, for respondent No. 9.

Mahadeva Ayyar, for respondent No. 10.

Ranga Ramanujachariar, for respondents Nos. 13 and 14.

K. Srinivasa Ayyangar, for respondent No. 17.

JUDGMENT.

Before dealing with this appeal generally it will be convenient to dispose of the question as to the admissibility of Exhibit A. This document was tendered in evidence on behalf of the plaintiff in support of the allegation contained in paragraph 3 of the plaint.—" Before his return to "India, he gave plaintiff and defendants Nos. 1 and 2 each one-third share " of the moveable and immoveable properties he possessed then under a " will which he had executed on 28th February 1872."

Before the Subordinate Judge, no other evidence was tendered in proof of this allegation. The Subordinate Judge marked this document and filed it as an exhibit in the case, but in giving judgment he held that it was not admissible in evidence. The document purports to be a copy of a will executed by a person of the name of Chinnathambia Pillai. The copy contains an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that the copy was a true copy of a last will and testament made from the Protocol of record filed in that office, and the same was issued to M. R. M. A. Narayanan Chetti on his application at Colombo on the 8th day of March, 1897.

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The Subordinate Judge held this document inadmissible on the ground that it was not a "public document" and that if it was a public document, there was no certificate "under the seal, &c." (Section 78 (6), Evidence Act). After the delivery of the judgment by the Subordinate Judge the plaintiff obtained a certificate which purported to be signed by the Governor of Ceylon to the effect that the person who signed the endorsement on Exhibit A was the Assistant Registrar-General for the island of Ceylon.

In our judgment the will is not a public document within the meaning of Section 74 (1) (iii) or (2) of the Evidence Act. It has been argued that if the original will is not a public document, it is a document to which Section 65 of the Evidence Act applies, and that inasmuch as it is in the possession or power of a person out of the reach of, and not subject to, the process of the Court, secondary evidence may be given of its contents. By Section 63 of the Evidence Act "secondary evidence" is defined as meaning and including (1) certified copies under the provisions [503] hereinafter contained, that is to say, in the case of public documents, (2) copies made from and compared with the original. No legal evidence was tendered before the Subordinate Judge that this copy had been made from, and compared with, the original, and the appellant cannot rely on the provisions of the Evidence Act which apply only to public documents where the document of which secondary evidence is sought to be given is not a public document. We do not think that the document is admissible under Section 35 as an entry in a public register or record. It seems doubtful whether this section applies to an entry in a public register or record kept outside British India. In any case the entry, even if admissible under Section 35, would not be proof of the allegation contained in paragraph 3 of the plaint.

Even if admissible, the document would only be evidence of the fact that a man of the name of Chinnathambia Pillai made a will in 1872 disposing of his property in a certain way. There is no evidence forthcoming to identify the maker of this will with the plaintiff's father.

We have been asked that an opportunity should be given to the plaintiff to give legal evidence, if she is in a position to do so, of the will of 1872. We do not think she is entitled to any such indulgence. There is no reason why she should not have produced the necessary legal evidence to establish her allegations with regard to the alleged will of 1872 when the case was tried before the Subordinate Judge. In our judgment the Subordinate Judge rightly held that Exhibit A was inadmissible, and we must decline to allow the case to be re-opened.

* [Their Lordships then dealt with the facts, and dismissed the appeal.]

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* [The following is last portion of the judgment in the case reported in 23 M. 499, though omitted in the I.L.R., yet it is given for facility of reference:—ED.]

As regards the alleged will of August 19, 1889, we agree with the conclusion of fact at which the Subordinate Judge arrived that this alleged will was a forgery. The testator died seven days after the will was alleged to have been executed. Nothing was heard of the will until October 10th when it was presented for registration. The defendants at once attacked the alleged will, and on the very day it was presented for registration they presented a petition alleging it to be a forgery. Thereupon, the plaintiff at once agreed to refer all matters in dispute, including the genuineness of the will to arbitration. The award of the arbitrators was published on the 26th June 1890, and under the award, the plaintiff received a very substantial sum though not so much as she would have been entitled to under the alleged will. The plaintiff after the issue of the award, proceeded to deal with the property allotted to her by the award and she did not attempt to put forward any claim based upon the alleged will, until

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[504] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

KANNI AMMAL (*Plaintiff*), *Appellant v.* AMMAKANNU AMMAL AND OTHERS (*Defendants*), *Respondents.** [6th and 7th December, 1899.]

Hindu Law—Purchase by stranger from one of two daughters jointly entitled to their father's property—Decree for partition.

A purchaser, having purchased certain property from one of two sisters jointly entitled to their deceased father's property, under the Hindu Law, re-sold it, whereupon the other daughter sued for a declaration that such sales were invalid as against her, and that the property might be restored to her and her sister, or that there might be a partition of it:

Held, that while one of two daughters cannot by any alienation alter the character of the daughters' estate so far as the right of survivorship or that of the reversioners is concerned, she may alienate her interest in the property, or have that interest taken and sold in execution of a decree against her. Also that, subject to the same condition, she may demand a partition of the property.

[F., 33 A. 443 (449)=8 A.L.J. 220=9 Ind. Cas. 498.]

SUIT for a declaration and for possession of immoveable property, with mesne profits. One Munisami Mudali, having had two wives who predeceased him, died leaving a third wife him surviving. Plaintiff was the daughter of his first wife; his second wife left a daughter, who had also predeceased her father; first defendant was the daughter of the third wife, the latter having died prior to the commencement of the suit. Plaintiff's case was that a certain house, the subject of the suit, had belonged to her father; that at his death, sonless, it devolved upon his third wife, and that upon the death of the latter, the property came to the daughters, namely, to plaintiff and first defendant. First defendant had, however, sold it to second defendant, who in turn had sold it to third defendant. Plaintiff contended that both the sales were void, the property having been inherited by herself and her step-sister jointly. She asked for a declaration to that effect and for possession of the house for herself and first defendant jointly or for a partition of it. First defendant was *ex parte*. Second defendant made formal defences, the suit being contested by third defendant alone. This defendant said that the house was the property, not of [505] Munisami but of his third wife, and that, in consequence, it had been inherited, not jointly by plaintiff and first defendant, but solely by first defendant. She claimed a right to it by her purchase and denied that plaintiff had any right at all. Though the sale-deed was drawn up in Munisami's favour, it was contended that the house had been really purchased benami for his third wife, and with the proceeds of her jewels. The City Civil Judge found, upon the evidence, that the plaintiff's case

more than seven years after the publication of the award. There was a considerable body of oral evidence in support of the execution of the alleged will of 19th August, 1889, but we think that the Subordinate Judge was perfectly right in declining to believe this evidence in face of the facts referred to above and the inference to be drawn from Exhibit 4, and the other circumstances of the case, which it is not necessary for us to go into. The appeal is dismissed with costs. Costs payable to defendants appearing in this Court will be apportioned in proportion to their respective interests on the same principle, as costs of these defendants were apportioned in the Courts below.

* City Civil Court Appeal No. 7 of 1889, against the decree of P. Srinivasa Rao, City Civil Judge, Madras, in Original Suit No. 225 of 1898.

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had not been established, and that she had no interest in the property. He held that the sales by first defendant to second defendant and by second defendant to third defendant were valid. He dismissed the suit.

Plaintiff preferred this appeal.

Seshagiri Ayyar (*V. Krishnasami Ayyar* and *Balamukunda Ayyar* with him), for appellant.—The City Judge is wrong in holding that the property was not Munisami's at the time of his death. The burden of proof is clearly upon those who contend that the transaction is not what it appears to be on the face of it. The latest cases upon the point are *Ranga Ayyar* v. *Srinivasa Ayyangar* (1) and *Ram Narain* v. *Muhammad Hadi* (2). The evidence to prove that the transaction was benami is inconsistent and unreliable. [He dealt with the evidence.] It is further contended that the plaintiff is entitled to recover the entire house. The plaintiff and the first defendant are the only persons entitled to the property. It is clear upon the authorities that each of the daughters is entitled to enjoy every portion of the property. It is not like the case of sons where each has a vested right to his share which he can alienate to a stranger (see Mayne's 'Hindu Law,' Sections 510 and 515). Daughters, like widows, only take a life interest (see Mayne's 'Hindu Law,' paragraph 568, and *Kattama Nachiar* v. *Dorasinga Tevar* (3)). The earliest case in Madras wherein the texts of Hindu Law bearing upon the question were fully examined is that of *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (4). It was there held that widows were not entitled to partition. [SHEPHARD, J.—Is it your contention that two or more co-widows cannot divide the property of their husband at all?] They have no right to partition and Courts [506] of Law will not decree partition at their instance. But they may arrange among themselves to divide the property and to enjoy the portions separately. The observations in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (4) are in point. The same point was decided in *Sri Gajapathi Nilamani Patta Mahadevi Garu* v. *Sri Gajapathi Radhamani Patta Mahadevi Garu* (5). It was again raised in *Kathaperumal* v. *Venkubai* (6), and the decision in that case in conclusive. *Bhugwandeen Doobey* v. *Myna Baee* (7) is to the same effect. Nor is the case of *Ariyaputri* v. *Alamelu* (8) against this contention. There, the mortgage was by both the widows, and both the widows were consenting parties to the arrangement. The principle of estoppel was applied. In *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati Alakarjeswari* (9), where the alienation by one of the widows had been effected for purposes binding upon the estate, their Lordships of the Privy Council said:—"that necessity did not render a mortgage by one widow binding upon the joint estate so as to affect the interest of the surviving widow;" compare also *Ram Piyari* v. *Mulchand* (10). The decision of the Privy Council in *Mussammat Sundar* v. *Mussammat Parbati* (11) was really based on the ground that one of the widows was seeking the aid of the Court to carry out the arrangement entered into between the widows and acted upon; otherwise *Mussammat Sundar* v. *Mussammat Parbati* (11) is inconsistent with *Sri Gajapati Radamani Garu* v. *Maharani Sri Pusapati Alakarajeswari* (9). Under any circumstances the case in *Mussammat Sundar* v. *Mussammat Parbati* (11) does not decide that,

(1) 21 M. 56. (2) 26 C. 227. (3) 6 M.H.C.R. 310 (333).
(4) 3 M.H.C.R. 424. (5) 4 I.A. 212=1 M. 220.
(6) 2 M. 194. (7) 11 M.I.A. 487. (8) 11 M. 304.
(9) 19 I.A. 184=16 M. 1. (10) 7 A. 114. (11) 16 I.A. 186=12 A. 51.

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at the instance of an alienee from one of the widows, the Courts will decree partition. The Calcutta cases (especially *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhobadhya* (1)) have no bearing, as they were decisions under the Dayabhaga Law. It is submitted that (*a*) the daughters are not entitled to alienate the properties in which they have the mere right of enjoyment during their joint lives ; (*b*) that they have no right to claim in a Court of Law to partition the properties, especially if all the daughters do not agree ; and (*c*) that under no circumstances can an alienee of one [507] of the daughters compel a partition and allotment to him of his alienor's share. Under any circumstances, plaintiff is entitled to a half of the house.

K. Srinivasa Ayyangar (with him *Sundara Ayyar*), for respondents Nos. 2 and 3.—(after referring to the evidence for the purpose of showing that Munisami was only benamidar for his wife the mother of the first defendant, and therefore that the first defendant alone was entitled to the house):—If the plaintiff and the first defendant jointly succeeded to the house as the heirs of Munisami, the question is whether the vendee of first defendant is entitled to any share of the house. As to this it is submitted that the real question is whether the first defendant was entitled to sell her portion of the estate and not whether there could be compulsory partition between the two daughters. If the two daughters jointly succeeded to their father's property, they are entitled to enjoy the properties during their joint lives ; and if one of them dies, the survivor of them, as the heir of the father, succeeds to that portion enjoyed by the deceased daughter and after the death of both daughters, the other heirs of the father will succeed. There is nothing in Hindu Law or in any enactment which prevents the alienation of the estate vested in one of the daughters. Alienation by a widow of her life estate to a stranger is of common occurrence and the daughter's estate is similar. The alienee of a daughter is entitled to all the rights of that daughter. He is entitled to enjoy the property jointly with the other daughter during the lifetime of the alienor and the appellant has not contended that the estate of the first defendant was an inalienable estate. As to the question of partition, a distinction has to be dranwn as to the sense in which that word is used. The daughters, no doubt, succeed jointly ; and if one of them dies the other daughter or daughters succeed to the portion of the deceased sister. This is commonly, though not accurately, spoken of as occurring by right of survivorship. The surviving daughters succeed because they are the nearer heirs of the father. All that is involved is that the estate of the daughter is not stridhan estate and on the death of one daughter, her heirs do not succeed, but the succession has to be traced from the last male holder, the father. Partition in the case of joint property is used in the sense of getting rid of the right of survivorship and creating an estate in severalty Partition is also used in the sense of dividing for more convenient [508] enjoyment without affecting any rights of survivorship and without creating an estate in severalty. In *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(2) all that the Court decided was that there could not be compulsory partition so as to defeat the rights of the other co-widows, *i.e.*, one widow could not have a decree for partition so as to let in her own heirs after her death and during the lifetime of the co-widows. Partition there is used in the first sense. So also in the cases cited as authorities by the other side. If this distinction as to the sense in which 'partition'

(1) 9 C. 580. (2) 3 M.H.C.R. 424.

is used in the reported cases is borne in mind, there is no conflict. An example of a division for the convenient enjoyment of the estate without affecting the rights of the co-widow is found in *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati Alakarajeswari* (1). Similarly in *Ariyaputri* v. *Alamelu* (2) the two senses in which 'partition' is used are clearly shown, and the distinction between the two kinds of partition pointed out. In *Mussammat Sundar* v. *Mussammat Parbati* (3) the Privy Council expressly decides that co-widows are entitled to partition. The case of *Sri Gajapathi Nilaman Patta Mahadevi Garu* v. *Sri Gajapathi Radhamani Patta Mahadevi Garu*(4) supports my contention. Their Lordships approve of *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5), and say there could be no absolute partition, *i.e.*, such a partition as would defeat the rights of the co-widow or co-heir. But that case itself clearly shows that all the widows (and by analogy, all daughters) are jointly and equally entitled to their husband's property and the Courts would decree partition for more convenient enjoyment. The case of *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya* (6) which strongly supports my contention was decided under the Dayabhaga Law, but there is no difference on this point between the Mitakshara and Dayabhaga. The Privy Council decisions are distinguished at page 585. If, therefore, the first defendant is not solely entitled to the house but takes it joinly with plaintiff, my client, as the vendee of the first defendant, is entitled to a division and the plaintiff is entitled to recover only her half share. This, of course, would not affect her right, if any, to succeed after the first defendant's death.

[509] *Tiruvengadasami Pillai*, for respondent No. 3.

JUDGMENT.

On the main question in this case, *viz.*, whether the house was the property of Munisami at the time of his death, we are clearly of opinion that the judgment of the City Civil Judge is against the weight of evidence. The two witnesses, who, at the trial, said that the house was bought in the name of Munisami benami, told a contradictory story at the previous trial and it is quite beside the point to say that the precise question now in issue was not then at issue. The two stories are irreconcilable.

The recital in the sale-deed of 29th March 1897 refers to the debts contracted by the vendor's father and makes no reference to any claim to the house as the property of the vendor independently of her father.

The burden of proof was on the defendants and we are of opinion that the alleged title of Munisami's vendor has not been proved. The question then arises as to the terms of the decree to which the plaintiff is entitled.

It is argued on her behalf that the purchaser who has bought from one of two sisters jointly entitled to their father's property under Hindu Law takes nothing by his purchase and cannot ask for a partition against the other sister. This statement of the law, which would practically place widows or daughters enjoying property inherited from a husband or father on the footing of the members of a Malabar tarwad is not in accordance with the law as laid down in several cases: *Ariyaputri* v. *Alamelu* (2), *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya* (6) and *Mussammat Sundar* v. *Mussammat Parbati* (3). Having regard to those

(1) 19 I.A. 184=16 M. 1.
(2) 11 M. 304 (306).
(3) 16 I.A. 186=12 A. 51.
(4) 4 I.A. 212=1 M. 290.
(5) 3 M.H.C.R. 424.
(6) 9 C. 580.

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authorities we must hold that, while one of two daughters cannot by any alienation alter the character of the daughters' estate so far as concerns the right of survivorship or the rights of reversioners, she may alienate her interest in the property or have that interest taken and sold in execution of a decree against her. She may also, subject to the same condition, demand a partition of the property.

It is obviously desirable that there should be a partition between the plaintiff and the purchaser, who is a stranger to the family.

[510] The plaintiff asks for partition and there must be a decree accordingly.

We must direct the City Civil Judge to find * on the evidence on record to what amount the plaintiff is entitled on account of mesne profits and submit his findings within one month from the date of the receipt of this order. Seven days will be allowed for filing objections after the findings have been posted up in this Court.

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23 M. 510.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

MADHAVI AMMA (*Plaintiff No.* 3), *Appellant v.*
KUNHI PATHUMMA AND OTHERS (*Defendants Nos.* 1 *to* 11, *and Plaintiffs Nos.* 1 *and* 2), *Respondents.*†
[13th December, 1899.]

Transfer of Property Act—Act IV of 1882, *Sections* 83, 84—*Deposit in Court to the account of the mortgagee of amount remaining due on mortgage—Deposit to credit of persons not entitled in addition to persons entitled.*

A mortgagor before bringing a suit for redemption deposited the mortgage money in Court to the credit of persons who were not entitled to it in addition to that of persons who were entitled to it:

Held, that he was not entitled to claim the benefit of Sections 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it.

SUIT for redemption. Plaintiffs sued to redeem, for third plaintiff, a kanom granted by second plaintiff to defendants Nos. 1 to 3 and to the deceased mother of defendants Nos. 4 to 6. Third plaintiff further contended that she had duly deposited the mortgage money in Court as provided by Section 83 of the Transfer of Property Act and was, in consequence, entitled to future rent under Section 84, inasmuch as, by the terms of the kanom, the mortgagees took the rent of the property in lieu of interest. Defendants denied third plaintiff's claim to future rent. The payment under Section 83 had in fact been made to the credit of defendants Nos. 1 to 7. Defendants Nos. 1 to 3 claimed the whole amount. Defendant No. 7 also made a claim. The District Judge found that defendants Nos. 1 to 3 were entitled to

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* [The following is the substance of the finding and the judgment thereon:—ED.]
The City Civil Judge found that the plaintiff was entitled to Rs. 68 on account of mesne profits, and their Lordships accepted the finding and gave judgment accordingly.

† Appeal No. 69 of 1899, against the decree of A. Thompson, District Judge of North Malabar, in Original Suit No. 45 of 1898.

[511] three-fourths of the kanom amount and the tarwad of which defendant No. 7 was karnavan was entitled to one-fourth. An issue having been framed on the question, the District Judge held that the deposit made by third plaintiff was not unconditional, and was, in consequence, ineffectual. Plaintiff No. 3 had, after depositing the money, caused the notice under Section 83 of the Transfer of Property Act to be served not only on defendants Nos. 1 to 6 but also on the seventh defendant, the karnavan of the tarwad, who also claimed the kanom. As a result, neither defendants Nos. 1 to 6, nor defendant No. 7 could draw the kanom amount. Third plaintiff's claim to rent from date of plaint was disallowed on the ground that she had not done all that had to be done to enable the mortgagee to take the amount out of Court, within the meaning of Section 84.

Plaintiff No. 3 preferred this appeal.

Sundara Ayyar, for appellant.—This was a good tender under Section 83 of the Transfer of Property Act. The deposit was, in effect, to the credit of such of the defendants as should be entitled to take it. The section only provides that the amount remaining due upon the mortgage may be deposited "to the account of the mortgagee," that is, in this case, such of the defendants who may be found to be entitled. The amount was paid to the credit of defendants Nos. 1 to 7, and the finding is that defendants Nos. 1 to 3 and 7 are entitled. A mortgagor should have the benefit of Section 84 without being compelled to determine who is entitled to take the money out of Court. The defendants might have decided that among themselves, but in consequence of their disputes the difficulty arose. [DAVIES, J.—You deposited the money to the credit of two persons, who were mortgagees, and two who were not.] The question is whether under Section 83 the mortgagor is bound to decide who the mortgagee really is.

J. L. Rosario, for respondents Nos. 1 to 3, referred to *Barber Maran* v. *Ramana Goundan*(1). Respondents Nos. 1, 2 and 3 had signified their willingness to accept the amount of the kanom if it were duly deposited,—which, he contended, had not been done.

Mr. *C. Krishnan,* for respondents Nos. 4 to 7.

JUDGMENT.

[512] The third plaintiff deposited the mortgage-money to the credit of persons who were not entitled to it in addition to persons who were entitled to it. This prevents her from claiming the benefit of Sections 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it. The appeal therefore fails and is dismissed with costs.

The two memoranda of objections by the defendants Nos. 1, 2, 3 and 7 as to the proportion in which they have been assessed in costs are also dismissed with the costs of the third plaintiff.

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(1) 20 M. 461.

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23 M. 512 = 10 M.L.J. 111.

23 M. 512 = 10 M.L.J. 111.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

VAIKUNTAM AMMANGAR (*Plaintiff*), *Appellant v.* KALLAPIRAN AYYANGAR (*Defendant*), *Respondent.**
[26th January and 1st February, 1900.]

Hindu Law—Liability of undivided brother of deceased Hindu to defray expenses of his niece's marriage—Improper refusal—Performance by widow—Maintainability of suit brought by widow—Contract Act—Act IX of 1872, *Section* 69—" *Person who is interested in the payment of money.*"

The defendant having improperly refused to perform the marriage ceremony of his niece, the daughter of his undivided brother (deceased), the widow of the latter herself performed the ceremony, borrowing money for the purpose, and sued her late husband's said brother (the defendant) to recover the amount expended on the marriage. On its being contended that defendant was under no obligation to provide for the expenses of his brother's daughter's marriage :

Held, that defendant was liable, the marriage having been properly performed.

Held, further, that the suit was maintainable though it had been brought by the mother of the bride and not by the bride herself.

Semble, that the mother was, within the meaning of Section 69 of the Indian Contract Act, interested in making the payment which had given rise to the action. It was not necessary for her to prove that she had been compelled to make it, or that she had made it at the defendant's request.

[R., 32 A. 325 (332) = 7 A.L.J. 236 = 5 Ind. Cas. 418 ; 26 M. 497 ; 33 M. 232 (234) = 4 Ind. Cas. 1083 = 19 M L.J. 750 ; 35 M. 728 (737) = 11 Ind. Cas. 570 = 21 M L.J. 600 = 10 M L T. 57 = (1911) M W.N. 285 (292) ; 4 Ind. Cas. 786 (790) = 5 N.L.R. 161 ; 19 M.L.J. 666 (668) ; 7 O C. 146 (150) ; **Expl.**, 26 M. 505.]

[513] SUIT to recover the costs incurred in performing the marriage ceremonies of plaintiff's daughter. Defendant and his brother (plaintiff's deceased husband), were undivided, when the latter died leaving a daughter of marriageable age and plaintiff, his widow, him surviving. Defendant, as the District Munsif found, improperly refused to perform the daughter's marriage ; in consequence of which refusal plaintiff borrowed money and herself performed it. She now sued defendant (her husband's brother) to recover the amount so expended. The District Munsif decreed in her favour for the amount claimed. On appeal, the District Judge agreed with the Munsif as to the defendant's refusal to perform the ceremony and as to the reasonable nature of the expenses claimed, but he held that the defendant was under no legal obligation to perform the ceremony, and that the suit was in consequence not sustainable. He relied upon *Seshammal* v. *Munisami Mudaliar* (1), 1 Strange's 'Hindu Law,' page 230, and Bannerjee on 'Marriage and Stridhan,' page 51, and dismissed the suit.

Plaintiff preferred this second appeal.

Kasturiranga Ayyangar (for *Sivasami Ayyar*), for appellant.—The case of *Seshammal* v. *Munisami Muduliar* (1) on which the District Judge has relied applies only to Sudras. Here the parties are Brahmans, among whom there is a recognised duty to marry their daughters ; moreover,

* Second Appeal No. 21 of 1899 against the decree of K. C. Manavedan Raja, Acting District Judge of Tinnevelly, in Appeal Suit No. 538 of 1897, reversing the decree of C. Krishnasami Rao, District Munsif of Srivaikuntam, in Original Suit No. 307 of 1897.

(1) Referred Case No. 40 of 1896 (unreported).

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that suit was against the husband, whereas this suit is against the husband's brother. Though the obligation was only a moral one during the father's lifetime, it became legally enforceable at his death, *Janki* v. *Nand Ram* (1); see also *Kamini Dassee* v. *Chandra Pode Mondle* (2) and *Rangammal* v. *Echammal* (3). Moreover, it is usual to make provision for marriage expenses in partition deeds. The exact point has never been decided, but it is dealt with in West and Buhler's 'Hindu Law' in a note at page 754. He referred to *Tulsha* v. *Gopal Rai* (4). Trevelyan on 'Minors,' page 258; Colebrooke's 'Digest of Hindu Law,' volume II, page 294, *et seq.*, and also at page 438; 2 Macnaughten's 'Hindu Law,' page 47, quoted at page 501 of West and Buhler's 'Hindu Law'; 'Dayabhaga,' chapter III, Section II, paragraphs 36-40; 'Smriti Chandrika,' page 54, **[514]** paragraphs 18-36. The Mitakshara discusses whether one-fourth share should be given or merely the marriage expenses. The allotment of one-fourth share is now obsolete, but the duty to defray the expenses still subsists. See also the analogous case of daughters of disqualified heirs, 'Mitakshara,' part II, chapter II, Section X, placitum 13.

V. Krishnasami Ayyar for respondent.—The suit should have been brought by the daughter; she being the person in whose favour the right existed. In *Tulsha* v. *Gopal Rai* (4) both mother and daughter sued. The question is whether the obligation on a father is a legal or only a moral one: it is submitted that it is the latter. If the father is not bound to give in marriage he is not liable for the costs incurred in respect of it. See Mayne's 'Hindu Law', 5th edition, paragraph 81. In *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (5) the Privy Council held it to be a religious obligation, and the same view was taken in *Namasevayam Pillay* v. *Annammai Ummal* (6); such a duty is not legally enforceable, and if not legally enforceable there can be no legal obligation to pay the expenses. Among Brahmans it is only optional to marry daughters, though it is considered meritorious from a religious point of view. *Janki* v. *Nand Ram* (1) does not touch the present question, as it was a case of property self-acquired and inherited. The word "interested" in Section 69 of the Indian Contract Act refers to pecuniary interest; the principle of that section is that a person is interested, and (as shown in the illustration) is unable to pay, and permits payment to be made by another person. See also Leake on 'Contracts,' 1st edition, page 85. The obligation cannot be a general one to pay any one the expenses. Moreover, the obligation ceases when the marriage has been performed, and no duty can be afterwards enforced in relation to it. The minor might possibly have had a right of action prior to the marriage and to enable her to get married. But there must be a legal and not merely a moral liability to support an action, Section 69 being based on the English Law; *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (5) was cited to the Court in *Seshammal* v. *Munisami Mudaliar* (7). Moreover, Bannerjee, J's **[515]** judgment at page 47 is not a correct interpretation of *Namasevayam Pillai* v. *Annammai Ummal* (6).

Kasturiranga Ayyangar, in reply, contended that Section 69 of the Indian Contract Act is wider in its terms than the English Law, and inasmuch as the word "interested" is not restricted in its meaning, the interest

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(1) 11 A. 194. (2) 17 C. 373. (3) 22 M. 305. (4) 6 A. 632.
(5) 3 I.A. 72 = 1 C. 289. (6) 4 M.H.C.R. 339 (344).
(7) Referred Case No. 40 of 1896 (unreported).

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need not be only pecuniary; that is shown by Section 25 of the Contract Act which expressly refers to love and affection.

JUDGMENT.

SHEPHARD, J.—The plaintiff, a widow, seeks to recover from her husband's brother money expended by her on the celebration of her daughter's marriage. The plaintiff's deceased husband and the defendant were members of an undivided family, the property of which is in the hands of the defendant. It is found that the defendant, though he professes to have been ready to get his niece married, did not in fact take any steps to that end, but, on the contrary, improperly refused to perform the girl's marriage. Accordingly the girl was married at her mother's cost, and it must be taken that the marriage was a proper one.

In the Court of First Instance no question was raised by the defendant, except as to the alleged refusal of the defendant to have the marriage performed and as to the amount spent by the plaintiff.

The District Judge dismissed the suit on the ground that the defendant was under no obligation to provide for the expense of his brother's daughter's marriage. In support of this opinion he refers to some observations made in *Namasevayam Pillay* v. *Annammai Ummal* (1). The point decided in that case is that a brother in the position of the defendant in this case is not, as against his widowed sister-in-law, entitled to the absolute and exclusive right of giving the latter's daughter in betrothal. In the order of succession of the persons who should give a girl in marriage he comes before the mother, but the right or duty which devolves on him is not one which can be exercised independently of the mother. The case decides nothing with regard to the question whether the brother or the property of the family in his hands is chargeable with the cost of a marriage properly performed by the mother. There is an observation to the effect that the obligation laid on the girl's relatives is not an enforceable legal obligation, [516] but it is also said that if the mother improperly declines to accept a suitable bridegroom she might be compelled by suit to provide means for the celebration of the marriage. It was in effect argued before us that if the defendant was not compellable to give the girl in marriage himself, he could not be called upon to pay the cost incurred by anybody else. This was evidently not the view taken by this Court in 1869, for if the brother could not be chargeable neither could the mother be. There is nothing inconsistent in holding that the person possessed of family property and chargeable in respect thereof with the maintenance of unmarried girls is also chargeable with the cost of their marriages, though he himself does not choose to give them in marriage. The object of specifying several persons who may give a girl in marriage is to ensure the celebration of her marriage: it has no reference to the question upon whom the expense of the marriage is to fall.

That the expenses are to be borne by the family property just in the same way as the cost of maintenance, there seems no doubt upon the authorities (see *Tulsha* v. *Gopal Rai*(2); 'West and Buhler,' 754; Mayne's 'Hindu Law,' Sections 81, 408). The common practice of providing in partition decrees for the marriage expenses of daughters can hardly be accounted for except on the hypothesis that such expenses are properly chargeable on the family property.

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(1) 4 M.H.C.R. 339 (340). (2) 6 A. 632.

For these reasons, I hold that the defendant can be made liable for the expenses of his niece's marriage, the same having been properly incurred. But, it is argued, that the girl herself, not her mother, ought to have been plaintiff in the action. This is a new point not taken in the Court of First Instance. It is argued that although the defendant may be liable for the expenses of the marriage, the plaintiff's daughter is the person in whom the corresponding right resides just as it would be if the daughter's maintenance were in question. I think there is a clear distinction between the two cases. The right to maintenance is purely personal, and in point of law exists solely for the benefit of the person to be maintained. In the case of marriage, on the other hand, it is not only the bride that is concerned. Marriage, according to Hindu Law, involves the idea of gift, and the mother may be a party to the transaction in giving her daughter in marriage. [517] When the mother has lawfully undertaken this part and in consequence has incurred expense, she can, as I conceive, claim the advantage of the obligation which the law recognizes. The object which the law has in view, namely, the procuring of the marriage of the daughter would be frustrated if the obligation to provide means for it could not be enforced by the member of the family on whom the duty of giving the girl in marriage devolves. In addition, I think, the plaintiff was, within the meaning of Section 69 of the Indian Contract Act, interested in making the payment which has given rise to the action. It is not necessary that she should prove that she was compelled to make it or that she made it at the defendant's request.

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I think the appeal should be allowed and the District Munsif's decree restored with costs in this and in the Lower Appellate Court. The memorandum of objections is dismissed with costs.

BODDAM, J.—I agree.

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23 M. 517=10 M L.J. 305.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice and Mr. Justice Subramania Ayyar.

ABDUL RAHIMAN SAHEB AND ANOTHER (*Guardians and Counter-petitioners*), *Appellants* v. GANAPATHI BHATTA (*Petitioners*), *Respondents.** [30th January, 1900.]

Civil Procedure Code—Act XIV of 1882, *Sections* 492, 503 *—Guardians and Wards Act —Act VIII of* 1890, *Sections* 33, 43, 47, 48 *and* 49 *—Appeal—Order purporting to be passed under appealable section—Appeal entertained though Judge had no power to pass orders under the section as he purported to do.*

By Section 43 (4) of the Guardians and Wards Act, 1890, in case of disobedience to an order passed under sub-Sections (1) and (2) of that section, in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under Section 492 or Section 493 of the Code of Civil Procedure. On a petition being presented to a District Court, asking that the guardians of certain minors, who had been appointed by the [518] Court under the Guardians and Wards Act, might be removed, the Judge passed an order in which he purported to issue an injunction under Section 492 of the Code of Civil Procedure for the attachment of the estate of minors and to

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* Civil Miscellaneous Appeal No. 71 of 1899 against the order of F. H. Hamnett, District Judge of South Canara, in Civil Miscellaneous Petition No. 299 of 1899.

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appoint a receiver to manage the estate. On an appeal being preferred against the said orders it was contended that the Judge must be taken to have acted under the Guardians and Wards Act, 1890, and that inasmuch as no appeal was provided by that Act, in respect of such an order, no appeal lay :

Held, that though both orders were passed without jurisdiction, the Judge purporting to have acted under Section 492 of the Code of Civil Procedure as regards the issue of an injunction, and under Section 503 as regards the appointment of a receiver, inasmuch as orders under either of these sections were appealable, the fact that the Judge had no power in this case to pass orders under them did not bar the High Court from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against the orders, since there was no provision of law under which the Judge could pass orders attaching property or appointing a receiver without such orders being subject to appeal.

Hurrish Chunder Chowdhry v. *Kali Sundari Debia* (10 I.A. 4=9 C. 482), referred to.

[F., 28 M. 127=14 M.L.J. 437; R., 15 C.W.N. 725 (727) ; 8 Ind. Cas. 26.]

ON 2nd March 1899 an order was passed by the District Judge of South Canara in connection with the management by the guardians, the appellants, of the estate of the late Haji Kassim Saheb. On 11th July 1899 a petition was filed in the same Court by the present respondent on which the District Judge passed an order, the material portion of which is as follows :—

" For the reasons stated in my proceedings, dated 2nd March 1899, I consider that the guardians of the minor children of the late Haji Kassim Saheb of Udipi are quite unfit to act as managers of the minor's property. In the interest of the estate I gave them time twice to submit accounts of their management. This was done not because I had any doubt as to their incapacity and the necessity for their removal, but because I thought it desirable that they should be made to put in accounts in the interests of the minors with a view to these accounts being verified and their mismanagement being clearly brought to light and steps taken to recover from them any loss proved to have accrued from their mismanagement. The petitioner in miscellaneous petition No. 299 of 1899 now brings to notice that the guardians, so far from utilising the time allowed them to prepare true and correct accounts, have colluded with Kalinga Hebbara, a man who at first came forward to give information against the guardians, and whom the guardians described as acting against them through enmity, because they pressed him for payment of a [519] debt due by him to the estate. This man unaccountably withdrew after a time from giving the Court or the Commissioners originally appointed by my predecessor any information, and there were reasonable grounds for suspecting him of having been won over by the guardians. This suspicion is now proved to be true. There can be no doubt that the guardians have no intention of furnishing true accounts, but have induced this man to join them in the preparation of false accounts. This conspiracy can only be broken up by prompt action, and I resolve under Section 492, Civil Procedure Code, to issue an injunction for the attachment of the entire estate of the minors and all the accounts and documents and other moveable and immoveable property connected therewith. The minors have only a share in the estate and the attachment of their share in the lands and jewels must therefore be only a constructive one, but inventories must be taken of all the property. Further, as this is a case where there are strong grounds to suspect fraud, I order that all the accounts and documents in possession of the guardians or elsewhere having connection with the estate to be immediately attached, and I appoint a receiver to manage the estate. . ."

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Against that order the guardians preferred this appeal, on the ground, among others, that the order issuing an injunction under Section 492 of the Code of Civil Procedure for attachment of the estate was illegal and passed without jurisdiction.

Mr. *N. Subrahmaniam* and *Narayana Rao*, for appellants.

Sankaran Nayar, for respondent, took the preliminary objection that no appeal lay under the Guardians and Wards Act (VIII of 1890), unless it was given by Section 47 of that Act, and that Section 47 did not provide for an appeal from such an order as that now before the Court. By Section 48, all other orders passed under the Act are declared to be final, subject only to revision under Section 622 of the Code of Civil Procedure. He contended that the appointment of a receiver was a step preliminary to the disposal of the case, and that the only remedy was under Section 622 of the Code of Civil Procedure, under which procedure, the High Court would not necessarily interfere, even though it might not approve of the manner in which the discretion of the Lower Court had been exercised. The effect of Section 47 was to curtail the general right of appeal. That the Judge was acting under the powers conferred by the Guardians and Wards Act, [520] 1890 was evident, since Section 43 gave him power to make orders for regulating the conduct or proceedings of guardians and to enforce those orders, and by Section 39 he was empowered to order the removal of a guardian.

Mr. *N. Subrahmaniam*, for appellants, referred to the order, in which the District Judge purported to act under Section 492 of the Code of Civil Procedure, from which an appeal lies under Section 588. He contended that the order might be upheld under one provision or the other.

JUDGMENT.

A preliminary objection has been taken to the hearing of these appeals that no appeal lies. The order which is sought to be set aside is an order dated July 14th, 1899, which purports to have been made on a miscellaneous petition presented in the Court of the District Judge by one Ganapathi Bhatta. The petition appears to ask that the guardians of certain minors who have been appointed by the Court under the Guardians and Wards Act should be removed. In the order of July 14th, which the guardians now seek to have set aside, the District Judge purports to issue an injunction under Section 492 of the Civil Procedure Code for the attachment of the estate of the minors and to appoint a receiver to manage the estate. In making this order the Judge seems to have acted under a misconception of his powers under Section 43 of the Guardians and Wards Act. That section provides that when an order made under sub-Section (1) is disobeyed, the order may be enforced in the same manner as an injunction under Sections 492 and 493 of the Civil Procedure Code. The section does not confer jurisdiction to issue an injunction, but gives jurisdiction in the case of disobedience to an order made under the Guardians and Wards Act, to proceed in the same manner as if an injunction had been issued under Section 492 of the Civil Procedure Code and the injunction had been disobeyed. The order appointing a receiver seems to have been made by the Judge as consequential on the order for an injunction. Both these orders were made without jurisdiction. It is contended, however, that the Judge must be taken to have acted under the Guardians and Wards Act, and that no appeal being provided by that Act in the case of such an order an appeal does not lie. We do not think this contention is well founded.

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The learned Judge purported to act under Section 492 of the Civil Procedure Code as regards the issue of an injunction and apparently under Section 503 of the [521] Civil Procedure Code as regards the appointment of a receiver. Orders made under either of these sections are appealable under the Civil Procedure Code. The fact that the District Judge had no power in this case to pass an order under these sections does not bar this Court from treating the order as having been passed thereunder for the purpose of entertaining an appeal against the order, seeing that there is no provision of law under which the Judge could pass an order attaching the property or appointing a receiver without such order being subject to appeal. This view is supported by the ruling of the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sundari Debia* (1).

The preliminary objection is overruled.

We set aside the order under appeal on the ground that it was made without jurisdiction without prejudice to any proceedings which are being taken under the Guardians and Wards Act. The costs of these appeals will be dealt with by the District Judge in any order he may make, in proceedings under the Guardians and Wards Act, with reference to the removal of the present guardians.

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23 M. 521=10 M L.J. 145.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

VENKATA KRISHNA AYYAR (*Defendant No. 6*), *Appellant v.*
THIAGARAYA CHETTI AND OTHERS (*Plaintiff and Defendants Nos. 1 to 5*), *Respondents.**
[20th and 21st November, 1899.]

Transfer of Property Act—Act IV of 1882, *Section* 93—*Application for sale of mortgaged property on default of mortgagor to redeem—Court in which application should be made.*

In a suit for the redemption of mortgaged property, the District Munsif passed a decree which was, on appeal, modified by the District Court. The mortgagor not having paid the decree amount, the mortgagee applied to the District Court under Section 93 of the Transfer of Property Act for an order that the mortgaged property might be sold:

[522] *Held*, that the application should have been made to the Court of the District Munsif.

Oudh Behari Lal v. *Nageshar Lal*, (13 A. 278), referred to.

[F., 23 A. 88; 13 C.L.J. 459 (462); R., 25 M. 244 (261) (F B.); 6 Ind. Cas. 323 (325).]

PETITION by a mortgagee under Section 93 of the Transfer of Property Act for an order that certain mortgaged property might be sold. In a suit by the mortgagor for redemption, the District Munsif had previously passed a decree directing petitioner (who was the sixth defendant therein, to take Rs. 362-6-0 from the plaintiff, the first counter-petitioner, and hand over the mortgaged property. Against that decree petitioner had appealed to the District Judge, who directed that petitioner should give up

* Civil Miscellaneous Appeal No. 85 of 1898 against the order of J. Hewetson, District Judge of Chingleput, in Miscellaneous Application No. 598 of 1897.

(1) 10 I. A. 4=9 C. 482.

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possession of the property on payment within three months of Rs. 2, 088, and on failure of payment the mortgaged property was ordered to be sold. The money not having been paid, petitioner filed this petition in the Court of the District Judge. A preliminary objection was then taken that the application was one for execution and should have been made to the District Munsif's Court. The District Judge referred to *Oudh Behari Lal* v. *Nageshar Lal* (1), and, upholding the preliminary objection, dismissed the petition.

Against this order petitioner preferred this appeal.

Sundara Ayyar and *Ranga Ramanuja Chariar*, for appellant.

Ramachandra Rao Saheb, for respondents.

JUDGMENT.

The question for decision in this case is whether an application for an order for sale under paragraph 4 of Section 93, Transfer of Property Act, should be made to the Court of First Instance or to the Appellate Court in a case where it was the Appellate Court that made a decree for redemption under Section 92 of the Transfer of Property Act, modifying the decree of the Court of First Instance.

We have not been referred to any statutory provision which lays down the procedure to be followed. The question, therefore, has to be decided with reference to principle and analogy. The decree of the Appellate Court must be taken to be the decree which the Court of First Instance should have passed if it had decided the case correctly. Had the decree been duly passed by the Court of First Instance, the application for an order under Section 93 of the Transfer of Property Act would have been made to that Court. The same course should, in our opinion, be followed when the Appellate Court passes the decree which ought to have been passed [523] by the Court of First Instance. We are unable to accept the contention that when the Appellate Court passes a decree under Section 92 of the Transfer of Property Act the suit should be regarded as still pending in that Court until the order absolute under Section 93 has been passed. The more reasonable view is that the proceedings in the Appellate Court have terminated with its decree under Section 92, and that any further order which the parties require in order to give effect to the rights of the parties, as settled by the decree, should be obtained from the Court of First Instance on which would have devolved the duty of making such order if a correct decree had been passed in the first instance. This procedure is manifestly more convenient than to throw the duty on the Appellate Court.

It is also in accordance with the policy on which the rules in Sections 15 and 583 of the Code of Civil Procedure proceed.

Our conclusion is in accordance with what we believe has been the uniform practice of this Court ever since the Transfer of Property Act came in force, and it is also in accordance with the view adopted by the Allahabad High Court (*Oudh Behari Lal* v. *Nageshar Lal*(1), though we do not wish to be understood as accepting all the reasoning on which that decision is based.

The result is that the order of the District Judge is right and we dismiss this appeal with costs.

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(1) 13 A. 278.

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23 M. 523 = 10 M.L.J. 138.

23 M. 523 = 10 M.L.J. 138.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

THE MUNICIPAL COUNCIL, TANJORE (*Defendant*), *Petitioner v.* UMAMBA BOI SAHEB (*Plaintiff*), *Respondent.** [24th November, 1899.]

District Municipalities Act (Madras)—Act IV of 1884, *Sections* 71 (2), 262 (2)—*Notice of intended insertion of name or property on assessment books—Substantial compliance with Act—Action to recover money paid in respect of tax.*

By Section 71 of the Madras District Municipalities Act, 1884, the chairman may at any time, amend the assessment book in manner therein provided, but [524] no person's name or property shall be inserted, nor any increase of assessment made unless notice thereof has been served on such person not less than thirty days previous to a day to be specified in such notice as the day upon which such notice will be revised. By Section 262 no assessment made under the authority of the Act shall be impeached and no action shall be maintained in any Court to recover money paid in respect of any tax levied under the Act provided that the directions and provisions of the Act shall have been substantially complied with. A notice which was served upon plaintiff by a municipal council purported to be issued under Section 71 (2) of the Madras District Municipalities Act, 1884, and was as follows "I have the honour to forward herewith a list showing the amount of land and water taxes due for 1895-1896 on devastanam lands within the limits of this municipality and to request that you will be good enough to cause the amount to be remitted to this office at your earliest convenience:"

Held, that the notice was bad, that the terms of Section 71 (2) had not been substantially complied with and that consequently Section 262 (2) had no application.

Municipal Council, Nellore v. *Rangayya* (19 M. 10), explained.

PETITION asking the High Court to revise a decree of a Subordinate Judge. Plaintiff had brought a suit for Rs. 443-11-6, being the amount recovered from her by the defendant municipal council on account of land and water taxes, with interest. The money has been paid under protest, plaintiff complaining that the assessment was new and illegal. Defendant contended that the amount had been properly and legally levied from the plaintiff under Madras Act IV of 1884, which was then in force, that the plaintiff was not entitled to recover the amount, that due notice under Section 71 of Madras Act IV of 1884 had been given to plaintiff, that no appeal had been preferred to the council against the revision made by the chairman though due notice to pay the assessment had been given under Section 71 of Madras Act IV of 1884, that the plaintiff was debarred from bringing this suit for the recovery of the amount, that she was not entitled to interest, and that the Civil Courts had no jurisdiction to entertain the suit under Madras Act IV of 1884.

The Acting Subordinate Judge decreed for plaintiff remarking as follows :—"The first and most important objection relates to the want of notice. The evidence adduced by the plaintiff clearly shows that no notice was issued to the plaintiff under Section 71 of Madras Act IV of 1884. The defendant has not adduced counter-evidence to show that a notice was duly issued and served upon the plaintiff of the intended assessment providing thirty days for the revision of the same by the chairman.

* Civil Revision Petition No. 139 of 1899, praying the High Court to revise the decree of C. G. Kuppusami Ayyar, Acting Subordinate Judge of Tanjore in Small Cause Suit No. 1891 of 1897.

The so-called notice [525] which the defendant produces is Exhibit I which runs as follows:—'I have the honour to forward herewith a list showing the amount of land and water taxes due for 1895-96 on devastanam lands within the limits of this municipality and to request that you will be good enough to cause the amount to be remitted to this office at your earliest convenience.' This document is no notice, but a demand calling upon the plaintiff to pay the assessment referred to in a list appended thereto, which had been imposed by the defendant. The alleged said list is not now forthcoming. This procedure appears to be arbitrary, as the provisions of the said Act have not been duly complied with and as the assessment was actually imposed upon the plaintiff without her knowledge and without giving her an opportunity of urging what she had to submit to the municipal chairman. I, therefore, hold that the levying of the assessment from the plaintiff was not legal. There were several protests made by the plaintiff, but to no purpose. The amount of the assessment was paid at last under protest. I think it is fair that the plaintiff should expect a due compliance with the provisions of the Act."

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23 M. 523 = 10 M.L.J. 138.

Against this decree the municipal council preferred this civil revision petition.

Sivasami Ayyar, for petitioner.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*), for respondent.

JUDGMENT.

In this case the chairman of the municipal council of Tanjore, professing to act under the authority of Section 71 of Madras Act IV of 1884, inserted the name of the respondent as liable to pay a portion of the land and water taxes which had previously been levied from other parties who had an interest in certain land within the limits of the municipality. The Subordinate Judge found that the chairman had omitted to give the respondent the notice prescribed by sub-Section (2) of Section 71 of the Act and gave the respondent a decree for the amount of the taxes paid by her under protest. The municipal council now asks us to revise this decree on the ground that "the provisions of the Act "relating to the assessment and levy of the taxes . . . . have been "in substance and effect complied with" and that, therefore, Section 262 (2) of Madras Act IV of 1884 is a bar to the maintainability of the suit in a Civil Court.

We are unable to admit the validity of this contention. Section 71 (2) requires that "no person's name . . . . shall be [526] "inserted . . . . unless notice of such intended insertion . . . " . has been served on such person . . . . not less than thirty "days previous to a day to be specified in such notice as the day upon "which such assessment will be revised by the chairman."

The only notice given to the respondent was that contained in the following letter from the chairman to the respondent:—

"I have the honour to forward herewith a list showing the amount of "land and water taxes due for 1895-96 on devastanam lands within the "limits of this municipality, and to request that you will be good enough "to cause the amount to be remitted to this office at your earliest conveni- "ence." This notice is obviously on the face of it not such a notice as is prescribed by the section. It does not state that the respondent's name will be inserted at a future date specified in the notice, so as to give her an

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opportunity, if so advised, of appealing against the assessment. It is merely a demand for a tax assumed to have been already properly assessed on the respondent and due by her. It follows that the provisions of the Act have not only not been substantially complied with, but have been completely ignored. Consequently Section 262(2) has no application.

Our attention has been called by the petitioner's vakil to the decision of *Municipal Council, Nellore* v. *Rangayya* (1), but we are unable to accept his contention that that decision is opposed to the view we have taken in this case. Even the somewhat general language used in that case by Mr. Justice Shephard was not, in our opinion, intended to cover neglect to comply with the express provisions of the Act, such as we find in the present case, nor can we agree with the vakil's contention that Section 262(2) refers only to defects in regard to the first imposition for the year of a tax throughout the municipality, and not to the provisions of the Act relating to its subsequent assessment on individuals, for the section refers to such assesssment in express terms.

The failure to observe the procedure prescribed in Section 71 (2) is a defect of an essential character since it deprives the taxpayer of the opportunity provided by the Act of obtaining redress by an appeal to the municipal council whose decision the law declares shall be final.

We dismiss the petition with costs.

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23 M. 527.

[527] APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

RAMACHANDRA RAO AND OTHERS (*Plaintiffs*), *Appellants* v. VENKATARAMANA AYYAR AND OTHERS (*Defendants*), *Respondents.**
[29th November, 1899.]

Promissory note—Suit by assignee by invalid endorsement—Claim also on the original debt in respect of which note was given—Maintainability of suit.

The purchaser of the assets of a Bank in liquidation, which assets included a debt due by defendants to the late Bank and a promissory note given in respect of that debt, sued defendants on the promissory note as well as on the original debt in respect of which the note had been given. The note had not been endorsed until after the Bank had been wound up and had ceased to exist, and the endorsement had been held to be invalid ;

Held, that plaintiffs were entitled to sue for the original debt even though they were not entitled to sue on the promissory note.

Pothi Reddi v. *Velayudasivan* (10 M. 94), referred to.

[Diss., 14 Bur. L.R. 179=U.B.R. (1907) 3rd. Qr., Evidence, 91 ; R., 12 Bom.L.R. 466 (470).]

SUIT for money. Plaintiffs alleged that defendants had received the amount represented by the note from the late Coimbatore Swadesa Dravya Sekhara Nidhi, then in course of liquidation, the assets of which had been purchased by the plaintiffs and included the note sued on. The note

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* Second Appeal No. 83 of 1898, against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Appeal Suit No. 50 of 1897, affirming the decree P. S. Gurumurti Ayya, District Munsif of Erode, in Original Suit No. 543 of 1896.

(1) 19 M. 10.

had not been endorsed until after the Bank had been wound up. Plaintiffs also sued on the original debt for which the note had been given. The defendants objected to the maintenance of the suit on the ground that the endorsement had been held by the District Court and the High Court to be bad, and that without the endorsement the suit could not succeed. The District Munsif dismissed the suit, referring to *Basavayya* v. *Subbarazu*(1), *Abboy Chetti* v. *Ramachandra Rau*(2) and *Gopaludu* v. *Venkataratnam*(3). Plaintiffs appealed to the District Court, which confirmed the decree of the Court below.

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Plaintiffs preferred this second appeal.

[528] *Kasturiranga Ayyangar*, for appellants Nos. 2 to 4.

Mr. *John Adam*, for respondents.

JUDGMENT.

We think the decrees of the Lower Courts should be set aside.

The plaintiffs purchased the assets of a Bank in liquidation, which has now been wound up. The assets would undoubtedly include the debts, and among other property the plaintiffs became assignees of certain promissory notes.

These notes were not endorsed until after the Bank had been wound up and had ceased to exist and the endorsement was held to be invalid.

The plaintiffs sued for the original debt due, in respect of which one of the promissory notes had been given, as well as upon the note.

Both Courts dismissed the plaintiffs' action, holding that they could not sue on the note, and the District Judge held further, on the authority of *Pothi Reddi* v. *Velayudasivan*(4), that they could not sue for the original debt. This case is in no way similar to, or governed by, *Pothi Reddi* v. *Velayudasivan*(4); for, in that case, the note, not being admissible in evidence, could not be looked at, and the main ground for the decision was that, in the absence of the writing containing the contract arrived at, injustice might be done. Nothing of the sort arises in this case, and we hold that the plaintiffs were entitled to sue for the original debt, even though they were not entitled to sue on the promissory note. We, therefore, reverse the decisions of the Courts below and remand the suit to the District Munsif for trial. Costs to abide and follow the event.

(1) 11 M. 294. (2) 17 M. 461. (3) 18 M. 175 (178). (4) 10 M. 94

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[529] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

BARCLAY (*Appellant*) *v.* PRESIDENT, MUNICIPAL COMMISSION, MADRAS (*Respondent*).* [20th and 29th November, 1899.]

City of Madras Municipal Act (Madras)—Act I of 1884, *Sections* 103, 110—*Profession tax—Liability of member of a firm to pay separate tax in respect of a Government appointment, his qualification for such appointment being the profession which he also carries on jointly with the firm—Meaning of "person" under the Act.*

A member of a firm of Attorneys-at-Law and Notaries Public, which paid the profession tax leviable under Section 103 of the City of Madras Municipal Act, 1884, also held the appointment of Government Solicitor. He practised no other profession or business than that exercised by his firm; and the duties of Government Solicitor could not be performed by any person other than a practising attorney. The municipality of Madras having demanded profession tax in respect of the appointment of Government Solicitor in addition to the tax paid by the firm of which the holder of the appointment was a member:

Held, that the tax was rightly levied.

THE facts and arguments are set out in the following judgment.

Mr. *K. Brown*, for appellant.

The respondent was not represented.

JUDGMENT.

This is a case stated for the decision of the High Court under Section 193 of Act I of 1884 (The City of Madras Municipal Act).

The facts out of which the reference has arisen and the questions which we have to determine are stated by the Magistrates in the following terms:—

"On the 6th September 1899, Mr. Ernest Barclay, Government "Solicitor, Madras, appealed to us against the decision of the Municipal "Commissioners of Madras, assessing him to profession tax in the sum "of Rs. 75 per annum in respect of his appointment of Government "Solicitor.

[530] The grounds of appeal were:—"(*a*) That the appellant's firm of "Barclay, Orr & David, Attorneys-at-Law and Notaries Public, pays the "Municipal Commissioners for the City of Madras the sum of Rs. 250 a "year, being the tax leviable under Section 103 of the City of Madras "Municipal Act, 1884, for the exercise in the city of Madras of the said "firm's profession of Attorneys-at-Law and Notaries Public and on the "14th July 1899 paid to the said Commissioners the sum of Rs. 125, being "the amount payable in respect of such tax for the half-year ending 30th "September 1899. (*b*) That the appellant does not exercise or carry on "any profession or business other than that carried on by his said firm. "(*c*) That even taking it, for the sake of argument, that because the "appellant performs the duties of Solicitor to the Government of "Madras, he, therefore, holds an appointment, in respect of which he is "liable to be taxed; Section 110 of the City of Madras Municipal Act I of

* Referred Case No. 15 of 1899, stated under Section 193, City of Madras Municipal Act I of 1884 (Madras), by B. H. Chester and Sultan Mohi-ud-in Saheb, Presidency Magistrates, Black Town, Madras, in Calendar Case No. 26599 of 1899, on Application No. 5723 of 1899.

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"1884 does not provide for the taxation of a person on his aggregate income "from a profession and also from an office or appointment. (*d*) That "the duties of Solicitor to the Government of Madras cannot be carried "on by any person other than a practising attorney. (*e*) That in carry-"ing on the duties of Solicitor to the Government of Madras, the "appellant does so in the exercise of the profession of an attor-"ney of the High Court, Madras, in respect of which the annual "sum of Rs. 250 is now paid by the appellant's firm to the said "Commissioners and that part of the monthly remuneration re-"ceived by the appellant for carrying on such duties and all costs "recovered by the appellant in carrying on such duties are received "by his said firm. (*f*) That the remuneration received by the appel-"lant in respect of work done by him as Government Solicitor is not "paid to the appellant in respect of any office or appointment in which "the appellant is employed independently of the profession of Attorneys "and Notaries Public carried on by his said firm. (*g*) That the salary "received by the appellant in respect of the work done by him for "Government does not amount to the monthly sum of Rs. 1,000 after "deducting therefrom the proportion of such salary received by his said firm. "(*h*) That the Government of Madras to which the appellant is Solicitor "is in the same position as any other client of the appellant, except that "instead of paying for each item of work done by the appellant for such "Government, such Government compounds [531] for all costs earned "by the appellant by payment of a monthly sum.

"The appeal was heard by us on the 20th September 1899. On the "27th idem, we made the following

"ORDER.—We are of opinion that the members of the firm of Messrs. "Barclay, Orr & David jointly constitute one 'person' [*vide* Section 3 (*c*) "of the Municipal Act] and that Mr. Ernest Barclay, the Government "Solicitor, is not the same 'person' as Messrs. Barclay, Orr & David. We "are, therefore, of opinion that Mr. Barclay in his capacity as Govern-"ment Solicitor is separately liable to be assessed to profession tax. As "his salary as Government Solicitor exceeds Rs. 1,000 and is less than "Rs. 2,000 a month, the profession tax of Rs. 75 per annum imposed on "him by the Madras Municipality is correct. The said amount is con-"firmed and Mr. Barclay's appeal is dismissed.

"On the 2nd October, Mr. Barclay applied to us to state a case for "the decision of the High Court. We, accordingly, under Section 193 of "Act I of 1884, beg to refer the following questions for decision:—

"(1) Whether the appellant is liable to be assessed under Section 103 "of the Act individually and separately as Solicitor to the Government of "Madras, in respect of the salary paid to him by such Government for "performing the duties of such office, seeing that the firm of Barclay, Orr "& David, of which the appellant is a member, pays to the Municipality "of Madras the maximum tax leviable in respect of the profession of "Attorneys-at-Law, that part of the work of the Government of Madras "sent to the appellant as Solicitor to Government is done by the said firm, "their assistants and clerks and that the said firm in consideration thereof "receives a portion of the salary paid to the appellant by the Government "of Madras and also receives all costs recovered in suits to which the "said Government is a successful party and in which costs are awarded "to the said Government.

"(2) Whether the said tax paid by the said firm of Barclay, Orr & "David, in respect of their profession of Attorneys-at-Law, includes the

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"profession tax which would be payable in respect of the appointment "of Solicitor to the Government of Madras, an appointment the duties of "which cannot be performed by any person other than an Attorney-at-Law.

[532] "(3) Whether, having regard to the provisions of Sections 103 "and 110 of the said Act, a person is liable to be assessed for profession "tax in respect of a profession exercised by him, as well as in respect of "an appointment held by him in the exercise of that profession."

We are of opinion that the decision of the Magistrates is right. Section 103 enacts that—"Every person who within the city exercises "any one or more of the arts, professions, trades or callings, or holds any "one or more of the offices or appointments, specified in Schedule A, shall "pay in respect thereof the sum specified in the said schedule as payable "by persons of the class in which such person is placed, subject to the "provisions of Section 110," and the latter section provides that "a "person who carries on more arts, professions, trades or callings, or holds "more offices or appointments than one, and comes under more than one "of the designations or classes mentioned in Schedule A, shall be charge- "able under any one of such designations or classes on his aggregate in- "come from all such sources." The firm of Messrs. Barclay, Orr & David is a "person" within the meaning of the Act (*Davies* v. *President of the Madras Municipal Commission*(1)) and is liable to be taxed as such on the business of the firm. Mr. Barclay is obviously not the same "person" as the firm.

He holds his appointment as Government Solicitor not by virtue of being a member of the firm, but personally and independently of the firm. If the latter should cease to exist to-morrow, Mr. Barclay would not thereby cease to hold his appointment as Government Solicitor. It is clear that if Mr. Barclay had no business save that of Government Solicitor he would be a "person" liable to taxation in respect of such appointment. The fact that he is also a member of a firm which is a different "person" cannot alter his liability, unless the Act so provides, but this it does not do. Section 110 deals only with one and the same "person" who carries on two or more arts, professions, &c., and no other provision of the Act is relied on.

Nor does the fact that Mr. Barclay employs the firm of Messrs. Barclay, Orr & David to do some of his work as Government Solicitor and pays them part of his salary for so doing make any difference, any more than it would if he employed and [533] paid any other firm of Solicitors to do part of the work. The contention of the learned counsel for Mr. Barclay, *viz.*:—that because the firm of which Mr. Barclay is a member pays a tax—even the maximum tax—for the business carried on by it, Mr. Barclay is not liable to taxation for the business carried on by him personally, is not supported by any provision in the Act, and to accept it would lead to great difficulties and anomalies. Can it, for instance, be contended that because a Banker or Savukar has a share in the Bank of Madras and that Bank pays a tax as such, the Banker or Savukar is exempt from taxation on his own business as a Banker or Savukar? Clearly we think that it cannot, and the reason is that the Banker or Savukar is not the same "person" as the Bank of Madras, though he is undoubtedly one of the individuals who collectively form that person.

Again, take the case of two mercantile firms in both of which one individual is a partner, it cannot be held that because one firm pays a tax

(1) 14 M. 140.

on its business, the other is exempt; nor can it be held that only one tax is to be paid with reference to the total profits of the two firms taken together. The only reasonable course is to assess each firm with reference to it own profits.

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Our answer to the first question proposed is in the affirmative and our answer to the second question is in the negative.

Our answer to the third question is that under Section 110 a person who exercises a profession and who holds an appointment in the exercise of that profession and who therefore comes under more than one of the designations or classes mentioned in Schedule A, is chargeable under any one of those designations or classes, on his aggregate income from all such sources. We may, however, point out that this question does not arise on the facts before us. As already stated, Mr. Barclay who holds the appointment is not the same "person" as the firm of Messrs. Barclay, Orr & David which exercises, and is taxed for, the profession of attorneys. It is not suggested that Mr. Barclay pays any separate tax for the exercise of his profession as an attorney.

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23 M. 534.

[534] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

GHANTAYYA (*Plaintiff*), *Appellant* v. PAPAYYA AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.** [30th November, 1899.]

Post-diem *interest—Amount secured by mortgage bond with interest repayable by three instalments—Whole amount to become due on failure to pay any instalment—No provision for* post-diem *interest.*

By a registered mortgage bond it was stipulated that the mortgaged debt secured thereby and interest thereon at one per cent. per annum should be repaid by three annual instalments, the first of which was to become due on a certain date; and it was provided that if default should be made in payment of any instalment, the whole amount secured by the bond should at once become payable. The bond contained no provision for the payment of *post-diem* interest. Default having been made, the mortgagee sued for principal and for *post-diem* interest.

Held, that the covenant must be construed to be one for the payment of interest as long as the principal sum was improperly withheld.

Moti Singh v. *Ramohari Singh*, (24 C. 699), considered.

[F., 2 Ind. Cas. 850; R., 11 M.L.J. 183.]

SUIT to recover money due on a registered mortgage-bond. The bond (which was filed as Exhibit A in the suit) stipulated for repayment of the debt due thereunder together with interest thereon at one per cent. per annum in three yearly instalments, with a condition that if default should be made in the payment of any instalment, the whole amount due under the bond should become at once repayable. No provision was made for *post-diem* interest. Default was made in payment of the first instalment, on its due date, namely, 6th January 1890. Plaintiff having filed this suit to recover the amount alleged that first defendant had executed a sale-deed of portion of the mortgaged property in his favour in part

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* Second Appeal No. 1621 of 1898, against the decree of M. D. Bell, District Judge of Godavari, in Appeal Suit No. 95 of 1898, modifying the decree of D. Venkoba Rao, District Munsif of Tanuku, in Original Suit No. 542 of 1896.

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satisfaction of the first and second instalments, and claimed to recover the balance by sale of the mortgaged property, which was in the hands of the second defendant. The suit was defended by second defendant alone, who contended that under the deed plaintiff [535] was entitled to claim interest only up to the due date of the first instalment, that plaintiff had no right to claim interest after that date, and that the claim for interest in the shape of damages was time-barred, inasmuch as the suit had been brought more than six years after the failure to pay the first instalment. The District Munsif upheld this contention, so far as second defendant was concerned, but he held that *post-diem* interest was recoverable as against first defendant's interest in the mortgaged land. The District Judge, on appeal, held that the claim for *post-diem* interest in the shape of damages was barred by limitation and could not be enforced against either defendant.

Plaintiff preferred this second appeal.

Ayya Ayyar, for appellant.

Sundara Ayyar, for respondent No. 2.

JUDGMENTS.

SUBRAHMANIA AYYAR, J.—The provisions of Exhibit A, whereby the mortgagor undertook to pay interest on the mortgage amount, do not in express terms lay down that *post-diem* interest was to be paid. On the other hand, there is absolutely nothing in the other provisions of the instrument which points to the view that *post-diem* interest was not intended to be paid.

The contention on behalf of the respondent that in such circumstances no *post-diem* interest should be taken to be due implies that the dates fixed for the payment of the several instalments, specified in the instrument, were fixed not only for preventing the mortgagee from demanding payment before the arrival of those dates, but also for marking the limit of time up to which alone interest was payable. It is obvious, however, that the object of fixing the dates referred to was merely the former, and that there was no necessary connection between the dates and the question of liability for interest; the determination of that question being entirely dependent upon the language of the provisions properly relating to it. Now to hold that a promise to pay interest in the general words contained in the instrument before us is a promise to pay up to the due date only would be to say that a default in the due performance of the contract was to result in an advantage to the party making the default and a disadvantage to him who was not in fault. This is, of course, not what parties contemplate when they contract with each other. Certainly, it is more reasonable to hold that a promise to pay interest in circumstances like the present is a promise to pay interest as long as the principal sum is improperly withheld. This is not, as urged for [536] the respondent, tantamount to raising a legal presumption in the matter. It would be more correctly described as the adoption of a rule of construction, *i.e.*, a rule as Professor Thayer expresses it "designed to aid in interpreting words and conduct." Now, as tersely put by Hawkins, * in a passage quoted by the learned author just referred to, "a rule of construction may always be reduced to the following form :—Certain words "and expressions which may mean either X or Y shall, *prima facie*, be "taken to mean X. A rule of construction always contains the saving

* Hawkins on Wills' Preface, p. iii.

"clause 'unless a contrary intention appear' . . . . though some "rules are much stronger than others, and require a greater force of in-"tention in the context to control them." ('Preliminary Treatise on Evidence at the Common Law,' 316 n; see also 'Pollock on Contracts,' 6th edition, 242 and 243). And, assuming that an undertaking expressed in general words, as in this case, were capable of being taken in more senses than one, still, having regard to the ordinary intentions of persons entering into such transactions, on which the Judicial Committee lay stress in *Mathura Das* v. *Raja Narindar Bahadur Pal* (1) the *prima facie* meaning of the words should be held to be that interest shall be payable until the actual liquidation of the principal. With reference to *Moti Singh* v. *Ramohari Singh*(2) cited for the respondents, I prefer the view taken by Trevelyan and Banerjee, JJ., which is substantially the same as that adopted in *Pedda Subbaraya Chetti* v. *Ganga Razulangaru* (3); see also *Sarala Dasi* v. *Jogendra Narayan Basu* (4) where Maclean, C.J., with the concurrence of Banerjee, J., observes "and in a simple mortgage trans-"action it is not an unusual intention, that if the principal money be not "paid by the stipulated time interest should continue to run and run at "the stipulated rate."

I would, therefore, allow the appeal and modify the decree of the Lower Court by the award of interest at the contract rate up to the expiry of the time granted to the mortgagor for the payment of the amount due by him. As the Lower Courts followed rulings of this Court which proceeded on an erroneous view of the matter there will be no order as to costs of this appeal.

MOORE, J.—I concur.

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23 M. 537 = 10 M.L.J. 106.

[537] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

NARAYANA AYYAR AND ANOTHER (*Plaintiffs Nos.* 1 *and* 2), *Appellants*, *v.* KUMARASAMI MUDALIAR AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents*.* [23rd November, and 1st December, 1899.]

Civil Procedure Code—Act XIV of 1882, *Sections* 15, 539—*Religious Endowments Act —Act XX of* 1863, *Sections* 14, 15, 18—*Suit by a general trustee and a worshipper for removal of trustees.*

A suit was filed in a District Court by the general trustee of a temple and a worshipper therein praying that certain trustees might be declared incompetent and removed, that others might be appointed in their place, that the properties belonging to the endowments of the temple might be vested in them, and that a scheme might be settled for the management of the trust. Leave to file the suit had been obtained under the Religious Endowments Act, 1863, and under Section 539 of the Code of Civil Procedure:

Held, that the suit was maintainable.

SUIT for the removal of the trustees of a temple. First plaintiff was the general trustee and second plaintiff the manager of the Sri Kailasanatha Swami temple at Srivaikuntam in the Tinnevelly District. Defendants were trustees of certain lands which had been granted to them for

* Civil Miscellaneous Appeal No. 69 of 1899 against the order of J. W. F. Dumergue, District Judge of Tinnevelly, in original suit No. 5 of 1896.

(1) 23 I.A. 138 (145) = 19 A. 39.
(2) 24 C. 699.
(3) 20 M. 149.
(4) 25 C. 246 (248).

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the performance of certain services in the temple. Plaintiffs sued as trustee and manager and also as worshippers in the said temple, and as such having a direct interest in the proper management of its affairs and in the due performance of all the services in connection therewith; they prayed for a declaration that defendants were incompetent to hold office as such trustees, that they might be removed from such office, and from the management of the properties belonging to the endowment; that plaintiffs or some other persons might be appointed in their stead, and that a scheme of management might be settled. The suit purported to be brought under Sections 14 and 18 of the Religious Endowments Act, 1863. Leave had been obtained under that Act, as well as under Section 539 of the Code of Civil Procedure. The District Judge, being of opinion that the suit was [538] not maintainable either under the Religious Endowments Act or under Section 539 of the Code of Civil Procedure, returned the plaint with the following remarks :—" This suit involves the removal of the defendants from the trusteeship, and in *Rangasami Naickan* v. *Varadappa Naickan* (1), the Full Bench of the Madras High Court decided that a suit to remove a trustee will not lie under Section 539 of the Civil Procedure Code. In that case the trust was of a charitable nature, but the decision was followed in *Nellaiyappa Pillai* v. *Thangama Nachiyar* (2) with regard to the religious trust. So far, therefore, as Section 539, Civil Procedure Code, is concerned, there seems to be no doubt that the suit cannot proceed. There still remains, however, the question whether the suit can be maintained under Act XX of 1863. I have not been able to find, and, I have not been referred to, any direct authority in the cases decided by the Madras High Court, but I think the principle enunciated in *Nellaiyappa Pillai* v. *Thangama Nachiyar* (2) with reference to Section 539, Civil Procedure Code, applies with equal force to Act XX of 1863. In that case it was pointed out that the general trustee of a temple, such as the first plaintiff is, in this suit, would have been entitled, even before Section 539, Civil Procedure Code, was enacted, to resort to the ordinary Courts to enforce the obligations of special trustees and to obtain all appropriate relief for the protection of the interests of the temple and to sue for the removal of such trustees and the appointment of fresh trustees, and that, if Section 539, Civil Procedure Code, were held to apply to the cases of a general trustee, the rights which he had prior to the enactment, would be seriously restricted. The same argument, as it seems to me, must prevail against a suit proposed under Act XX of 1863 by a general trustee and manager of a temple against a special trustee connected with the temple and the view, I take, is supported by the decision of the Calcutta High Court in *Pudmalav Roy* v. *Ram Gopal Chatterjee* (3). Therein it was held (at page 337) that Section 14 of Act XX of 1863 is an enabling section, intended to allow suits to be brought by any person interested in an endowment against the members of the committee of management themselves or any of those who are engaged in managing or superintending the affairs [539] of the endowment, but it is not intended to take from the committee the power which would be inherent in them of their own authority to bring a suit in the ordinary Courts against the manager in respect of moneys misappropriated. No doubt the removal of trustees is a remedy provided by Section 14 of Act XX of 1863, while no such remedy is provided in Section 539, Civil Procedure Code, but for the reasons I have given,

(1) 17 M. 462. (2) 21 M. 406. (3) 11 C.L.R. 333.

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I am of opinion that Section 14 of Act XX of 1863 does not authorize persons in the position of the plaintiffs to maintain such a suit as the present one. The plaint must, therefore, be returned, and, under the circumstances, the parties must bear their own costs."

Against that order the plaintiffs preferred this appeal.

Ramakrishna Ayyar, for appellants.

Sivasami Ayyar and *K. Srinivasa Ayyangar*, for respondents.

JUDGMENT.

We do not think that the order of the District Judge can be sustained.

This is a suit by two persons, one of whom is the general trustee of the temple and the other merely a worshipper, instituted after leave obtained under Section 18, Act XX of 1863, and Section 539, Civil Procedure Code.

Even assuming that the first plaintiff, as general trustee of the temple, was at liberty to sue for the removal of the defendants in the ordinary Courts, there can be no doubt he is not precluded from suing under Section 14, Act XX of 1863. This is clear from the very wide language of Section 15 of that Act, which is framed so as to include not only persons having a pecuniary or direct interest in the institution, but also persons having interests of a fair inferior character. If the first plaintiff were the sole plaintiff, it would be right that he should comply with the rule laid down in Section 15, Civil Procedure Code, and bring his suit in the Subordinate Judge's Court as the Court of the lowest grade competent to try it; but the second plaintiff, being a mere worshipper, could not sue in the Subordinate Judge's Court. It is only the provisions of Sections 14 and 15 of Act XX of 1863 which give him a right to maintain a suit for the removal of a trustee, and such a suit by a worshipper lies only in the District Court. It is competent to the two plaintiffs to join in a suit like the present. It follows that the rule in Section 15, Civil Procedure Code cannot be held to apply so as to prevent the first plaintiff from joining with the second plaintiff in instituting this suit in the [540] District Court. Nor do we think that the plaintiffs are precluded from claiming in this suit relief by way of appointing a fresh trustee, vesting the property in him, and settling a scheme, because these reliefs are not claimable under Act XX of 1863 but only in a suit instituted under Section 539, Civil Procedure Code. If the removal of the defendants in the present suit should be ordered, then, and then only, it would become necessary to consider the claim to these reliefs, at least so far as the first two of them are concerned, and we are unable to see why the plaintiffs should not be at liberty to ask the Court for such reliefs at once, instead of being required to institute a separate suit. To hold otherwise would, we think, be unreasonable, having regard to the fact that the protection of the interests of the institution is the purpose for which both Section 539, Civil Procedure Code, and Act XX of 1863, were passed.

We must, therefore, reverse the order of the District Judge, and direct him to receive the plaint and proceed to dispose of the suit according to law. Costs will abide and follow the result.

The memorandum of objections is dismissed.

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DEC. 14.

APPEL-
LATE
CRIMINAL.

23 M. 540=
2 Weir 222.

23 M. 540=2 Weir. 222.

APPELLATE CRIMINAL.

Before Sir Charles Arnold White, Chief Justice and Mr. Justice Benson.

KANDASAMI CHETTI (*Complainant*), *Petitioner v.* SOLI GOUNDAN (*Accused No.* 2), (*Counter-petitioner*).* [13th and 14th December, 1899.]

Criminal Procedure Code—Act V *of* 1898, *Section* 197—*Charge against village magistrate for alleged offence while acting not in a judicial capacity—Sanction.*

A village magistrate having been apprised of a disturbance in his village forcibly separated the combatants, one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the Sub-Magistrate [541] upon his file without any previous sanction of the Government or other authority mentioned in Section 197 of the Code of Criminal Procedure. The village magistrate raised the objection that the prosecution could not legally be proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary and kept the case on his file and commenced to enquire into it. The village magistrate presented a petition to the District Magistrate raising the same ground of objection, whereupon the District Magistrate quashed the whole of the proceedings, holding that the Sub-Magistrate had no jurisdiction to try the case against a village officer without sanction having been first obtained ;

Held, that sanction was not necessary under Section 197 of the Code of Criminal Procedure. The village magistrate, while preventing an offence, was not acting in the capacity of a Judge, or a public servant not removable from office without the sanction of Government, and therefore the section referred to had no application ;

Held, also, that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction.

Semble, that a village magistrate exercising jurisdiction, and trying an offender under Regulation XI of 1816 is a Judge within the meaning of Section 197 of the Code of Criminal Procedure and Section 19 of the Indian Penal Code.

[R., 4 Ind. Cas. 1056=6 M.L.T. 128 ; D., 32 M. 255=9 Cr. L.J. 89=3 Ind. Cas. 387 =4 M.L.T. 473.]

PETITIONER had filed a complaint against one Soli Goundan, the Village Magistrate of kasba Udamalpet, and others, on the ground that they had caused hurt to him. He said that while he and others were having an altercation the village magistrate arrived upon the scene and asked them to desist, and though they obeyed, he hit petitioner on the shoulder and told others to do the same. The Stationary Sub-Magistrate of Udamalpet took the complaint upon his file. Objection was then made by the village magistrate that the charge could not be prosecuted against him until sanction should first be obtained under Section 197 of the Code of Criminal Procedure. The Stationary Sub-Magistrate held that sanction was not necessary. The village magistrate then presented a petition to the District Magistrate under Sections 435 and 528 of the Code of Criminal Procedure, in which he admitted that he had attempted to separate the petitioner from another man, while a disturbance was going on, and in doing so pulled him by his hair. He further contended that as village magistrate it was his duty to so interfere and quell a disturbance. He claimed that the Stationary Sub-Magistrate was wrong in holding that

* Criminal Revision Case No. 323 of 1899, under Criminal Procedure Code, Sections 435 and 439, praying the High Court, to revise the order of C. H. Mounsey, Acting District Magistrate of Coimbatore, dated 26th July 1899, quashing the proceedings of the Stationary Sub-Magistrate of Udamalpet in regard to accused No. 2 in Calendar Case No. 78 of 1899 on his file.

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sanction was not necessary under Section 197 of the Code of Criminal Procedure and concluded his petition to the District Magistrate as follows :—

"That your petitioner respectfully ventures to point out that Section 197, Code of Criminal Procedure, is one meant specially for [542] the benefit and protection of public officials, who, in the discharge of their public duties, cannot always please all parties, and that the object of such section is to prevent frivolous and vexatious complaints against public servants in the discharge of their duties, and that some special enquiry must be held before subjecting public servants to criminal prosecutions for acts done in the discharge of their duties. That the officer to whom is delegated the power of deciding whether or not to sanction the prosecution of village magistrates, under Section 197, Code of Criminal Procedure, is the District Magistrate, and it is therefore that the petitioner comes to this Court. That ordinarily, a departmental enquiry is held and a report made, so that the Court may have materials to decide whether any and what offences have been committed, and if a prosecution is desirable, or called for. That in this case no such enquiry has been held, and your petitioner has been gravely prejudiced thereby. . . . . Your petitioner, therefore, respectfully prays that under Section 435, Code of Criminal Procedure, the records of the case may be called for, and under Section 528, Code of Criminal Procedure, the case may be withdrawn to the file of this Court, and if this Court is of opinion that the prosecution of the petitioner should be proceeded with, then that a departmental enquiry should be held, before determining whether sanction should be accorded under Section 197, Code of Criminal Procedure, and that in the meantime proceedings may be stayed."

On this petition the District Magistrate passed the following order quashing the Stationary Sub-Magistrate's proceedings :—"The Council (Mr. C. V. Narasayya) for petitioner asked that the records in calendar case No. 78 of 1899 on the file of the Stationary Sub-Magistrate of Udamalpet be sent for that it might be seen if the trial of petitioner was a legal one in that he was being prosecuted for acts done in his official capacity. Petitioner states that he interfered as village magistrate to prevent a disturbance, seizing a certain man by his top-knot to do so. The man so seized charged petitioner with causing hurt. The Stationary Sub-Magistrate of Udamalpat took cognizance of the case, although a petition was put in before the Sub-Magistrate in which petitioner claimed that he acted as a village magistrate, and therefore that sanction was necessary before he could be tried. The Sub-Magistrate on this petition passed an order saying :—"The question is whether in preventing or repressing crime he can use force . . . . [543] in his capacity of a village magistrate.' The Village Officers' Code says :— "It is their duty (village magistrates') to strive by all means to prevent the commission of offences." This is what the petitioner claims he did. The Sub-Magistrate goes on to say 'if he found the rioting imminent, he ought to have reported to the authorities.' Considering that it is alleged a breach of the peace was going on, this reasoning is futile. For this reason the Sub-Magistrate thinks he did not act in his magisterial capacity. This is not a sufficient reason to take it for granted that petitioner's objection is not a *bona fide* one, when the Sub-Magistrate himself states that the question was one of what powers the petitioner could use in 'preventing or repressing crime' which assumes that he did act

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to prevent or repress crime. The Sub-Magistrate had no jurisdiction, he is trying a case of whether petitioner exceeded his powers as village magistrate, for which he has no sanction. All his proceedings in regard to petitioner are quashed."

Against the latter order, the complainant preferred this petition to the High Court.

Hon. Mr. *E. Norton* and *Kasturiranga Ayyangar*, for complainant.

Mr. *J. G. Smith* (for Acting Public Prosecutor,) for the Crown.

Sivasami Ayyar, for accused No. 2.

JUDGMENT.

The order of the District Magistrate quashing the proceedings of the Sub-Magistrate was clearly passed without jurisdiction. There is no provision of law which gives a District Magistrate power to interfere in this way. His proper course was to have reported the case for the orders of the High Court, if interference was considered necessary. This is indeed conceded, but it is urged on behalf of the accused that the High Court, as a Court of revision, should, while setting aside the District Magistrate's order, also quash the proceedings of the Sub-Magistrate as illegal for want of the necessary sanction under Section 197, Code of Criminal Procedure. We might, no doubt, take this course if the proceedings of the Sub-Magistrate were illegal, but we do not think that they were so.

The village magistrate was neither a Judge, nor a public servant not removeable from office without the sanction of Government. It may be that a village magistrate exercising jurisdiction and trying an offender under the Regulation (XI of 1816) is a Judge within the meaning of Section 197, Code of Criminal [544] Procedure, and Section 19, Indian Penal Code; but in the present case he was, it is alleged, preventing an offence, not trying an offender and illustration (*d*) to Section 19, Indian Penal Code, makes it clear that in such capacity he is not a Judge.

Section 197, Code of Criminal Procedure, therefore, has no application, and it is not suggested that the village magistrate is otherwise protected from prosecution without sanction.

We, therefore, set aside so much of the District Magistrate's order as purports to quash the proceedings of the Sub-Magistrate. The latter should proceed with the case according to law.

23 M. 544=1 Weir 112.

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23 M. 544= 1 Weir 112.

APPELLATE CRIMINAL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

QUEEN-EMPRESS *v.* SANKARALINGA KONE AND ANOTHER.* [2nd February, 1900.]

Criminal Procedure Code—Act V of 1898, *Section* 161—*Examination of witnesses by the Police—Legal obligation to speak the truth—Refusal to answer questions—Liability to punishment under Sections* 176, 179, *and* 187 *of the Indian Penal Code.*

A refusal to answer questions asked by a Police officer under Section 161 of the Code of Criminal Procedure is not punishable under Sections 176, 179, and 187 of the Indian Penal Code.

[545] APPEAL against an order of discharge. A complaint was made against two persons to the effect that the Inspector of Police had been to investigate a case of cattle theft and questioned the accused about the occurrence, and that they had replied that they were not willing to give any statement before the Inspector as they had sent a petition to the joint Magistrate to try the case himself. It was contended that the accused had committed an offence punishable under Section 179, Indian Penal Code, of refusing to answer a public servant authorized to question. The Magistrate by whom the case was tried, after taking evidence, said:—"It is clear that the two accused persons before the Court refused to answer the questions put to them by the Police Inspector. Their action in refusing to answer the questions is very improper and calls for some punishment. The wording of Section 179, Indian Penal Code, however, does not permit me to punish the accused persons. The section runs thus:—(he quoted it). Under Section 161, sub-Section (2), Criminal Procedure Code (Act V of 1898), such persons are bound to answer all questions put to them by a Police officer. They are not legally bound to answer 'truly' such questions. The Procedure Code of 1882 contained such a provision, which has been explicitly omitted in the new Code of 1898. When the Procedure Code was thus amended no corresponding amendment was made in Section 179, Indian Penal Code. It has, therefore, to be concluded that a man cannot be punished under Section 179, Indian Penal Code, unless he be legally bound to speak the truth. The

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* Criminal Appeal No. 723 of 1899 under Criminal Procedure Code, Section 417, against the judgment of acquittal passed on the accused in Calendar Case No. 247 of 1899 by the Stationary Sub-Magistrate of Srivaikuntam.

In *Queen-Empress* v. *Appigadu*, (Criminal Revision Case No. 199 of 1899), relating to the construction of the same section, Sir SUBRAHMANIA AYYAR, OFFG. C. J. and O'FARRELL., J., on 27th July 1899, passed the following ORDER:—"The accused was charged in the alternative with making a false statement to a Police officer investigating under Section 161, Criminal Procedure Code, or with making a false statement before the Magistrate on solemn affirmation, the charge being based on the irreconcilability of the two statements. Under the present Criminal Procedure Code, section 161 (2), which reverts to the language of the Code of 1872, a person is no longer bound by law to tell the truth when questioned by a Police officer: (see *Empress* v. *Kassim Khan* (8 C.L.R., 300; I.L.R. 7 Calc., 121). A conviction in the alternative cannot therefore, be sustained nor can we consider the suggestion of the Deputy Magistrate that he intended to find that the statement before the Second-class Magistrate was false, looking to the way in which the charge was framed. We set aside the conviction and sentence and order the fine, if levied, to be refunded."

23 M. 544 N.=1 Weir 166 [R. 23 M. 544.]

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prosecution has not shown me any other provision of law under which the accused can be dealt with. In these circumstances I consider that no case has been made out against the accused, and discharge them under Section 245, Criminal Procedure Code."

Against this order of discharge an appeal was preferred by the Public Prosecutor.

The Acting Public Prosecutor (*C. Sankaran Nayar*), for the Crown.

The accused were not represented.

JUDGMENT.

The question in this case is whether a person who is examined under Section 161 of the Code of Criminal Procedure by a Police officer making an investigation under Chapter XIV of the Code, and who refuses to answer the questions **[546]** put to him, can be punished under Section 179 of the Penal Code as a person "legally bound to state the truth." The Code of 1882 contained the word "truly" after the word "questions" in sub-Section (2) of Section 161. This word has been omitted in the Code of 1898. Section 118 of the Code of 1872, which corresponds to Section 161 of the present Code, did not contain the word "truly." We are of opinion that under the law as it now stands, a person who is examined under Section 161 of the Code of Criminal Procedure is not "legally bound to state the truth." The legal obligation to speak the truth when so examined no doubt existed under the Act of 1882; but the effect of the omission of the word "truly" has been to do away with this legal obligation.

In the case of *Empress* v. *Kassim Khan* (1), a Full Bench of the Calcutta High Court decided that the words "shall be bound to answer all questions" in Section 119 of the Code of 1872 did not constitute an "express provision of the law to state the truth" within the meaning of Section 191 of the Indian Penal Code. The reasoning upon which this decision is based is, in our judgment, clearly applicable to the present case. We do not think that a person who refuses to answer when examined under Section 161 of the Criminal Procedure Code can be said to commit an offence either under Section 176 (see the case of *The Queen* v. *Luckhee Singh* (2)) or Section 187 of the Indian Penal Code.

The appeal is dismissed.

(1) 8 C.L.R., 300 = 7 C. 121.

(2) 12 W.R. (Cr. R.) 23.

23 M. 547 (F.B.) = 10 M.L.J. 329.

1900 OCT. 15 — FULL BENCH. — 23 M. 547 (F.B.) = 10 M.L.J. 329.

[547] APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar, Mr. Justice Davies and Mr. Justice Benson.

SOUNDARAM AYYAR AND ANOTHER (*Plaintiffs*), *Appellants v.* SENNIA NAICKEN AND OTHERS (*Defendants Nos.* 3 *to* 5, 1 *and* 2), *Respondents.** [11th April, 21st and 27th September, and 15th October, 1900.]

Civil Procedure Code—Act XIV of 1882, Section 586—" Suit of the nature cognizable in Courts of Small Causes "—Suit for rent other than house-rent—Second appeal.

A suit for the recovery of rent other than house-rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of Section 586 of the Code of Civil Procedure, and no second appeal lies from a decision therein when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

So *held* (SUBRAHMANIA AYYAR, J., dissenting).

Vedachala Mudali v. *Ramasami Raja*, (22 M. 229), overruled.

[F., 1 L.B.R. 69; R., 2 L.B.R. 47; D., 1 L.B.R. 335.]

SUIT for rent other than house rent. The District Munsif decreed for plaintiffs. Defendants Nos. 3 to 5 appealed to the District Judge who allowed the appeal and dismissed the plaintiffs' suit.

Plaintiffs preferred this second appeal.

S. Subrahmania Ayyar, for appellants.

Desikachariar, for respondents Nos. 1 to 3.

The case first coming on for hearing before SHEPHARD and DAVIES, JJ., their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH.

As we are both of opinion that the ruling in *Vedachala Mudali* v. *Ramasami Raja* (1) requires re-consideration, we refer to a Full Bench the question whether a suit for rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of Section 586 of the Code of Civil Procedure, it being admitted that the notification required by Clause 8 of the second schedule of the Provincial Small Cause Courts Act, (Act IX of 1887) has been issued for all the Courts.

[548] The case then came on for hearing before a Full Bench, consisting of Sir ARNOLD WHITE, C.J., BENSON and MOORE, JJ.

Sir *V. Bhashyam Ayyangar* and *S. Subramania Ayyar*, for appellants.

Desikacharair, for respondents Nos. 1 to 3.

Sir *V. Bhashyam Ayyangar.*—I submit that a second appeal lies. The simple question is—What is the true meaning of the words "of the nature cognizable in Courts of Small Causes"? By the Provincial Small Cause Courts Act, Section 15, it is enacted that " (1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as

* Second Appeal, No. 476 of 1899, against the decree of S. Russell, District Judge of Madura, in appeal suit No. 192 of 1898, reversing the decree of V. Narayansami Ayyar, District Munsif of Madura, in original suit No. 36 of 1897.

(1) 22 M. 229.

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suits excepted from the cognizance of a Court of Small Causes; (2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes . . . ." By Schedule II, Clause 8, "a suit for the recovery of rent, other than house-rent, is excepted from the cognizance of a Court of Small Causes, unless the Judge of the Court of Small Causes has been expressly invested by the local Government with authority to exercise jurisdiction with respect thereto." The effect of these sections is that the Legislature has declared primarily that a suit for rent is not cognizable in a Court of Small Causes. But the local Government may declare a Judge to be expressly vested with authority to try to such suits. By Section 23 of the same Act, a Court has a discretion to return a plaint,—which was done in *Muttukaruppan* v. *Sellan* (1), where it was held that a suit of a nature cognizable by a Court of Small Causes does not cease to be so within the meaning of the Code of Civil Procedure, Section 586, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts Act, Section 23, on the ground that the suit involved questions of title. The decision in *Manappa Mudali* v. *McCarthy* (2) was prior to the Provincial Small Cause Courts Act. *Muttukaruppan* v. *Sellan* (1) was subsequent to it, and the view taken there was also taken in *Kali Krishna Tagore* v. *Izzatannissa Khatun* (3). Both cases were converse to the present one. *Ramachandra Raghunath* v. *Abaji Rastya* (4) decided that a suit for rent was not of a nature cognizable by a Court of Small **[549]** Causes, and that a second appeal lay, but that was under Act XI of 1865, Section 6, Clause 4. There is no corresponding enactment in Madras. Under it, a suit could, in Bombay, be tried by a Revenue officer. But Section 27 of Act XXIII of 1861, there referred to, corresponds with Section 586 of the present Code of Civil Procedure. I submit that the words "a suit of the nature cognizable by Courts of Small Causes" means a suit properly so cognizable by virtue of the Act, and does not include a suit which the local Government has empowered a Court of Small Causes to try.

[MOORE, J., remarked that when *Vedachala Mudali* v. *Ramasami Raja* (5) was considered, it was admitted that the power to try suits for rent had not been extended to all District Judges.] That is correct. The Legislature appears to have regarded suits for rent as having a special importance and it will be detrimental if the right of second appeal be taken away.

Desikachariar, for respondents Nos. 1 to 3.—The Legislature would not have provided for rent suits being brought in the Revenue Courts in Bombay if it had attached any special importance to them. There being no Revenue Courts in Madras in which such suits may be brought the local Government is empowered to give jurisdiction over such suits in Madras, the Provincial Small Cause Courts Act being a general Act applying to the whole of India. In the report of the Select Committee on the amendment of the Provincial Small Cause Courts Act, it is said: "By our amendment of the Schedule we have placed the following suits within the cognizance of Provincial Small Cause Courts, namely, . . .

(1) 15 M. 98. (2) 3 M. 192. (3) 24 C. 557.
(4) 6 B. H.C.R. (A.C.J.) 12. (5) 22 M. 229.

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(b) suits for the recovery of rent of agricultural land in certain circumstances." He referred to *Ramachandra Raghunath* v. *Abaji Rastya*(1), *Manappa Mudali* v. *McCarthy* (2), and *Secretary of State for India in Council* v. *Fischer* (3).

S. Subrahmania Ayyar, in reply.

The case came on for re-hearing on 21st September 1900, before a Court constituted as above.

Sir *V. Bhashyam Ayyangar*, for appellants.—(After dealing with the subject-matter of his previous argument).—Section 586 applies to the whole of India, and the policy of the Legislature [550] has been to describe in a compendious manner such suits as it does not consider sufficiently important to be entitled to a second appeal. If nothing be found to the contrary, it must be taken to be a general provision and not local or provincial, and its interpretation should not depend upon any power that may or may not be given to any local Government to invest Judges with jurisdiction to try suits of another nature. In that view it is immaterial whether Small Cause Courts are established or not, and Section 586 is independent of whether they are established or not. The sole meaning of the section is to shortly describe a class of cases which the Legislature deals with and it does not depend on whether there are Small Cause Courts in fact or not. It is a mere mode of description. The section in Act IX of 1887 is the definition and it is immaterial whether the local Government have in fact established Small Cause Courts under Madras Civil Courts Act of 1873, Section 28, or not, or whether Judges of Small Cause Courts have been endowed with further powers or not. The word "nature" in Section 586 means "nature generally." The pecuniary value of a suit does not determine its nature. A suit might be of the requisite "nature," though excluded by reason of the value of its subject-matter. The scheme of the Provincial Small Cause Courts Act is to be seen from, *e.g.*, Sections 4 and 5. No Courts have been established under this Act. Section 16 has the words "a suit cognizable" —not a suit of the "nature cognizable." Under Section 23, the Judge may decline jurisdiction. Section 32 is the section which really applies the enactment to Ordinary Courts invested by some other law with Small Cause Courts jurisdiction. That has been done by the Madras Civil Courts Act of 1873, Section 28. So the Provincial Courts of Small Causes Act need not have been brought into operation. Assuming it not to have been so brought into operation, Section 586 would still have barred the suits to which it applies. So it is not a question as to whether a class of suits can be tried by one Court or another. It is only that a certain class of suits are deemed to be of insufficient importance to justify the right of second appeal being accorded them: the question who can try them is immaterial. Suppose the Small Cause Court jurisdiction to have been established by local Government in a single place, such as Bellary, or in a cantonment, the result would be that Section 586 would apply to second appeals only from Bellary, and to no others in the Presidency. The view [551] expressed in *Muttukaruppan* v. *Sellan* (4) has been taken by other Courts in, *e.g.*, *Kali Krishna Tagore* v. *Izzatannissa Khatun* (5) and also in Bombay. "Suits of a nature," &c., means suits that are primarily so cognizable and not suits that are made so by the exercise of a power conferred by the Act.

(1) 6 B.H.C.R. (A.C.J.) 12. (2) 3 M. 192.
(3) Second Appeal No. 598 of 1890 (unreported).
(4) 15 M. 98. (5) 24 C. 557.

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The meaning is that which is given by the Act alone and not by the Act and something else in addition. It is a question whether the power of Government should not be exercised with reference to a Judge in person and not to his Court. See Clause 8 of Schedule II, Provincial Small Cause Courts Act. Section 35 distinguishes between a Court of Small Causes and a Court which has been vested with the powers of Courts of Small Causes. Section 28 of the Madras Civil Courts Act of 1873 enables the local Government to invest any District or Subordinate Judge with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to the amount of five hundred rupees. My contention is that "nature" means "unalterable nature." [SHEPHARD, J., referred to Section 32 of the Provincial Small Cause Courts Act and the way in which the word "nature" is used there.] *Ramchandra Raghunath* v. *Abaji Rastya* (1) would not be applicable in Madras, because the proviso could not apply here, as Revenue officers cannot try suits for rent. Moreover, Section 586 refers to suits of a nature cognizable by any Courts of Small Causes, not by particular Courts; that is, by every Court of Small Causes. Whether they exercise that power or not is immaterial. In any case it is questionable whether the so-called rent paid by many raiyats on zamindaris is rent at all or may come under exception (13) of Schedule II. In *Assanulla Khan Bahadur* v. *Tirthabashini* (2), it was held, (upon the objection of the respondents that the suit being one of the nature cognizable by a Court of Small Causes, and valued at less than Rs. 500, no second appeal would lie under Section 586 of the Code of Civil Procedure), that as the consideration for the payment of chowkidari tax is the occupation or the holding of the patni tenure, and as the payment has to be made periodically to the zamindar by the patnidar, and the amount agreed to be paid is lawfully payable, it comes within the definition of rent in the Bengal Tenancy Act, and that, [552] therefore, a second appeal lies. In the Madras Presidency all Munsifs and all Subordinate Judges have been invested with power to try suits of small cause nature, but not all have been given power to try suits for rent. *Musa Miya Saheb* v. *Sayad Gulam Husein Mahamad* (3), where it was held that no second appeal lies, is a very strong authority illustrating my contention that the meaning of Section 586 does not depend on whether there is a Small Cause Court or not, or whether or not it may try a particular case. That case was held to be cognizable by a Small Cause Court though the jurisdiction had been expressly taken away—which shows that the construction of Section 586 does not depend on whether a Small Cause Court can, in fact, try the suit but rather upon its nature. The decision in *Watson* v. *Sreekristo Bhumick* (4) depends on a special provision of the Bengal Tenancy Act, Section 153, which provides that no second appeal is to lie where there is no dispute as to the amount of the rent. It was contended that no second appeal lay, but it was held that that Section did not apply as the amount of rent was in dispute; and though the amount in dispute was less than Rs. 100, and notwithstanding the provisions of Section 153 of the Bengal Tenancy Act, it was held that a second appeal lay. *Ranga Roy* v. *Holloway* (5) impliedly recognizes that in a suit for rent a second appeal lies. See also *Khedu Mahto* v. *Budhun Mahto* (6) per Maclean, C.J., at page 510. In *Uma Churn Mandal* v. *Bijari Bewah* (7), the question was whether the rent there in question was "house-rent"

(1) 6 B.H.C.R. (A.C.J.) 12. (2) 22 C. 680. (3) 7 B. 100.
(4) 21 C. 132. (5) 26 C. 812. (6) 27 C. 508. (7) 15 C. 174.

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or not—it being for "bustoo or homestead land." In *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau* (1), it was assumed that there would be a second appeal if kattubadi was a charge on the land and the question now raised was not really considered. In *Vedachala Mudali* v. *Ramasami Raja* (2), it was held that a suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of Section 586 of the Code of Civil Procedure, because a Judge of a Court of Small Causes has been invested by the local Government with authority to exercise jurisdiction with respect thereto under Section **[553]** 15 and Schedule II, Article 8, of the Provincial Small Cause Courts Act, 1887, and that a second appeal lies from a decision in such a suit though the amount or value of the subject-matter of the original suit does not exceed Rs. 500. That decision has led to this reference.

Kuppusami Ayyar, (for *Desikachariar*), for respondents Nos. 1 to 3. —Before considering the general policy of the Section 586, it is more important to construe the section, if it can be logically interpreted. The result of that construction is immaterial. There are three qualifications necessary to render a suit of a "nature cognizable" in Courts of Small Causes: first, it must be for less than Rs. 500; secondly, it must not be excluded by the schedule; and thirdly, it must be cognizable. Inasmuch as suits for rent are permitted by the notification, they are cognizable. Section 15 gives the local Government power to extend the value, and Article 8 gives power to extend the subject-matter, of certain suits, and the two powers are consistent. Reading Section 15 and Article 8 together with the notification, the result is to take rent suits out of the exceptions in Schedule II. [He referred to *Vedachala Mudali* v. *Ramasami Raja* (2), *Bank of England* v. *Vagliano Brothers*(3), and *Norendra Nath Sircar* v. *Kamalabasini Dasi* (4).]

Sir *V. Bhashyam Ayyangar*, in reply.—The word "nature" may be omitted from consideration—the effect would be the same if it were not used in the section. If a Small Cause Court is established it can take cognizance of a certain class of suits, namely, inherently and by the mere fact of being established under Section 5 with the assent of the Governor-in-Council. Section 586 refers to suits of a "nature," that is, of a "character" cognizable by a Small Cause Court. Suits for rent are not cognizable by a Small Cause Court by virtue of its inherent jurisdiction. Section 586 therefore does not apply to them. The contention that a notification at the pleasure of the Governor-in-Council affects the meaning of words describing the nature of the suits that are referred to as being cognizable by Small Cause Courts is unscientific and opposed to the general policy of the Code of Civil Procedure, which is a general Act and the meaning of which cannot be said to be varied by or depend upon the notifications of a local Government.

JUDGMENT.

[554] SIR ARNOLD WHITE, C. J.—In this case, I am unable to agree with the view which was taken by a Division Bench of this Court in *Vedachala Mudali* v. *Ramasami Raja* (2). The question turns upon the construction to be placed upon the words "any suit of the nature cognizable in Courts of Small Causes" as used in Section 586 of the Code of Civil

(1) 19 M. 329. (2) 22 M. 229. (3) (1891) A.C. 107. (4) 23 I.A. 18.

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Procedure. The object of this section, as it seems to me, is to take away the right of second or special appeal where the value of the subject-matter of the original suit does not exceed Rs. 500 in the case of all suits which as regards their subject-matter would be within the jurisdiction of Courts of Small Causes, but which are outside that jurisdiction by reason of the amount claimed being beyond the pecuniary limit of the Small Cause jurisdiction. This section is a reproduction of Act XXIII of 1861, Section 27, which provided that no special appeal should lie in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860 when the debt, damage or demand did not exceed Rs. 500. Under Act XLII of 1860, claims for rent and other matters recoverable before a Revenue officer were expressly excluded from the jurisdiction of Small Cause Courts. Act XLII of 1860 was repealed by Act XI of 1865, the latter enactment providing (Section 50), that references to the Act of 1860 should be read as applying to the Act of 1865. The Act of 1865 was repealed by Act IX of 1887. Both the Act of 1865 and the Act of 1887 were Acts of the Governor-General-in-Council. The scheme of the Act of 1887 is the converse of that of the Act of 1865. Under the Act of 1865, a Court of Small Causes was given jurisdiction over certain specified claims. Under the Act of 1887, the Court has jurisdiction over all suits provided the amount of the claim is within the pecuniary limit of the special jurisdiction, unless the suit is expressly excepted from the cognizance of the Court. Section 6 of the earlier enactment provided that a claim for rent should be cognizable by a Court of Small Causes when the amount claimed did not exceed Rs. 500, but that no action should lie for rent for which, at the time of the passing of the Act, a suit might be brought before a Revenue officer unless, as regards arrears of rent for which such suit might be brought, the Judges of the Court of Small Causes had been expressly invested by the local Government with [555] jurisdiction over claims to such arrears. Section 7 gave power to the local Government to extend the jurisdiction in suits of the nature described in Section 6 "and thereby made cognizable by Courts of Small Causes" to an amount not exceeding Rs. 1,000. Section 15 of the later Act provides that a Court of Small Causes shall not take cognizance of the suits specified in the second schedule to the Act, but that, subject to the exceptions specified in the schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed Rs. 500 shall be cognizable by a Court of Small Causes. The same section empowers the local Government, subject to the exceptions in the schedule and the provisions of any enactment for the time being in force, to direct that all suits of a civil nature of which the value does not exceed Rs. 1,000 shall be cognizable by the Court of Small Causes. Amongst excepted suits specified in the schedule are suits for the recovery of rent other than house-rent, unless the Judge of the Court of Small Causes has been expressly invested by the local Government with authority to exercise jurisdiction with respect thereto (Article 8). By a notification, date 24th January 1888, the Madras Government has invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their small cause side all suits for rent falling within the pecuniary limits of their special jurisdiction. The effect of Article 8 and the notification read together is to give a Judge jurisdiction to entertain a suit for rent as a small cause suit provided (i) he is a Judge of a class to whom the notification applies and (ii) the amount claimed is not beyond the pecuniary limits of his special jurisdiction. By reason

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of the jurisdiction of a Small Cause Court being limited as regards amount, if the amount claimed exceed the limit, although the suit is "of a nature cognizable" by a Small Cause Court, it is not cognizable. If a suit is cognizable it must be of a nature cognizable. But if it is of a nature cognizable it does not follow that it is cognizable. When the claim is within the pecuniary limit, and the Court is within the terms of the notification, no restriction of the right of appeal is necessary, because under the Small Cause Courts Act itself the decision of the Small Cause Court is final. It seems to me that Section 586 of the Code applies to cases which as regards subject-matter would be within, but by reason of the amount claimed are without, the jurisdiction of a Court of Small [556] Causes. The words "of a nature cognizable" seem to have reference to the subject-matter of the suit as distinguished from the amount of the claim. In the case of *Vedachala Mudali* v. *Ramasami Raja* (1), a Division Bench were of opinion that a second appeal lay in cases where the suits for rent had been made cognizable by the notification and would not have been cognizable but for the notification, on the ground that such suits were not cognizable by virtue of the Act but by virtue of the authority conferred on certain Judges by the local Government. I do not see how it can be said that suits which are rendered cognizable by reason of the notification are not suits which are cognizable by virtue of the Act, since the notification was issued under the express powers conferred by the Act. The words "any suit of the nature cognizable" as used in Section 586 of the Code may be paraphrased thus :—Any suit relating to a subject-matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction The view that the effect of the notification is to render suits for rent suits "of the nature cognizable in Courts of Small Causes" does not, in my judgment, involve the proposition that, as soon as Government by notification empowers any Judge to try rent suits on the small cause side, all such suits throughout the Presidency cease to be suits excepted from the cognizance of Courts of Small Causes and become suits of the nature cognizable in such Courts. It does involve the proposition that all suits for rent become "of the nature cognizable;" but whether a given suit for rent ceases to be a suit excepted from the cognizance of a Court of Small Causes must depend, first, upon the question whether the tribunal before which the suit is instituted is included in the notification and, secondly, upon the question whether the amount of the claim is within the pecuniary limit of the jurisdiction of that tribunal. To my mind there is no anomaly in holding that a suit instituted upon the regular side of a Court which has not had small cause jurisdiction conferred upon it may be a suit of a nature cognizable by Courts of Small Causes. The suit would be actually cognizable by that particular Court if the Court was entitled to exercise the special jurisdiction. The fact that it is not so entitled does not prevent the suit being "of the nature cognizable in Courts of Small Causes" or affect the question [557] of the construction of Section 586. So far, I have dealt with the case apart from authority. As regards the case of *Ramachandra Raghunath* v. *Abaji Rastya* (2), Couch, C. J., seems to have overruled the preliminary objection on the ground that "suits of the nature cognizable by Courts of Small Causes must mean without reference to Clause 4 of Section 6 of Act XI of 1865 and must be cognizable in general." If we turn to

(1) 23 M. 229. (2) 6 B.H.C.R. (A.C.J.) 12.

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Section 6 of the Act in question, we find that the section begins by enacting affirmatively that a suit for rent (which, *prima facie*, includes a suit for arrears of rent) shall be cognizable by Courts of Small Causes. If, then, the words "of a nature cognizable" are to be construed without reference to Clause 4 we find that the section expressly enacts that suits for rent shall be cognizable. If they are cognizable it is difficult to see how it can be said that they are not of a nature cognizable.*

The very general words "of a nature cognizable" were, no doubt, advisedly used by the Legislature. In *Masa Miya Saheb* v. *Sayad Gulam Husein Mahamad*(1), the Bombay High Court went so far as to hold that, in a suit which, as regards subject-matter, had been expressly removed from the jurisdiction of a Small Cause Court by an enactment (Act X of 1876, Section 15) which removed suits to which the Collector was a party from the jurisdiction of Small Cause Courts, no second appeal lay. Sargent, C.J., and Melvill, J., held that the nature of the suit, by which must be understood the jural relations between the parties, remained unaltered and, as the suit was one of a nature cognizable by a Small Cause Court, no second appeal lay. The tendency of the Courts (with the exception of the Bombay case to which I have referred) seems to have been to carry out the intention of Section 586 by declining to place a narrow construction on the words "of a nature cognizable." See, for instance, the case of *Harakh* v. *Ram Sarup*(2), the Full Bench decision of this Court in *Manappa Mudali* v. *McCarthy*(3) and the cases of *Muttukaruppan* v. *Sellan*(4) and *Kali Krishna Tagore* v. *Izzatannisa Khatun*(5).

I think our answer to the question referred to us should be in the affirmative.

[558] SHEPHARD, J.—In order to see whether any suit is "of the nature cognizable in Courts of Small Causes" it is clear that the Act relating to Small Cause Courts must be examined. Chapter III of the present Act deals with the matter of jurisdiction. By sub-Section 2 of Section 15 it is declared that all suits of a civil nature not exceeding Rs. 500 in value shall be cognizable by a Court of Small Causes subject, however, to the exceptions specified in the second schedule to the Act. The exceptions are ranged under forty-four heads, one of which, relating to suits for rent, contains an exception and a proviso. It is contended on behalf of the appellants that, as the operation of Section 586, Civil Procedure Code, does not depend on the actual institution of Small Cause Courts in any given place, so its operation is limited to suits other than those specified in the schedule without regard to the question whether action has been taken under the proviso already mentioned. A suit for recovery of rent (other than house-rent) is, as I understand the argument, marked off by the Legislature as a suit not of the Small Cause Court nature. Therefore, the question whether such a suit is or is not actually triable by such a Court is no less immaterial than is the question whether such Court exists to try it. I am unable to follow this argument. It seems to be assumed in the argument that cases cognizable by a Small Cause Court form a class of cases having inherent and distinctive qualities in common. But that is not the fact under the present Act. The

* The following sentence forming part of the original judgment has been omitted in the I. L. R.—

"I confess I fail to follow the reasoning in this case."

(1) 7 B. 100. (2) 12 A. 579. (3) 3 M. 192.
(4) 15 M. 98. (5) 24 C. 557.

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Legislature has declined the task of ascertaining affirmatively what suits are to be deemed small causes or even of declaring to what general class such suits belong. Except that they are small cause suits belonging to that category, they may, for aught that appears in the Act, have no qualities in common. It is only by examining the schedule and seeing what is not a small cause that it can be decided that any individual suit is a small cause. This being so, when it is said that a suit is of the nature of suits cognizable by Small Cause Courts, what must be meant is that it is not a suit such as is named in the schedule. When it is a suit the cognizance of which by a Small Cause Court is barred by any enactment for the time being in force, I suppose nobody would assert that it is in the nature of suits cognizable by such Courts, seeing that Clause 44 of the schedule expressly provides for the legislative addition of new cases to the exceptions. In the same way, as it seems to me, Clause 8 provides for the exclusion [559] of certain cases from the list of exceptions or for the cancellation of that particular exception. The mode in which the cancellation is effected is surely immaterial; the result is the same whether it is brought about by the direct Act of the Legislature or by an act of Government authorized by the Legislature. To my mind it is, in the legal sense of the term, absurd to say that a suit for Rs. 400 claimed as rent might, but for the fact that the District Munsif's jurisdiction under the Act was limited to suits not exceeding Rs. 200 in value, be tried as a small cause, and at the same time to deny that such suit is of the nature of suits cognizable by Courts of Small Causes. Some of the cases cited by the Honourable Sir V. Bhashyam Ayyangar had reference to the old Small Cause Courts Acts, the scheme of which is totally different from that which is adopted in the present Act. In those Acts some attempt was made to describe in positive terms the nature of the suits intended to be designated as small causes. There was reason therefore for holding that, when a suit was found to possess that nature, it was intended to be treated as such for the purpose of Section 586 of the Code. The case in *Musa Miya Sahab* v. *Sayad Gulam Husein Mahamad* (1) is one which, if it had to be decided with reference to the Act of 1887, must, in my opinion, have been decided in favour of the appellant, because, as I have already shown, Clause 44 of the schedule allows for suits which are not within the schedule being added to it. Taking the schedule to the Act as the index by which it can be ascertained what is a small cause, I am of opinion that we must have regard to all the provisions of the schedule and that, if it is found that a suit for rent could legally be tried by a Small Cause Court, that suit is a small cause and, therefore, a second appeal is precluded.

SUBRAHMANIA AYYAR, J.—The provision, contained in Section 586 of the Code of Civil Procedure, "No second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed Rs. 500" and those of the Provincial Small Cause Courts Act which relate to the nature of suits that are cognizable by Small Cause Courts as well as those which relate to suits excepted from the cognizance of those Courts, are provisions applicable quite generally. It is, therefore, as urged by Sir [560] V. Bhashyam Ayyangar on behalf of the appellants, almost certain that the words "any suit of the nature cognizable in Courts of Small Causes" in Section 586 were intended to comprise suits which are cognizable by any Court of Small Causes by virtue of the provisions of the

(1) 7 B. 100.

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Small Cause Courts Act itself, but not suits which may become cognizable by Small Courts under special circumstances only, such as under the authority conferred on them by a local Government in pursuance of the discretionary power exercisable by such a Government under the proviso to Article 8 of the second schedule of Act IX of 1887. That very singular results would follow from holding otherwise is shown by, among others, the case put by way of illustration by Sir V. Bhashyam Ayyangar in the course of his argument. Suppose a suit for rent other than house-rent not exceeding Rs. 500 is brought in a Court within the jurisdiction of which the cause of action arose and which Court is competent to entertain the suit as a Court of ordinary jurisdiction, though not as a Court empowered to take cognizance of small cause suits. In such a case, according to the contention for the respondents the suit must, with reference to the question whether a second appeal lies or not, be treated as one not of the nature cognizable in Courts of Small Causes. If, however, a suit for the same rent is instituted in a Court which is empowered to take cognizance of Small Causes and within the jurisdiction of which the defendant resides, though the cause of action did not arise therein, the suit must, for the purposes of determining whether a second appeal lies or not, be held, according to the respondents, to be of the nature cognizable in Courts of Small Causes. In the absence of very clear language pointing to the conclusion that a rule leading to so anomalous a result was intended to be laid down, I find it impossible to uphold the contention on behalf of the respondents. The point, now raised, was substantially raised in *Ramchandra Raghunath* v. *Abaji Rastya* (1) which was decided when the Code of 1859 as amended by Act XXIII of 1861, was in force. Couch, C. J., and Gibbs, J., came there to the same conclusion as that adopted in *Vedachala Mudali* v. *Ramasami Raja* (2). That when the Code of 1877 was passed the Legislature did not think it necessary to introduce any change in the language of Section 586 of that Code corresponding to the [561] provision with reference to which *Ramchandra Raghunath* v. *Abaji Rastya*(1) was decided, shows that that decision was understood to be right. And when, with reference to the section last referred to, a similar point arose in *Musa Miya Saheb* v. *Sayad Gulam Husein Mahamed* (3) Sargent, C.J., and Melvill, J., decided the point in conformity with the principle on which Couch, C.J., and Gibbs, J., had acted. Sargent, C.J., pointed out that the circumstance that the class of cases to which the one that the Court was there concerned with belonged had been removed by a special enactment from the jurisdiction of Small Cause Courts did not alter the nature of the suit, by which must be understood the jural relations between the parties. That this decision is perfectly correct will be manifest, if the true effect of the enactment—Section 15 of Bombay Act X of 1876—is borne in mind. Now, that section makes every suit, to which Government or a public officer in his official capacity is a party, cognizable by a District Court alone and not by a Subordinate Court or a Court of Small Causes. Such an enactment, it is obvious, does not repeal or modify the provisions of the Small Cause Courts Act explaining the nature of suits cognizable by such Courts. The enactment merely creates a privilege in favour of certain classes of parties in all suits inclusive of suits of the nature cognizable in Courts of Small Causes. It is scarcely necessary to say that such a privilege does not affect the nature of suits cognizable by Small Cause

(1) 6 B. H. C. R. (A. C. J.), 12 at pp. 15, 16. (2) 22 M. 229.
(3) 7 B. 100.

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Courts, *i.e.*, the character of the legal relation which gives rise to suits ordinarily triable by those Courts. It would be as unreasonable to hold that the privilege referred to does affect the legal relation between the parties as it would be to hold that a legal relation, say that of the buyer and seller, would be affected by the circumstances that the buyer chances to be a Hindu, Muhammadan, Christian or Buddhist. If the decision of Sargent, C.J., and Melvill, J., had been different, it would have resulted in the view that, for instance, a suit for the price of goods sold to an officer of Government would, in Bombay, not be of the nature cognizable by Courts of Small Causes, though a suit for the price of goods sold to a private individual would there be of such a nature. It would also have followed that a suit for the price of goods sold to a Government officer would in Madras, unlike in Bombay, be of the nature of suits triable by Small Cause [562] Courts as no enactment like Section 15 of Act X of 1876 referred to existed in the former Presidency. Surely it must be taken that the Legislature did not intend that the words "of the nature cognizable in Courts of Small Causes" should have one meaning in Bengal, another in Madras, a third in Bombay and so on, but that the intention was that the words should be understood in one and the same sense in all the provinces to which the Civil Procedure Code extended and under all circumstances. How then can it be held that the legal relation which gives rise to a claim for rent is in any way affected by the circumstance that the claim may be taken cognizance of by a particular Court only under certain circumstances? I would only add that the decision of the Calcutta High Court in the recent case of *Rango Roy* v. *Holloway* (1) as to the meaning of Section 586 of the present Code proceeds on the same principle as that on which the Bombay decisions rest.

I am therefore of opinion that the construction contended for on behalf of the appellants is the sound construction and that the decision in *Vedachala Mudali* v. *Ramasami Raja* (2) is correct.

BENSON, J.—The question referred for our decision is "whether a suit for rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of Section 586, Civil Procedure Code."

There is no question but that a suit for house-rent is of a nature cognizable in Courts of Small Causes, for it is cognizable in such Courts under Section 15 (2) of the Provincial Small Cause Courts Act (IX of 1887). I take it that the reference was intended to refer only to a suit for rent, other than house-rent. The answer to the question so limited is not free from difficulty, but, in my judgment, the correct answer is in the affirmative. The jurisdiction of the Courts in regard to taking cognizance of civil suits is derived from the Legislature. Section 15 of the Provincial Small Cause Courts Act, read with the second schedule attached to the Act, declares categorically and directly that certain suits are, or are not, cognizable by a Court of Small Causes. But with regard to suits for rent, other than house-rent, it declares them to be excepted from the cognizance of a Court of Small Causes unless the Judge of the Court of Small Causes has been expressly invested by the local Government with authority to exercise jurisdiction in respect thereto. If he has been so invested, such suits become cognizable [563] by a Court of Small Causes. The cognizability of such suits by a Court of Small Causes is not determined directly by the Legislature, but by the local Government

(1) 26 C. 842. (2) 22 M. 229.

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under an authority derived from the Legislature. In other words the Legislature has determined that they are of such a character or nature that the local Government may make them cognizable by a Court of Small Causes.

The suits that are triable by Courts of Small Causes are, speaking broadly, suits of a comparatively simple character and of small pecuniary value. Let us now see how the Legislature deals with appeals against decrees in these suits. If the suit has been actually tried by a Court of Small Causes no appeal at all is allowed, for Section 27 of the Provincial Small Cause Courts Act declares that the decree of the Court is final. There are however many suits which would be triable by a Court of Small Causes if one existed with local and pecuniary jurisdiction, but which are in fact tried as original suits by a District Munsif's Court because there is no Small Cause Court with local and pecuniary jurisdiction competent to try them. In these suits a first appeal is allowed by Section 540, Civil Procedure Code, but a second appeal is disallowed by Section 586, Civil Procedure Code, which enacts that "no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 500."

When the Legislature in this section speaks of suits "of a nature cognizable in Courts of Small Causes," I think it means suits which the Legislature has determined to be suits of such a character or nature that they are, or may be made, triable in a summary fashion in Courts of Small Causes without any further action on the part of the Legislature itself, though further action may be necessary by the local Government in establishing a Small Cause Court or by investing an existing regular Court with small cause powers, or by investing the Judge of the Small Cause Court with power to try suits for rent as small cause suits.

When the Legislature determines that suits of a certain character may be made triable in Courts of Small Causes without further action on the part of the Legislature, I think that those suits are of a nature cognizable in Courts of Small Causes even though the local Government may not establish Small Cause Courts or invest any Judge with power to try small cause suits in general or rent suits in particular as small cause suits. The nature of the suit is, [564] I think, determined once for all by the Legislature, but it leaves the local Government to decide whether the suits shall, in fact, be tried as small cause suits or not, and this the local Government does by establishing Small Cause Courts or by investing existing regular Courts with a greater or less degree of small cause jurisdiction. The jurisdiction may be limited as regards local area and the pecuniary value of the suits, and it may or may not, be extended to suits for rent. These are all matters which depend on the will of the local Government, but do not affect the character or nature of the suits. That was determined by the Legislature when it enacted that such suits might be tried by Courts of Small Causes provided the local Government should take appropriate action to establish the Courts or to invest them with the necessary powers.

If such action be taken, then the suits are not only of a nature cognizable by Courts of Small Causes, but become actually cognizable by those Courts. If, however, such action is not taken, then the suits do not become actually cognizable by such Courts, but their nature or character as originally declared by the Legislature remains unaffected.

Suits for rent are therefore, in my judgment, suits of a nature cognizable by Courts of Small Causes within the meaning of Section 586, Civil Procedure Code, and they are so universally and independently of the action which may or may not have been taken by the local Government in establishing such Courts or investing the Judges with powers under the Provincial Small Cause Courts Act.

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It may be added that this view seems to assign to the Legislature a more consistent policy than the alternative view. It would be strange if the Legislature, when enacting the Civil Procedure Code, regarded rent suits as being of such a character as to be suitable for second appeals, and yet when enacting the Small Cause Courts Act regarded them as suits which might by notification of the local Government be made triable by a Court of Small Causes in which case not even a first appeal in regard to them would be allowed.

[DAVIES, J.—I concur in the conclusion arrived at by the majority of the Court, and would answer the reference in the affirmative.]

[This second appeal coming on again for final hearing, after the expression of the above opinion of the Full Bench, the Court dismissed it.]

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22 M. 535.

[565] APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

VENKATARAMAYYA (*Plaintiff*), *Petitioner v.* SUBBANNA (*Defendant*), *Respondent.** [7th February, 1900.]

Rent Recovery Act (Madras)—Act VIII of 1865, Section 72—Refusal to execute muchalka—Suit for rent.

By Section 72 of the Rent Recovery Act, when a judgment is given for the delivery of a muchalka, if the person required by the decree to excute such muchalka shall refuse to do so the judgment shall be evidence of the amount of rent claimable from such person, or a copy of the judgment under the hand and seal of the Collector shall be of the same force and effect as a muchalka executed by the said person. A landholder, having tendered a patta and obtained confirmation of it by summary suit, sued for rent. The tenant in his written statement denied that the patta was a proper one and contended that he was not bound to accept it:

Held, that this amounted to a refusal to execute the muchalka for the delivery of which judgment had been given, within the meaning of Section 72, and that the requirements of that section had been complied with.

SUIT for rent. Plaintiff alleged that a patta, which had been confirmed by the Revenue Court, had been duly tendered to defendant, and he filed it and the judgment of the Revenue Court in the suit. Defendant in his written statement denied that the patta had been confirmed, and contended that it was not a proper one, for reasons which he gave. He claimed that he was not in any way bound to accept it. Two issues were framed, namely:—(1) "Whether plaintiff tendered patta to the defendant for fasli 1305, and (2) whether the defendant is liable for the rent sued for." The Subordinate Judge refused to act upon plaintiff's evidence regarding

* Civil revision petition No. 163 of 1899, under Section 25 of the Provincial Small Cause Courts Act, praying the High Court to revise the decree of P. S. Gurumurti Ayya, Subordinate Judge of Kistna, in small cause suit, No. 2011 of 1898.

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the tender of patta, and held, referring to *Rangayya Appa Rau* v. *Ratnam* (1) that the judgment of the Revenue Court was not binding upon him. He found the first issue against plaintiff and dismissed the suit.

[566] Plaintiff preferred this civil revision petition.

Kuppusami Ayyar, for petitioner.—The question in this case is not one of *res judicata* and the case of *Rangayya Appa Rau* v. *Ratnam*(1) has no application. The point that was decided there was whether the decision of a Revenue Court regarding the propriety or impropriety of a patta arrived at in proceedings to set aside an attachment was or was not *res judicata* when the same question came up for decision in a Civil Court. But the present case is covered completely by the provisions of Section 72 of the Rent Recovery Act, *i.e.*, that where a Revenue Court in a suit instituted under Section 9 of the Rent Recovery Act settles a patta between the parties, the judgment is conclusive evidence of the amount of the rent, and a copy of the judgment shall have the same force and effect as a muchalka executed by the tenant. The Civil Court in such circumstances has nothing further to decide.

Sivasami Ayyar, for respondent.—Section 72 requires as a condition precedent that the tenant shall have refused to execute a muchalka subsequent to the judgment of the Revenue Court. Here there is no such allegation or proof. Further, the contention of the petitioner is in effect to plead *res judicata* and I therefore submit that the case of *Rangayya Appa Rau* v. *Ratnam* (1) is in point.

Kuppusami Ayyar, in reply.—The refusal by the tenant is not a condition precedent under the section to the institution of the suit. Such refusal no doubt must be proved before the judgment of the Revenue Court is used in evidence as contemplated by the section. The written statement filed in the case contains the refusal and that is enough for the purposes of that section.

JUDGMENT.

On the hearing of this case by the Subordinate Judge the attention of the Judge does not seem to have been called to the provisions of Section 72 of the Rent Recovery Act. That section provides as follows :—

"When a judgment is given for the delivery of a muchalka, if the
" person required by the decree to execute such muchalka shall refuse to
" execute the same, the judgment shall be evidence of the amount of rent
" claimable from such a person, and a copy of the judgment under the hand
" and seal of the Collector shall be of the same force and effect as a
" muchalka executed by the said person."

[567] If the requirements of Section 72 are complied with a copy of the judgment has the same force and effect as a muchalka executed by the person required by the decree to execute the muchalka. It has been argued on behalf of the respondent (the tenant) that the landlord cannot rely on this section inasmuch as one of the requirements of the section *viz.*, that the person required by the decree to execute the muchalka has refused to execute the same since the judgment was given, has not been complied with. The question we have to determine is, has there been, since judgment for the delivery of a muchalka, a refusal by the tenant to execute the same? In his plaint the landlord alleges a tender of a patta for fasli 1305 and confirmation of this patta by the summary (*i.e.*, the Revenue) Court.

(1) 20 M. 392.

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The defendant in his written statement denies that the patta tendered was a proper one and alleges that he is not bound to accept it.

We think that this amounts to refusal to execute the muchalka for the delivery of which the judgment was given, within the meaning of Section 72 of the Rent Recovery Act, and that the requirements of that section have been complied with. The Subordinate Judge ought to have given judgment for the landlord on this ground. There is nothing left for the Subordinate Judge to try under the second issue and accordingly we do not remit the case to him. We reverse the decree of the Subordinate Judge and give judgment for plaintiff for the amount sued for. In the circumstances we make no order as to costs either before the Subordinate Judge or in this Court.

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23 M. 568=10 M.L.J. 314.

[568] APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

SIVASAMI NAICKER AND ANOTHER (*Defendants-Petitioners*) *Appellants v.* RATNASAMI NAICKER (*Plaintiff-Counter-petitioner*), *Respondent.** [9th February, 1900.]

Civil Procedure Code—Act XIV of 1882, *Sections* 2, 244, 588—*Application to stay sale in execution proceedings on ground of under-valuation—Order dismissing application —Appeal against order of dismissal—Decree.*

An application was made by certain defendants, against whom a decree had been passed for an order that a sale at the instance of the decree-holder, in execution of his decree, should not be proceeded with, on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge held the under-valuation to be immaterial and dismissed the application, whereupon the judgment-debtor appealed to the High Court. On the preliminary objection being there taken that no appeal lay from the order of dismissal:

Held that an appeal lay, the order having been made with reference to a question which related to the execution and the question being one arising between the parties to the suit in which the decree was passed and relating to its execution, within the meaning of Section 244 of the Code of Civil Procedure.

On a sale of property in execution of a decree the value stated in the sale proclamation is a material fact within sub-Section (*e*) of Section 287 of the Code of Civil Procedure. Under-valuation of such property is a material irregularity in publishing or conducting the sale.

[**Diss.**, 27 M. 259=14 M.L J. 57; **F.**, 8 C.W.N. 257 (261); **R.**, 14 C.L J. 35=16 C. W.N. 124=10 Ind. Cas. 371; 14 C.L.J. 489 (497); 6 M.L.T. 252; **D.**, 31 C. 922 (926)=8 C.W.N. 264 (265).]

PETITIONERS, as defendants and judgment-debtors in a suit, petitioned a subordinate Court for an order that an auction sale at the instance of the decree-holder, in execution of his decree, should not be proceeded with on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge passed an order to the effect that the under-valuation was immaterial, since the

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* Civil Miscellaneous Appeal No. 152 of 1899 against the order of N. Sarvothama Rao, Subordinate Judge of Tanjore, in Miscellaneous Petition No. 2257 of 1899 (in the matter of original suit No. 24 of 1898).

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property would be knocked down to the highest bidder. He dismissed the application.

From this order the petitioners preferred this appeal.

Sundara Ayyar, for respondent.—There is a preliminary objection to the hearing of this appeal. It is submitted that no [569] appeal lies against the order of the Lower Court, the case not coming under Section 588 of the Code of Civil Procedure. The only other section which provides for appeals in miscellaneous matters is Section 540, read with Sections 2 and 244 of the Code of Civil Procedure, and, in fact, this appeal purports to have been presented under these sections. But Section 540 applies only to the case of decrees, and the order of the Lower Court which is now complained of is not a "decree." Section 2 of the Code of Civil Procedure defines a "decree" as "the formal expression of an adjudication of any right claimed or defence set up." The present case does not come within this definition of a decree. The latter part of the definition in controlled by the former, so that an order determining any question mentioned in Section 244 will be a "decree," only when it is a final adjudication of and right claimed or defence set up. The case of *Nihal Chand* v. *Rameshari Dassee* (1) supports this contention. It was not intended to give a right of appeal against every order passed in the executive department.

Sivasami Ayyar, for appellant.—The question arises between the parties to a suit, and it relates to the execution of the decree. It is consequently within Clause (*c*) of Section 244. And Section 2, which defines what a decree is says "that an order determining any question mentioned in Section 244, but not specified in Section 588" is within the definition of a decree. This case comes under Clause (*c*) of Section 244, and is admittedly not specified in Section 588. So an appeal does lie under Section 540 read with Sections 2 and 244 of the Code of Civil Procedure. The latter part of the definition of "decree" in Section 2 should not be controlled by the former. The two parts are quite independent of each other. It is submitted that an appeal does lie.

JUDGMENT.

A preliminary objection that no appeal lies has been raised. The order appealed against was made on an application by the defendants that an application for execution put in by the plaintiff should be dismissed. In substance, the application was for an order that a sale under an execution should not be proceeded with on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge dismissed the defendant's application on the ground that the fact that the value of the property had been under-estimated was [570] immaterial. The effect of the Subordinate Judge's order would be that the sale would be proceeded with notwithstanding the fact of under-valuation. We think the question raised by the defendant's application was a question arising between the parties to the suit in which decree was passed, and relating to the execution of the decree within the meaning of Section 244 of the Code of Civil Procedure. It has been urged on behalf of the decree-holder (the respondent) that having regard to the definition of "decree" contained in Section 2 of the Code, an order determining any question mentioned or referred to in Section 244, but not specified in Section 588 is not an

(1) 9 C. 214.

appealable order unless it amounts to a "formal expression of an adjudication upon a right claimed." Even assuming that the order of the Subordinate Judge is not in substance a formal expression of an adjudication upon a right claimed, it appears to us that so long as the order determines a question referred to in Section 244 an appeal lies from such order. The judgment of the Calcutta High Court in *Nihal Chand* v. *Rameshari Dassee* (1), no doubt supports the contention now put forward by the decree-holder, but we are not prepared to place the same construction on the words of the definition of "decree" in Section 2 of the Code as the Calcutta High Court seemed prepared to adopt. We are, therefore, thrown back on Section 244 and we have to say whether the question raised before the Subordinate Judge related to the execution. Without attempting to lay down any general rule applicable to all orders passed in execution proceedings, it is sufficient to say that the order was made with reference to a question which related to the execution, and consequently the order made is appealable. We accordingly overrule the preliminary objection.

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On the merits we think the Subordinate Judge was clearly wrong in his view that the under-valuation was immaterial. The law is now settled by the Privy Council decision in *Saadatmand Khan* v. *Phul Kuar* (2).

We allow the appeal with costs. We reverse the order of the Subordinate Judge and we direct him to ascertain, as far as possible, the value of the property and amend the sale proclamation accordingly.

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23 M. 571 = 10 M.L.J. 261.

[571] APPELLATE CIVIL.

Before Sir Arnold White and Mr. Justice Benson.

ORR AND ANOTHER (*Plaintiffs*), *Appellants* v. SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*), *Respondent*.*
[24th and 26th January and 13th February, 1900.]

Revenue Recovery Act (Madras)—Act II of 1864, Sections 52, 54—Madras Hereditary Village Offices Act (Madras)—Act III of 1895, Section 21—Emoluments due to village officers—Demand for payment under Section 52 of Revenue Recovery Act—Payment under protest—Suit to recover amount paid—Legality of demand—Limitation.

By the custom of a zemindari its tenants brought their produce to the threshing-floor, where it was divided, *inter alia*, among the village servants. The lessees of the zemindari altered this system, directing the tenants to bring their produce direct to the granaries of the lessees, who promised to pay the village servants their fees from the said granaries. These fees having been only partly paid, the village servants complained to the Government revenue officials, who applied to the lessees for payment of the arrears, a demand for the same being ultimately issued under Section 52 of the Revenue Recovery Act (Madras) 1864. The lessees thereupon paid the amount of the arrears under protest, and a year later filed a suit against the Secretary of State to recover the money so paid:

Held, that the lessees had made themselves liable for the fees, and the Collector was entitled to proceed under Section 52 of the Revenue Recovery Act (Madras), 1864, to recover them.

Held also, that inasmuch as the suit had not been brought within six months of the time when the alleged cause of action had arisen, it was barred under Section 59 of the Revenue Recovery Act (Madras), 1864.

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* Appeal No. 9 of 1899 against the decree of T. Varada Rao, Temporary Subordinate Judge of Madura (East), in Original Suit No. 34 of 1897.

(1) 9 C. 214. (2) 25 I.A. 146 = 20 A. 412.

1900 FEB. 13. — APPELLATE CIVIL. — 23 M. 571 = 10 M.L.J. 261.

SUIT for a declaration and for the recovery of arrears of revenue paid to defendant under protest. The plaint stated that plaintiffs were the lessees of the Sivaganga Zemindari; that there were totties who performed the totti work of the village of Tirupatur, situated therein; that the zemindari was a permanently-settled estate, the Government having reserved only the right of collecting the fixed peishcush under Regulation XXV of 1802; that the zemindar alone had the power to appoint and dismiss servants, and amongst them the totties, and to give them the emoluments due to them (swatantrams); that such swatantrams were allowed in [572] proportion to the amount of grain harvested, which should be obtained from the tenants before the melvaram was divided; that for these reasons Regulation VI of 1831 was not applicable to the said zemindari, nor were the servants governed thereby. Plaintiffs contended that, under Section 52 of Madras Act II of 1864, Government had no power to collect the swatantrams of the said totties as if they were arrears of revenue, there being no arrears of revenue in fact; and that they should be collected from the tenants; yet the Government Deputy Tahsildar had, on 27th July 1896, sent a demand to plaintiffs under Section 52 of Madras Act II of 1864, whereupon the sum now sued for (Rs. 219-0-1) was deposited under protest on behalf of the plaintiffs on 5th August 1896. Plaintiffs filed this suit on 4th August 1897 and prayed for a declaration that Regulation VI of 1831 was not applicable to the Sivaganga Zemindari; that under Section 52 of Madras Act II of 1864, the Government had no right to collect the swatantrams from plaintiffs as arrears of revenue; and for an order that the amount paid under protest should be refunded. In defence it was denied that Government had no other right than that of collecting peishcush, or that the totties were bound to receive their emoluments from the tenants, and it was claimed that the village servants were entitled to recover their said emoluments from the plaintiffs; that Regulation VI of 1831 and the enactments which repeal it apply to the Sivaganga zemindari and that the said emoluments, if not duly paid, might be recovered under Section 52 of Madras Act II of 1864. It was also pleaded that the suit was barred by limitation under Section 59 of Madras Act II of 1864.

The Subordinate Judge framed the three following issues:—" (1) Are the totties of the villages comprised in the Sivaganga zemindari, obtained on lease by plaintiffs, entitled to receive the swatantrams, which are due to them, from the raiyats directly, or from the proprietor? If such swatantrams have not been paid, is the defendant bound to collect from those who are found liable the aforesaid swatantrams and disburse the same to the said totties? If so, are the plaintiffs entitled or not to a return of the sum of Rs. 219-0-1 collected from them on 5th August 1896 being the value of undisbursed swatantrams from faslis 1300 to 1302 by the Deputy Tahsildar of Tirupatur? Is plaintiff's claim to the return of the said amount of Rs. 219-0-1 barred by Section [573] 59 of Madras Act II of 1864? (3) Are the plaintiffs, as the lessees of the zemindari, bound to pay swatantrams or their value?"

On the first issue he found that the totties were entitled to recover the swatantrams due to them from the proprietor and not directly from the tenants; on the second issue he held that the plaintiffs were not entitled to a refund of the Rs. 219-0-1 paid under protest. He further held that inasmuch as by Section 59 of Madras Act II of 1864, persons aggrieved by any proceedings under that Act may institute suits only within six months from the time at which the cause of action arose, and inasmuch as

the suit had been filed a year after cause of action had arisen, the Court could not take cognizance of it. He referred to *Yellaya* v. *Viraya* (1); *Raman* v. *Chandan* (2); and *Kumarasami Pillai* v. *Orr* (3). 1900 FEB. 13. — APPELLATE CIVIL. — 23 M. 571 = 10 M.L.J. 261.

Plaintiffs preferred this appeal.

V. Krishnasami Ayyar and *S. Srinivasa Ayyangar*, for appellants, contended that demand could not properly be made against plaintiffs for arrears of swatantrams under Section 52 of the Revenue Recovery Act (Madras), 1864. The contention that persons in the position of plaintiffs could be sued because arrears were due was incorrect. If liable at all, plaintiffs' liability was rather for damages as wrong-doers, than for the fees; and such damages were recoverable only in the Civil Courts. He cited *Venkatapathi* v. *Subramanya* (4); *Venkata* v. *Chengadu* (5); and *Narayanan Nambudri* v. *Damodaran Nambudri* (6). The crops were the property of the tenants, who should have been proceeded against under Madras Act III of 1895, and not plaintiffs. He argued that the suit had been wrongly held to be barred by limitation under Section 59 of Act II of 1864, inasmuch as no revenue was payable. He referred to *Venkatapathi* v. *Subramanya* (4); and *Venkata* v. *Chengadu* (5).

The Acting Government Pleader (*C. Sankaran Nayar*), for respondent.—The Revenue Recovery Act only directs the procedure and does not refer to the nature of the claim to be enforced. If the totties had brought a suit against the zemindar, the Civil Courts would have had no jurisdiction, and the Collector alone could have decided it. That being the case, plaintiffs cannot now [574] sue on account of the alleged illegal levy, the Collector alone being able to decide that question. The cases cited with reference to limitation do not support the proposition put forward. In *Venkatapathi* v. *Subramanya* (4), Section 59 of Madras Act II of 1864 was not considered. In *Venkata* v. *Chengadu* (5), Muttusami Ayyar, J., at page 175, lays down that even if the proceedings are defective and irregular and therefore not in strict conformity with the provisions of the Act, they should be taken as being professedly under it, otherwise their could be no grievance at all to be redressed by a Civil Court. The section presupposes that certain proceedings have been professedly taken under the Act, and that there might possibly be a valid claim to redress on the ground that they were not in accordance with the provisions of the Act, and then directs that the claim shall not be adjudicated upon the merits unless it is preferred within six months from the time when the cause of action arose. It is submitted that that is the true construction. The present claim is not in respect of land revenue, but for a fee payable to a village officer. Plaintiffs do not deny that a fee is due, but merely contend that it is payable by some one else. Under Madras Acts II of 1864 and III of 1895, the land may be sold for such arrears. This suit falls within Section 21 of Madras Act III of 1895, and if the Collector had decided it under that Act the jurisdiction of the Civil Courts would have been barred. If the suit is brought under Regulation VI of 1831 it is also barred. *Muthayya Chetti* v. *Secretary of State for India* (7) shows that money must be shown to have been paid under illegal coercion to enable a plaintiff to recover it. The payment here was not made by illegal coercion, but by lawful process, and on that ground plaintiffs cannot recover. The Limitation Act does not apply to cases brought under Madras Act III of 1895—see Section 25—except to the extent there provided.

(1) 10 M. 62. (2) 15 M. 219. (3) 20 M. 145. (4) 9 M. 457. (5) 12 M. 168, (175). (6) 17 M. 189. (7) 22 M. 100.

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V. Krishnasami Ayyar in reply.—The last clause in Section 21 of Madras Act II of 1895 has reference to the emoluments of an office. This suit is not for such emoulments. It is a rule that a statute should not be construed so as to take away the jurisdiction of the Civil Courts. In *Muthayya Chetti* v. *Secretary of State for India* (1), there had been no distress but only a voluntary [575] payment. The terms of the warrant under which plaintiffs in this case paid show that the property would have been immediately sold, had they not prevented sale by paying as they did.

JUDGMENT.

The following facts are either undisputed or are proved by the evidence :—

The plaintiffs are the lessees of the Sivaganga zemindari. Prior to Fasli 1300 it was the custom for the tenants to bring their paddy, when harvested, to the threshing floor, where it was divided among those entitled to it in the following manner :—First the "common charges" were deducted ; that is, the actual cultivator took his expenses of cultivation (kudi swatantram) and the village servants, such as the karnam, ambalagaran, totti, &c., took the shares due to them (pala swatantram). Then the balance was equally divided between the zemindar (or his lessees) (melvaram) and the tenant (kudivaram).

This was done in the presence of the zemindari officials, the tenants and the village servants, and neither the melvaram nor the kudivaram could be taken until the "common charges" had first been appropriated. From and after Fasli 1300 the lessees altered this old system which had obtained from time immemorial. They then directed the tenants not to bring the paddy to the threshing floor for division as hitherto, but to bring it direct to the granaries (kalanjiams) oft he lessees, and they promised to pay the village servants their fees (swatantram) in a lump from the granaries. The village servants do not appear to have been consulted as to this arrangement ; some of them appear to have acquiesced in it, but the totties protested. Their protest was unheeded and they appear then to have accepted the situation and looked to the lessees for payment of their fees. These fees were, in part at all events, paid by the lessees to the village servants, but a part of the fees due to the totties of Tirupatur and Themmapattu for the Faslis 1300 to 1302 remained unpaid. The totties are menial village servants who discharged various duties both for the zemindar and for the Government and for the villagers. Their duties include both revenue and police duties, as there are no kavalgars in those villages, their duties being discharged by the totties. They made repeated applications to the lessees' officials for the unpaid fees, but could get no satisfaction. They then sent a number of petitions to the Government revenue officials, who repeatedly pressed the lessees' officials for payment of the [576] arrears due. These arrears are shown in Exhibit A (1)—a statement furnished by the lessees' Tahsildar to the Government Deputy Tahsildar on the 7th April 1894. It showed the total paddy fees due to the totties for Faslis 1300 to 1302 (1st July 1891 to 30th June 1893), the amount which had been actually paid to them in kind from the lessees' granaries and in cash from the lessees' treasury for paddy which had been collected and sold and the balance that was still due, partly in cash by the lessees and

(1) 22 M. 100.

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partly in kind. The latter was shown as "with parties," meaning apparently, that it was still in the hands of the tenants and had not been collected by the lessees. Further correspondence followed, and at length on the 27th July 1896 the Deputy Tahsildar issued a demand, under Section 52 of the Revenue Recovery Act (II of 1864, Madras), on the lessees for the balance shown in Exhibit A (1). This was paid by the lessees on the 5th August 1896 under protest, on the ground that they were not liable for any fees which had not been actually collected by them. On the 4th August 1897 the lessees filed the present suit against the Secretary of State to recover the money (Rs. 219-0-1) so paid and for other reliefs. The Subordinate Judge dismissed the suit and the lessees now appeal against that decree.

The fundamental question which we have to decide is whether, in the circumstances of this case, the totties were entitled to demand their fees from the lessees or could recover them only from the tenants. The question is not altogether free from difficulty, but the conclusion at which we arrive is that the totties could demand them from the lessees. It is to be observed that prior to Fasli 1300 the question never arose. The crop was taken to the threshing floor by the actual cultivator or the tenant under the supervision of the lessees' officials and the "common charges" including the totties' fees were there and then deducted as a first charge, and handed to the persons entitled thereto, or, in their absence, to the ambalagaran, who took charge of them for the absentees; and it was only after this had been done that either the landlord or the tenant could take their shares of the balance. The village servants could hardly be said to recover their fees from either the tenant or the landlord, but rather from a common fund from which all were to receive a share, and the shares of both landlord and tenant were equally liable to, and equally affected by, the deduction of [577] the first charge in favour of the village servants. The fees to the village servants were not at that time entered in the zemin accounts, but from Fasli 1300 the tenants were required by the lessees to bring the whole crop, or at least the melvaram and village officers' fees, to the lessees' granaries direct, and the village officers' fees were from that time entered in the zemin "demand, collection and balance" accounts. The reason for the change is not quite clear, but it was probably to enable the lessees to exercise a stronger control over the village servants, for the lessees' Tahsildar says:—"The lessees issued orders not disburse the swatan- "trams if the village servants should show remissness." Whatever the reason was, it is clear that the change was made by the authority of the lessees, and for their own purposes, and on a promise or understanding that they would pay the fees in a lump to the village servants at the granaries (see evidence of first defence witness, uncontradicted). The effect of the change was to deprive the totties of their customary and easy means of recovering the dues as a first charge on the produce and to give them instead the security of the lessees' undertaking that they themselves would pay them the fees. There is nothing to support the present contention of the lessees that they are liable to pay only so much of the fees as were actually collected by them. There is no evidence to that effect, and the plea does not appear to have been put forward by their Tahsildar until quite a late stage. There is no evidence that the lessees have in fact been unable to collect their melvaram to an extent proportionate to the arrears of swatantram. All that appears is that up to the date of Exhibit A (1) the totti swatantram not received by the lessees was the amount therein shown. That totti swatantram is a fixed proportion (8 markals in every 35

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kalams) of the gross outturn of the crop, and it is not clear how the lessees' officials could have calculated the exact amount of the fees due to the totties unless the outturn had been measured or the melvaram paid. Apparently the lessees collected their own melvaram, but not, in all cases, the swatantram. Thus the fourth witness for plaintiffs, the karnam of Themmapattu, says, "some of the big raiyats, ambalagarans and others, without paying swatantram, only paid the melvaram." Thus the effect of the change, if the lessees are not liable to the totties for their fees, is to enable the lessees to apply in satisfaction of their own melvaram the grain first received from each tenant, depriving the totties [578] of there first charge on the crop, and leaving them to get their dues as best they can from the balance in the hands of the landlord or the tenant, as the case may be. We think that the lessees by their conduct, and by undertaking to pay the fees to the village servants, rendered themselves liable for the payment of those fees. The fact that the fees were, for the first time, from and after Fasli 1300 entered in the lessees' "demand, collection and balance" accounts shows that it was their intention to collect them and supports the inference and the evidence of the first defence witness, that they made themselves responsible for their payment to the village servants. It is argued that the lessees prior to Fasli 1300 never collected the fees from the tenants, and have no legal power now to collect them and cannot, therefore, be liable for them. It has not yet been decided whether the lessees have or have not that right, but it does not affect the question of their liability to the totties. Prior to Fasli 1300 the totties never collected their fees from either the tenants or the lessees, as already explained, but it cannot be argued that, for that reason, neither are now liable to the totties. The change of system was made by the lessees and the tenants without the consent of the village servants, and it seems reasonable that, in the circumstances, both should be liable for the fees. The lessees, at all events, are liable since they are entirely responsible for the new state of things under which the totties are deprived of their customary means of obtaining the fees.

It is contended for the plaintiffs that if they are liable at all, it is not for the fees but for damages, as wrong-doers; and that such damages can only be recovered by suit in a Civil Court. We do not think the contention is sound. The lessees made themselves liable to pay the fees, and whether that liability results from custom, or contract, or otherwise does not seem to affect the question of procedure. Section 52, Act II of 1864 (Madras) enacts that "all fees or other dues payable by any person to or on behalf of the village servants employed in revenue or police duties may be recovered in the same manner as arrears of land revenue." The Collector, as representing Government, is interested in seeing that village servants of the class specified are paid their dues so as to enable them to discharge their duties efficiently, and if he is satisfied that their dues are improperly withheld by any person he has power under this section summarily to compel payment. It [579] is suggested that when the person alleged to be liable to pay the fees denies his liability and claims that it rests on some other person, the Collector cannot take action until the dispute has been settled by a suit under Regulation VI of 1831 (Madras). No doubt it would be open to the Collector to take this course, and it would ordinarily be the better course, but we do not think that he is bound to take it in all cases. He may satisfy himself, in any way, that the fees are payable, just as he may satisfy himself in any way that land revenue is payable, by a person, and when so satisfied, he may proceed under the

section. It is further contended that the totties could not have sued the lessees under Act III of 1895 (Madras) for recovery of the arrears as they had accrued more than three years before the Deputy Tahsildar's demand was issued, and that, therefore, the debt was barred and consequently not "payable" within the meaning of Section 52 when the demand was issued. In answer to this it seems to be enough to say that by Section 22 of Act III of 1895 it is enacted that nothing in that Act shall affect the provisions of Section 52 of Act II of 1864.

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We think, then, that the lessees were liable for the fees and that there was nothing to prevent the Collector from proceeding under Section 52 to realize them. On this ground we think that the decree of the Subordinate Judge dismissing the suit was right both on the merits and because the suit was barred under Section 59 of the Act, not having been brought within six months of the time when the alleged cause of action arose. No issue was raised in the Lower Court, nor was any argument addressed to us to show that Regulation VI of 1831 and Act III of 1895 (Madras) are not applicable to the Sivaganga zemindari.

We dismiss the appeal with costs.

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23 M. 580.

[580] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

PAKRAN (*Plaintiff*), *Appellant* v. KUNHAMMED AND OTHERS (*Defendants*), *Respondents*.*
[20th February, 1900.]

Registration Act—Act III of 1877, Section 35—Representative of deceased settlor—Admission of execution of document by one out of three representatives—Defect of procedure in course of registration—Validity of registration.

The mother of three sons executed a deed of gift in favour of one of them and then died. The donee alone registered the document, the other sons not appearing before the registering officer. The document having been subsequently put in evidence, it was contended that it was inadmissible on the ground that under Section 35 of the Registration Act, the donor being dead, the execution of the document must be admitted by the representative of the deceased and that an admission by one out of three representatives is not an admission within the meaning of the Act:

Held, that assuming that the three sons of the deceased donor ought to have joined in admitting the execution of the document and that the registering officer was in error in considering one of them the due representative of the deceased, such error was a defect in procedure in the course of registration and the registration was not rendered invalid by reason thereof.

[R., 33 C. 584 = 4 C.L.J. 340; 10 C.W.N. 717; 9 A.L.J. 300 = 14 Ind. Cas. 61 (63); 13 C.W.N. 722 = 4 Ind. Cas. 69.]

SUIT by plaintiff against his two brothers for possession of one-third share of certain lands which had been the property of his mother. Defence; that the mother had made a gift of the said property to first defendant; and an issue was framed on that point. The District Munsif found against the alleged gift, and decreed one-third share to plaintiff. First

* Second Appeal No. 169 of 1899, against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 312 of 1898, reversing the decree of A. Annasami Ayyar, District Munsif of Badagara, in Original Suit No. 635 of 1897.

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defendant appealed to the District Judge who (after ordering additional evidence to be taken), upheld the validity of the gift to first defendant. He said :—" Exhibit I is produced as a deed of gift by the mother to first defendant . . . . and I find that the deed of gift is true . . . . . It is contended that the registration of the deed of gift was obtained improperly. This deed was registered by first defendant after the death of his mother. First defendant as her son was one of her representatives, and I can see no reason [581] to hold that the registration was invalid. I find that the gift by his mother to first defendant is true and valid." He also found that the gift had been accompanied by such transfer of possession as was possible and referred to *In re Shaik Abdul Aziz* (1).

Plaintiff preferred this second appeal.

Mr. *C. Krishnan*, for appellant, contended that the document, Exhibit I, was not duly registered and should have been held to be inadmissible in evidence. By Section 35 of the Registration Act, in case the person who has executed a document is dead, the registering officer is to register the document if the representative of the deceased appears before him and admits its execution. Here, the deceased was not represented as required by the section, only one out of three representatives having appeared before the officer. He referred to *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (2). He contended that all the three sons of the deceased should have admitted the execution before the registering officer, and that Section 60 could only apply and render documents admissible in evidence when the terms of Section 35 had been complied with. Here the first defendant, who alone admitted the execution, was himself the donee, and as such, solely interested in the registration. He also contended that even if the registration should be held to be valid, the gift must fail, inasmuch as there had been no transfer of possession in pursuance of the gift, as required under the Muhammadan Law.

J. L. Rosario (with him *Ryru Nambiar*), for respondent No. 1.—The Court cannot go behind a registered document when once it has been registered, for the purpose of enquiring into the validity of the registration. See *Hardei* v. *Ram Lall* (3) and *Mohammed Ewaz* v. *Birj Lall* (4). See also Sections 65 and 49 and Rules 7 and 8. The registering officer makes enquiry and may compel registration, and when he has once registered, the document is admissible in evidence.

JUDGMENT.

Section 123 of the Transfer of Property Act does not apply to the gift in this case, as it is one by a Muhammadan governed by Muhammadan Law (Section 129 of the same Act). It is contended that the gift although formally registered was not duly registered under the Registration Act and is therefore not [582] admissible in evidence. The ground upon which this contention is based is that, under Section 35 of the Registration Act, the donor in the deed of gift being dead, its execution should have been admitted by the "representative" of the deceased and that first defendant being only one of the three representatives, there being two other sons of the deceased, was not by himself the "representatives" of the deceased. Assuming that the contention is right and that the three sons should have

(1) 11 B. 691. (2) 18 C. 556.
(3) 11 A. 319. (4) 4 I. A. 166.

joined in admitting the execution of the document and that the Sub-Registrar was in error in considering the first defendant the due representative of the deceased, such error is in our opinion only a defect of procedure in the course of registration, and therefore the registration is not rendered invalid on that account. The observations of the Judicial Committee in *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1) and repeated in *Mohammed Ewaz* v. *Birj Lall* (2) warrant the view we have taken which has also been taken by the Allahabad High Court in *Hardei* v. *Ram Lall* (3). There are cases in which non-compliance with the provisions of the Registration Law has been held to amount to more than a defect in the procedure and to invalidate the registration, such as the cases of *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (4) and *Narasamma* v. *Subbarayudu* (5). Neither of these decisions has reference to Section 35 of the Registration Act, non-compliance with the terms of which is what we are now dealing with. The District Judge was therefore right in holding that the deed of gift was duly registered. There is no evidence to show that the gift was invalid under Muhammadan Law.

The second appeal is dismissed with costs.

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23 M. 583.

[583] APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice and Mr. Justice Davies.

THE COMMERCIAL BANK OF INDIA, LIMITED (*Defendant No.* 9), *Appellant v.* ALLAVOODEEN SAHEB AND OTHERS (*Plaintiffs Nos.* 1 *to* 4, *and Defendants Nos.* 1 *to* 8), *Respondents.**

[15th, 16th, 17th, 18th and 19th January, and 20th February, 1900.]

Limitation Act—Act XV of 1877, *Section* 14. *Articles* 120, 127—*Dismissal of former suit on substantive ground of failure to establish cause of action—Claim by contributors to a common fund.*

An agreement was entered into between an uncle and his nephews, in 1879, that their earnings should be put into a common fund, which fund should be utilized for family requirements. No provision was, however, made for the division of any surplus that might arise. The agreement was acted upon until 1894, by which time a sum of Rs. 37,723-8-0 had accumulated. Upon a claim being made by the nephews in 1894 for a distribution of this fund, the uncle denied their right to participate in it. The uncle, who was working in partnership with others, in the same year, 1894, instituted a suit against his partners for an account and for his share of profits. He claimed the said accumulated fund of Rs. 37,723-8-0 as his share. While his suit was pending, namely in December 1895, he assigned its subject-matter to the present ninth defendant, (a banking corporation). The partners, in defence, alleged that the present plaintiffs were entitled to share equally in the Rs. 37,723-8-0 and that they held the fund as stake-holders. In December 1894, present plaintiffs filed a suit against their uncle, the said first defendant and his partners, in which they claimed shares in the said sum of Rs. 37,723-8-0. The two suits were tried together. First defendant's suit against his partners was dismissed on the ground that he had claimed for himself alone and had not brought the proper parties before the Court. In plaintiffs' suit, the latter were declared to be entitled to shares in the said sum, as prayed. First defendant appealed in both suits, judgment being given by the Appellate Court on 19th October 1897. In the suit in which first

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* Original Side Appeal No. 26 of 1899 against the decree of Mr. Justice Boddam, in Civil Suit No. 25 of 1899.

(1) 2 I.A. 210. (2) 4 I.A. 166. (3) 11 A. 319.
(4) 18 C. 556. (5) 18 M. 364.

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defendant was plaintiff, the plaint was allowed to be amended and a decree was passed for the amount found due to him alone in the settlement of accounts. In the plaintiff's suit, the Appellate Court found that plaintiffs had no cause of action as against first defendant's firm; and that as between plaintiffs and first defendant there were accounts to be settled, in addition to those which appeared in the books of the firm. The Appellate Court further declined to treat the suit as one for partition only, and dismissed it, intimating that plaintiffs could obtain relief by way of partition in a suit so framed as to embrace all the parties interested [584] and all the property in which they were interested. On the 30th January 1899, plaintiffs filed the present suit in which they claimed that their shares in the said fund of Rs. 37,723-8-0 should be determined and paid:

Held, (affirming BODDAM, J.) that plaintiffs were entitled to recover.

Held, also, that the time occupied in prosecuting the former suit could not be excluded when computing the period of limitation. Though the plaintiffs had acted with due diligence in instituting their former suit, it was dismissed—not on any technical ground of misjoinder of parties or of causes of action—but on the substantive ground that having regard to the frame of the suit, no cause of action had been established against any of the defendants; and the suit was not one which the Court from defect of jurisdiction or other cause of a like nature, was unable to entertain.

Held further, that the claim was not barred by limitation. The title of the nephews was not based on contract, express or implied, but arose out of the fact that they were contributors to a common fund, which the Court was now asked to distribute. The claim was one which the Court must deal with on equitable principles and apart from any question of partnership or of contract, and was consequently one to which Article 120 of the Limitation Act applied. *Also*, that the question was not one relating to joint family property, within the meaning of Article 127.

Rani Mewa Kuwar v. *Rani Hulas Kuwar*, (13 B.L.R.. 312), referred to.

SUIT to determine plaintiffs' shares in a sum of Rs. 37,723-8-0. The following facts are taken from the judgment of the Chief Justice:—

"By a deed, dated 3rd December 1895, Oosman Saheb, the first defendant, assigned to the Commercial Bank of India, Limited, the ninth defendant, the subject-matter of suit No. 242 of 1894, which was then pending in the High Court, and for the purposes of the deed, appointed the Bank his attorney. In the suit in question, Oosman Saheb asked that his share in a business, which is described in the recitals to the deed as a partnership business carried on by him jointly with the defendants in that suit (four persons who carried on business under the name of T. Rahiman Saheb & Co.) between August 1885 and May 1894, should be ascertained and declared and that the share of the profits due to Oosman Saheb should be paid to him. The amount claimed by Oosman Saheb in that suit was Rs. 37,723-8-0. The defendants to that suit, in their written statement, alleged that the nephews of Oosman Saheb were entitled to share equally with Oosman Saheb in this sum of Rs. 37-723-8-0 and that they (the defendants) held this sum as stake-holders. This written statement was put in, in December 1894, a year before the date of the deed of assignment. Shortly after the institution of the suit, the subject-matter [585] of which Oosman Saheb purported to assign to the Commercial Bank under the deed above referred to, *viz.*, on 22nd December 1894, a suit (No. 266 of 1894) had been instituted by Oosman's nephews against the defendants in suit No. 242 and against Oosman, the nephews alleging that they were living as members of one family, that they were entitled to participate equally with Oosman Saheb in the sum claimed by him from the defendants in suit No. 242 of 1894 and asking for a declaration that they were entitled to five-sixths of this sum. Oosman's suit (No. 242 of 1894) and the nephews' suit (No. 266 of 1894) were tried together. Oosman's suit was dismissed on the ground that he had claimed for himself

alone and had not brought the proper parties before the Court. In the nephews' suit, a declaration was made that they were entitled to five-sixths of Rs. 37,723 and that Oosman Saheb was entitled to one-sixth of that sum; judgment was given for the nephews for five-sixths of the amount in question. Oosman appealed in both suits. On 19th October 1897, the Appellate Court delivered judgment in the two appeals. In Oosman's suit, the Appellate Court held that, in strictness, the suit ought to be dismissed, on the ground that he had framed his suit on the footing that the accounts between him and the defendants remained unsettled, whereas, in the view taken by the Appellate Court, a settlement of accounts had been made in May 1894. The Appellate Court were of opinion that if Oosman had framed his suit so as to demand from the defendants the payment of the sum found to be due to him in the settlement of accounts, he would have been entitled to a decree for that amount. They allowed the plaint to be amended and gave a decree for the sum named in the account. In October 1897, the date of the judgment of the Appellate Court the sum in dispute was in the hands of a receiver. On 30th August 1898, it was paid over to the Bank as the attorney of Oosman Saheb under the order of the Court in pursuance of the Appellate Court's judgment. Under a later order of Court, it has been paid into Court by the Bank and is now in Court. In the nephews' suit, the Appellate Court were of opinion that they had no cause of action against 'the firm' (*i.e.*, T. Rahiman Saheb & Co.). As between Oosman and the nephews, the view of the Appellate Court was that there were accounts to be settled and the debits and credits which appeared in the books of 'the firm' would have to be brought into those accounts, but that other accounts would have to be gone into besides **[586]** those appearing in the books of 'the firm.' The Appellate Court were of opinion that the plaintiffs could not ask the Court to treat their suit as one for partition only and claim a decree for their share as against Oosman Saheb and, whilst indicating their opinion that the plaintiffs could obtain relief by way of partition in a suit so framed as to embrace all the parties interested and all the property in which they were interested, allowed the appeal and dismissed the suit."

Three of the plaintiffs in the said original suit No. 266 of 1894 now brought this suit, another of the plaintiffs in that suit being now impleaded as second defendant, and another having since died. Plaintiffs claimed to have their shares in the said sum of Rs. 37,723-8-0 ascertained and paid to them. The suit was filed on 30th January 1899. The ninth defendant denied that plaintiffs had any cause of action. The judgment of the Court was to the effect that the first three plaintiffs were entitled to three-fifths and fourth plaintiff and defendants Nos. 3 to 8 were jointly entitled to one-fifth of the said sum of Rs. 37,723-8-0.

Defendant No. 9 preferred this appeal.

Mr. *R. F. Grant*, for appellant, contended that the suit was barred by limitation. If a partition suit, it was not governed by Article 127, as that article only applied to Muhammadan families who have accepted the rules of Hindu Law. See *Patcha* v. *Mohidin* (1). The parties here were Labbais. If not a partition suit, it must be either a suit on a contract, in which case it would be barred under Articles 113 and 115, or a partnership suit, when it would be bad, because all assets had not been brought into account. [He argued generally on the merits.]

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(1) 15 M. 57.

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Hon. Mr. *E. Norton* and *J. H. M. Ryan* for respondents Nos. 2 and 3.—There was no firm carrying on a common business, nor was there a combination of property, and so there was no partnership. See Sections 239 and 242 of the Contract Act. The title to division is only an incident to the contract attached by law, and the right to sue only accrued when the money reached the hands of another member of the family, and was ascertained. See *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (1). The suit is governed by Article 127, which applies to Muhammadans as well as Hindus. The suit is for a specific share, to be ascertained in [587] consequence of an alienation by one of the co-parceners. See *Venkatachella Pillay* v. *Chinnaiya Mudaliar*(2). That was a case of an undivided Hindu family, but there is no distinction. See also *Chinna Sanyasi* v. *Suriya*(3) and *Subramanya Chettyar* v. *Padmanaba Chettyar*(4). *Venkayya* v. *Lakshmayya*(5) does not apply as there had been no alienation to a stranger. Under Section 14 of the Limitation Act plaintiff is entitled to have the time occupied in the other proceedings allowed. See *Venkiti Nayak* v. *Murugappa Chetti* (6), and *Assan* v. *Pathumma* (7), in both of which time was allowed in respect of previous suits dismissed on account of misjoinder.

Mr. *R. F. Grant* in reply.—For Section 14 of the Limitation Act to apply, the dismissal must proceed on some other grounds than on a determination on the merits. In *Assan* v. *Pathumma*(7) the judgment in *Venkiti Nayak* v. *Murugappa Chetti* (6) is interpreted as covering every case of misjoinder, whereas the latter judgment was only on the particular facts of the case. The time occupied in prosecuting a suit dismissed because the plaintiff had falied to bring in all the property should not be deducted.

Sundara Ayyar and *K. Srinivasa Ayyangar*, for respondents Nos. 1 and 4.

JUDGMENT.

SIR ARNOLD WHITE, C.J. [after stating the facts as above].—In their written statement, the Bank denied in general terms that the plaintiffs in the present suit had any cause of action against them, but they did not plead the law of limitation, and they did not rely on the law of limitation in the Court below. The Bank now say that the question of limitation did not arise in the Court below—at any rate not until after judgment—because the suit was, in substance, a suit for partition, for which the time would begin to run from May 1894, and the period of limitation would be twelve years (Article 127 of the Schedule to the Limitation Act). In the Court below, the defendants contended that the nephews' suit was a suit for partition and that, as a suit for partition, it was bad, because *ex concessis* the whole of the family property had not been brought into account. The learned Judge held that it was not a suit for partition, but an action, founded on contract, [588] for the division of a particular sum of money. In this state of things, before this Court, the appellant (the Bank) raised the question of limitation and we are bound in law to consider this question and to give effect to the appellant's contention, if we consider it to be well founded. The present suit was instituted on 30th January 1899. It was argued on behalf of the

(1) 13 B.L.R. 312. (2) 5 M.H.C.R 166 (170). (3) 5 M. 196.
(4) 19 M. 267. (5) 16 M. 98. (6) 20 M. 48. (7) 22 M. 494.

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appellant that even assuming the suit to have been one for partition, Article 127 only applies to Muhammadan families who have accepted the rules of Hindu Law with reference to the succession and devolution of their property, and reliance was placed on the judgment of this Court in *Patcha* v. *Mohidin* (1)—a decision to the effect that the words "joint family property" in the article in question are intended to apply to joint family property in the Hindu sense of the term. It is admitted that the parties to this litigation are Labbais, but the plaintiffs do not allege any family custom, but rely on an agreement which, they say, was entered into in the year 1879 between themselves, their father Chandu Mean Saheb, and their uncle Oosman Saheb, under which all the earnings of Oosman Saheb, the uncle of the nephews then living, and of any other son that might thereafter be born to Chandu Mean Saheb, should be common property (paragraph 9 of plaint) and that, in case any of the persons entitled to share under this agreement should die leaving male issue, his share should descend to his issue in the same manner as in a joint Hindu family (paragraph 21 of the plaint). It seems doubtful, whether this agreement, even if we were prepared to hold that it has been proved in fact and was enforceable in law, would make the property in question joint family property in the Hindu sense of the term. The learned Judge in the Court below was of opinion that the plaintiffs had not, however, made out a contract in the terms alleged in their plaint but he held that they had established a contract to the effect that the earnings of the members of the family, who had worked in the firm of T. Rahiman Saheb & Co., and who were of age, as well as the earnings of the first plaintiff, who had worked in another firm at Ambur, should be shared equally and divided equally among those who entered into the arrangement, and in his finding that the fourth plaintiff and the third and eighth defendants were jointly entitled to a [589] one-fifth share he applied the Muhammadan and not the Hindu Rules of Law, with reference to the devolution of the property of a deceased member of the family. In this state of things, it cannot be said that the family property in question is joint family property in the Hindu sense of the term, and, in my judgment, Article 127 does not apply.

It was also argued on behalf of the appellant that, if the suit was not a partition suit, it must be regarded either as a partnership suit, in which case it would be bad, because, admittedly, all the plaintiffs' assets had not been brought into account, or a suit based on contract (see Articels 113 and 115), in which case the plaintiffs' suit was out of time, inasmuch as their cause of action arose in May 1894. Even if the cause of action arose in December in 1895, the date of the assignment by Oosman to the Bank, the present suit, which was instituted in January 1899, would be out of time, if the suit is to be regarded as a suit for an account and share of the profits of a dissolved partnership (Article 106) or a suit for specific performance of a contract (Article 113) or a suit for compensation for breach of contract (Article 115).

As regards the question of partnership, I am not prepared to say that, construing the language of Boddam, J., strictly and literally (. . . . . "there was a contract made at the commencement of the business," &c.), the contract found by him is not a contract of partnership between Oosman and his nephews *inter se*. In my judgment, however, Boddam, J. did not intend to find, as a fact, that Oosman and his

(1) 15, M. 57.

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nephews were partners. The language of Boddam, J., (. . . . . "that the profits made by those who became members of T. Rahiman Saheb & Co.") would also seem to indicate that in his view there was a partnership between Oosman and his nephews on the one hand and the firm of T. Rahiman Saheb & Co. on the other. But the learned Judge has himself held in another suit that there was no partnership as between the family and the firm and this view has been affirmed in appeal.

In my judgment, there was no agreement between Oosman and his nephews to combine their labour "in some business" and consequently the relation of partnership as defined by Section 239 of the Contract Act did not subsist between them.

If the suit is to be regarded as a partnership suit or as a suit based on contract, the plaintiffs' remedy would be barred by the law of limitation. As against this, it was contended on behalf of [590] the plaintiffs that their rights were saved by Section 14 of the Limitation Act and reliance was placed on the decisions of this Court in *Venkiti Nayak* v. *Murugappa Chetti*(1) and *Assan* v. *Puthumma* (2). In the latter case, it was held that it followed from the decision of the Full Bench in *Venkiti Nayak* v. *Murugappa Chetti* (1) that Section 14 applies where a proceeding has become abortive by reason of misjoinder of parties. In my judgment, Section 14 does not apply tothe facts of the present case. Though, no doubt, the plaintiffs acted with due diligence in instituting suit No. 266 of 1894 on 22nd December 1894, which was dismissed by the Appellate Court on 19th October 1897, the suit was dismissed, not on any technical ground of misjoinder of parties or of causes of action, but on the ground that, having regard to the frame of the suit, no cause of action had been established against any of the defendants. It cannot be said that the abortive suit was one which the Court, from defect of jurisdiction or other cause of a like nature, was unable to entertain.

The learned Judge has found upon the evidence that there was a contract under which the parties to the contract were to share equally and divide equally all their earnings. In my view, the agreement entered into in 1879 amounted to nothing more than an agreement between Oosman and his naphews to put their earnings into a common fund and to utilize that fund for family requirements. Whether this was a legal contract or whether, as regards some of the parties who acted on it, it was *nudum pactum* is immaterial. The agreement was in fact acted on by Oosman and his nephews from 1879 to 1894. It appears to me that, at tho time the agreement was entered into, the parties never contemplated that the common fund would be more than sufficient for family requirements, that they did not contemplate any surplus being available and that they made no agreement as to how any surplus was to be dealt with. In 1885, there was a settlement of accounts. Up to that time, although the contributors to the common fund must have known that there was a strong probability that when remuneration was apportioned to them by the firms for whom they worked, their earnings would amount to more than was necessary for ordinary family requirements, they did not know what the amount of their remuneration would be, or whether any [591] remuneration would in fact be awarded to them. Their claim for remuneration against their respective firms was recognized by their being allowed to draw in anticipation of their earnings, but it is doubtful whether it amounted to anything

(1) 20 M. 48. (2) 22 M. 494.

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more than a strong moral claim. It was left entirely to the *Ejaman's* of the firm to decide when the remuneration of the various workers in the firm should be allotted and what the proportion of that remuneration to profits made should be. Up till 1884, there had been no allocation of earnings. After the settlement of accounts arrived at in 1885, it was, of course, within the knowledge of the members of the family that a sum of Rs. 9,000 and odd stood to the credit of Oosman in the books of T. Rahiman Saheb & Co. Even then, however, no division of this sum was contemplated. The sum was allowed to remain as capital in the firm and no question appears to have arisen as to how it should be dealt with as between the members of the family until 1894. The state of things in 1894 was this. The contract to form a common fund out of the family earnings had been performed. No other contract was then subsisting. A fund was in existence created by the contributions of the members of the family and the nephews desired that this fund should be distributed among those entitled to participate in it. The firm of T. Rahiman Saheb & Co. were willing to pay over this amount, so long as the interests of the nephews were safeguarded, but they declined to pay it to Oosman. Oosman refused to admit the rights of the nephews to participate in it. The nephews then brought proceedings with the view of establishing their rights. These proceedings proved abortive. The rights of Oosman and his nephews, *inter se*, were never adjudicated upon by the Appellate Court, though that Court clearly recognized rights on the part of the nephews as against Oosman, which could be enforced if the appropriate remedy were adopted. After Oosman purported to assign to the Commercial Bank the whole of the fund in question, the nephews instituted the present suit, in which they ask that their rights may be declared and the fund dealt with by the Court. It seems to me that the title of the nephews is not based on contract, express or implied, but arises out of the fact that they were contributors to the common fund, which the Court is now asked to distribute.

The decision of the Privy Council, with reference to the question of limitation in the case of *Rani Mewa Kuwar* v. [592] *Rani Hulas Kuwar* (1) is an illustration of the principle, which, in my judgment, is applicable to the facts of the present case.

The claim is one which the Court must deal with on equitable principles and apart from any question of partnership or of contract and is consequently a claim to which Article 120 applies and the period of limitation is six years. In this view, it is immaterial to consider whether the plaintiffs' cause of action arose in 1894, when Oosman refused to recognize their rights, or on 3rd December 1895, the date of the assignment by Oosman to the Bank, or, as alleged in the plaint, on 30th August 1898, the date when the Bank as Oosman's assignee and attorney received the money out of Court. These dates are all within the six years' limitation provided by Article 120 of the Limitation Act. In my judgment, the plea of limitation fails.

[After dealing at length with the merits of the case, His Lordship concluded:] In my judgment, the family history and the system of promiscuous drawing to which I have referred, show that it was the intention of the parties to treat the fund created by their common earnings as a common fund. There is a presumption in favour of equality, when it is not shown that the parties interested intended any other principle of distribution

(1) 13 B. L. R. 312.

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to be applied. This principle of equality is illustrated by Section 45 of the Transfer of Property Act and Section 253 of the Contract Act.

I think Boddam, J. applied the right principle in dealing with the distribution of this fund, that his judgment ought to be affirmed, and the appeal dismissed with costs. Fees will be allowed for two counsel.

DAVIES, —I concur throughout.

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23 M. 593 = 10 M.L.J. 208.

[593] APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

SORNAVALLI AMMAL AND OTHERS (*Plaintiffs*), *Appellants* v. MUTHAYYA SASTRIGAL (*Defendant*), *Respondent*.*
[21st and 22nd February, 1900.]

Limitation Act—Act XV of 1877, *Articles* 113, 144—*Suit on an award—Meaning of "contract" in Article* 113—*Specific Relief Act—Act I of* 1877, *Section* 30.

By an award bearing date 7th July 1893 plaintiffs were held to be entitled to certain immoveable property. On 15th November 1897, they filed a suit to enforce the award. On its being contended that the suit was barred by limitation, under Article 113 of the Limitation Act, it being in fact for the specific performance of a contract :

Held, that the suit was not barred, the article applicable being article 144. A suit to enforce an award cannot be treated as a suit to enforce a contract, within the meaning of Article 113, the word "contract" in that article being used in its ordinary sense.

Sukho Bibi v. *Ram Sukh Das*, (5 A. 263), and *Raghubar Dial* v. *Madan Mohan Lal*, (16 A. 3), referred to.

[F., 23 A. 285; 15 C.P.L.R. 115; R., 34 A. 43 (46) = 8 A.L.J. 1138 = 11 Ind. Cas. 705; 33 C. 881 = 4 C.L.J. 162; 33 M. 246 = 4 Ind. Cas. 392 = 20 M.L.J. 79 = 7 M.L.T. 67; 4 Ind. Cas. 821 = U.B.R. 1909, II Qr. Limitation p. 9; 16 Ind. Cas. 804 = 265 P.W.R. (1912); 10 O.C. 218 (224); 20 P.R. (1913) = 101 P.W.R. (1913); 6 S.L.R. 148; U.B.R. (1897—1900) 446; D., 26 A. 497 = A.W.N. (1904) 72.]

SUIT to recover immoveable property. Plaintiffs Nos. 1 to 4 and defendant's late wife were sisters, in whose favour their grandmother had disposed of all her properties in specific portions by a registered settlement in 1884. Disputes having arisen, after the death of defendant's wife, regarding the properties which she had enjoyed, they were referred to arbitration, and an award was passed on 7th July 1893. Defendant had sued to set aside this award, without success, it being held to be valid and binding. This decision was affirmed on appeal by the District Court. Under the award, the right to the properties enjoyed by defendant's wife passed to plaintiffs Nos. 1 to 4, defendant being excluded from them. Plaintiffs alleged that they had obtained possession of the other properties except those now sued for. Plaintiff No. 5 was the son of plaintiff No. 4, and plaintiff No. 6 claimed to have purchased the share of plaintiff No. 4. Defendant set up the plea (among others) of limitation, the suit having been brought more than three years from the date of the award, and [594] an issue was framed on that

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* Second Appeal No. 195 of 1899, against the decree of S. Russell, District Judge of Madura in Appeal Suit No. 506 of 1893, reversing the decree of V. Narayanasami Ayyar, District Munsif of Madura, in Original Suit No. 650 of 1897.

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question. The District Munsif held that inasmuch as the award was a registered one, and as the plaintiff's claim was based on the award, the period of limitation was six years under Article 116 of the Limitation Act. He gave judgment for the plaintiffs. Defendant appealed to the District Judge who said :—"The case has been argued on the points of limitation only. The question in the case is whether Article 113 or 144 of the Limitation Act applies. There was a dispute between the plaintiffs and the defendant about certain items of property. An award was passed on 7th July 1893. It was registered. The items of land sued for were awarded to the plaintiffs. The arguments of the defendant's vakil are as follow: (1) an award is a contract; (2) Section 30 of the Specific Relief Act I of 1877 puts relief connected with awards on the same footing as that in the case of contracts; (3) the period of limitation is three years as per Article 113. Article 113 is for 'specific performance of a contract.' Plaintiffs allege that their suit is by way of ejectment and rely upon Article 144. If A executes a deed of sale to B, the latter has twelve years within which to recover the property conveyed. Similarly it is argued that the plaintiffs are entitled to twelve years from the date of the award upon which date the right in the property passed to the plaintiffs. I am not satisfied, however, that the argument advanced for the plaintiffs is sound. The suit is, to my mind, really one to enforce the terms of an award and the period of limitation is in my opinion only three years under Article 113. It makes no difference that the award has been registered."

He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal.

Sundara Ayyar and *K. Srinivasa Ayyangar*, for appellants.—The suit is for the recovery of land on title, and not for specific performance of a contract. The award is the title, just as a sale deed or a judgment of the Court would be. We have twelve years. An award is not a contract. It is a judgment of a tribunal agreed upon by the parties; though it cannot be executed without being first made a decree of Court,—as in the case of foreign judgments. In some suits on awards special periods of limitation are provided in the Act; see Articles 45 and 46 of Schedule II to the Limitation Act. Article 113 relates to the specific performance of a contract. Though under the Specific Relief Act the procedure to be followed in granting relief on an award is similar to that on [595] contracts, the word, contract, as used in Article 113 of Schedule II to the Limitation Act, cannot be extended to mean an award. Both terms are used in the Act. Further, this suit is not for specific performance at all, but for recovery of possession. The award is only used as evidence of title. Even if Article 144 does not apply, then the only Article applicable is 120, and even then the suit will have been brought in time.

V. Krishnasami Ayyar, for respondent.—An award, is in effect, a contract, since the parties agree that they will be bound by such terms as may be settled by the arbitrator. The finding of the arbitrator, when arrived at, becomes a term of the original contract agreeing to the arbitration; see *Wood* v. *Griffith* (1). Two Allahabad cases (*Sukho Bibi* v. *Ram Sukh Das* (2), and *Raghubar Dial* v. *Modan Mohan Lall* (3)) are exactly in point. The Legislature, too, has treated awards as contracts; see Specific Relief Act, Section 30; and per Lord Justice Turner, in *Nickels* v. *Hancock* (4).

(1) 1 Sw. 43 (54.)
(2) 5 A. 263.
(3) 16 A. 3.
(4) 7 De Gex M. & G. 300 (317).

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JUDGMENT.

The award in this case adjudged to the plaintiffs' certain immoveable property, to recover which the present suit is brought. The date of the award is 7th July 1893, and this suit was instituted on the 15th of November 1897. The District Judge held the suit was barred by limitation, as the article applicable was 113 of the second schedule of the Limitation Act. That article provides for suits for specific performance of a contract and allows only three years from the date fixed for the performance, and in case no date is fixed, when the plaintiff has notice that performance is refused. We may note in passing that, if the article is applicable, the Judge's decision is defective, as he does not state from which period limitation began to run in this case. We are, however, unable to agree with the Judge that the said Article 113 is applicable to the present case. This is a suit for the recovery of land, the title to which was declared in plaintiffs' favour by the award. The award does not provide for the execution of any instruments between the parties, or the performance of any conditions precedent to the plaintiffs' enjoyment of the land– in other words, the plaintiffs acquired under the award a complete title to the land on the date of the award and were entitled to take possession thereof from that date. [596] In these circumstances, the suit clearly appears to us to be one falling under Article 144, for the possession of immoveable property, and is within the twelve years' time allowed by that article. Even if the suit be treated as one to enforce the terms of an award, the only article applicable is No. 120 for suits for which no period of limitation is otherwise provided and the suit is within the six years' time allowed by that article. Our attention has been called to *Sukho Bibi* v. *Ram Sukh Das* (1), where a suit for money under an award was held to be virtually a suit to have the award specifically enforced and was governed by Article 113, and the same article was held applicable in a similar suit (*Raghubar Dial* v. *Madan Mohan Lal* (2), although the reasoning in the latter case appears to be inconsistent with that in the former. In the first place, it is difficult to see how a suit for a sum of money can in any light be regarded as a suit for specific performance. In the next place, we think a suit to enforce an award cannot be treated as a suit to enforce a contract within the meaning of Article 113, as the term contract there must be understood in its ordinary sense. It is true that Section 30 of the Specific Relief Act directs that the provisions of Chapter II of that Act shall apply to awards. It cannot on that ground be contended that awards are contracts, because it would have to be similarly contended that directions in a will or codicil to execute a particular settlement, which are included in the same section, are also contracts, which would be absurd. No doubt an award springs out of an agreement to submit to arbitration, but the award itself is a decision of the arbitrator binding upon the parties as a decision. The observations of the Lord Chancellor in *Wood* v. *Griffith* (3), and of Lord Justice Turner in *Nickels* v. *Hancock*(4), do not, in our opinion, go so far as to declare that in England an award is a contract. They merely show that the jurisdiction of the Courts of Equity in enforcing the specific performance of the provisions of an award rests on the ground that the award is the outcome of the contract to refer to arbitration. It appears to be on this principle that Section 30 of the Specific Relief Act so far as it relates

(1) 5 A. 263.
(2) 16 A. 3.
(3) 1 Sw. 43 (54).
(4) 7 De Gex M. & G. 300 (317.)

to awards has been enacted. However this may be, the authorities cited afford no warrant for our construing the term "contract" in Article 113 as comprehending an award.

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[597] We must, therefore, reverse the decree of the District Judge, as the suit is not barred by limitation, and remand the appeal for hearing and disposal with reference to the other questions raised in the case. Costs will abide and follow the result.

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23 M. 597.

APPELLATE CIVIL.

Before Mr. Justice Shephard, Mr. Justice Subrahmania Ayyar, and Mr. Justice Davies.

KRISHNA AYYAR AND OTHERS (*Defendants Nos.* 2 *to* 9), *Appellants v.* KRISHNASAMI AYYAR (*Plaintiff*), *Respondent.**
[23rd February and 1st March, 1900.]

Hindu Law—Promissory note by member of an undivided Hindu family—Liability of other member—Negotiable Instruments Act—Act XXVI of 1881, *Sections* 4, 26, 27.

The maker of a promissory note (executed in plaintiff's favour), being a member of an undivided Hindu family, had borrowed from plaintiff the money represented by the note and purchased therewith land for the benefit of the family, which consisted of himself (the maker of the note), an uncle and the sons of the uncle. The uncle had always recognized the debt as a family debt, and the land purchased with the money borrowed had, in a subsequent division of property, been allotted to the uncle and his sons, who had also agreed with the maker of the note that they would discharge the debt. On a suit being brought against the maker of the note, as well as the uncle and his sons:

Held, (DAVIES, J., dissenting), that all the members of the undivided family were liable.

Per SUBRAHMANIA AYYAR, J.—Even assuming that the maker of the note was not the manager of the family, he was the agent of his coparceners when buying the land and raising the loan, and his acts as such agent bound the uncle who expressly assented to them; also that inasmuch as the uncle was liable, his sons must be also held liable for the debt to the extent to which they were interested in the family property, and that even if they were minors when the money was borrowed.

Whether, having regard to Sections 233 and 234 of the Indian Contract Act, a principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name.—*Quære.*

Per DAVIES, J., (1) Had the suit been brought on a bond, or on the debt of which the promissory note afforded evidence, other members of the family might [598] have been held liable as well as the maker of the note, on the ground that the latter represented them. But in the case of a suit on a promissory note (as this suit was) no such representation could be alleged unless the persons said to be represented appeared by name on the face of the document; (2) Where the name of only one person appears on a promissory note and he does not purport to make it on behalf of any one but himself, none but the maker can be held liable to discharge it.

[R., 28 M. 244; 31 M. 343=18 M.L.J. 347=4 M.L.T. 195; 11 C.W.N. 139; 2 Ind. Cas. 203; 17 Ind. Cas. 497 (500)=23 M.L.J. 610 (616)=(1912) M.W.N. 1188; D., 30 M. 88=16 M.L.J. 508=1 M.L.T. 377.]

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* Appeal No. 6 of 1899, under Section 15 of the Letters Patent, against the decision of the High Court in Second Appeal No. 455 of 1898, presented against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Appeal Suit No. 492 of 1897, affirming the decree of M. Subbayyar, District Munsif of Pattukottai, in original suit No. 581 of 1896.

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SUIT to recover a sum of money obtained from plaintiff by first defendant for the expenses of his family and for which first defendant had executed a promissory note in plaintiff's favour. Second defendant was the uncle of first defendant, and defendants Nos. 3 to 9 were the uncle's sons. Defendant No. 1 had obtained the loan for the purchase of land for the benefit of the family. Defendant No. 2 had always acknowledged the debt to be a family debt; and the lands purchased with the borrowed money had since been allotted, in a division, to defendants Nos. 2 to 9, who had agreed with the first defendant that they would discharge the debt. The plaint stated as follows:—"The first defendant's father and the second defendant are undivided brothers. Defendants Nos. 3 to 9 are undivided sons of the second defendant. The first defendant's father died about 8 years ago. His son, first defendant, and the second defendant are undivided. For the Rs. 1,000 received from me for the expenses of defendant's family, a promissory note was executed to me by the first defendant on 10th June 1894, in which it is stipulated that the above sum should be paid to me on demand with interest at ½ per cent. per mensem. No amount has been received in respect of that. Now I hear that defendants have effected partition of their properties and that in that partition deed it is laid down that the second defendant should discharge the plaint debt. As the plaint debt has been incurred by the defendants for the expenses of their own family and as all the defendants are bound to discharge that amount, I instituted this suit against all the defendants who are concerned in it. I demanded payment of the said sum from the defendants but with no effect. The cause of action arose from 10th June 1894." Plaintiff prayed for a decree ordering payment to him by the defendants of the amount mentioned with future interest and costs in the suit. The second issue was:—"Whether the note and the plaint debt is binding on defendants Nos. 2 to 9." The promissory note which was filed as Exhibit A was in the following terms:—"Promissory note, dated 10th June 1894, executed to Krishnasami Ayyar Avergal, son of [599] Chinniah Seshappayyar, residing in Sithamalli, Mannargudi taluk, by Rangasami Ayyan, son of Vengachi Ayyar, residing in Pottivayal, Pattukottai taluk.—I shall, on demand, pay you the sum of Rs. 1,000 being the sum payable to you on a promissory note executed to you by me on 23rd June 1891 last,—with interest at 8 annas per cent. per mensem, and take back this promissory note.—(Signed) Rangasami Ayyan." The District Munsif passed a decree against the first defendant alone. Plaintiff appealed on the ground, among others, that inasmuch as the amount due under the note had been borrowed for family purposes and the executant had been admittedly the family manager, defendants Nos. 2 to 9 were also liable. The Subordinate Judge allowed the appeal, decreeing that all the defendants were liable.

Defendants Nos. 2 to 9 preferred this second appeal, on the ground, among others, that they could not be liable on a promissory note executed by first defendant.

The case first came on for hearing before SUBRAHMANIA AYYAR and DAVIES, JJ.

V. Krishnasami Ayyar, for appellants.

Ramakrishna Ayyar, for respondent.

SUBRAHMANIA AYYAR, J.—The plaintiff (respondent) sued for the money due under a promissory note executed by the first defendant when

he was undivided from his uncle, the second defendant, and the latter's sons, defendants Nos. 3 to 9. The loan was obtained by the first defendant in connection with the purchase of certain lands made by him for the family. The debt has all along been acknowledged by the second defendant to be a family debt. Further, the lands, in connection with the purchase whereof the debt was contracted, having, in the division which took place subsequently, been allotted to the share of the defendants Nos. 2 to 9, it was then agreed between them and the first defendant that the former should discharge the debt. The Lower Appellate Court held that the defendants Nos. 2 to 9 (appellants) also were liable to the plaintiff for the amount in question. The first contention on their behalf was that though the debt was contracted for a family purpose, yet, as the document is a promissory note none but the actual maker of the note is liable to the plaintiff. No doubt according to the English law none but those whose signatures appear on a bill of exchange or a negotiable promissory note can be sued thereupon. No authority was cited to show that that rule has been adopted in [600] this country. No provision similar to Section 23 of the English Bills of Exchange Act, 1882, has been enacted here, And having regard to Sections 233 and 234 of the Indian Contract Act, it is a question whether the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name. However this may be, the rule stated above is not applicable to the present case as the promissory note in question is not a Negotiable Instrument, within the meaning of the Negotiable Instruments Act, 1881. It was next urged, if I followed the argument correctly, that the first defendant, even if he was the manager of the family, could not, by such an instrument as the one in question, bind his coparceners. Now there can be no doubt that a manager can even by a contract to pay money, not evidenced by an instrument which does not amount to a negotiable instrument and which does not create a charge on the family property, bind his adult coparceners. In the Court of First Instance no direct statement appears to have been made by either party with reference to the question whether the first defendant was manager or not. But in the Lower Appellate Court, it was urged for the plaintiff that the first defendant was the manager when the debt was contracted. The Subordinate Judge's notes of the argument before him suggest that that allegation was not denied on behalf of the contesting defendants. However, the Subordinate Judge says nothing about it in his judgment. Assuming that the first defendant was not the manager of the family, still the facts established leave, in my view, no alternative but to conclude that, in buying the land referred to and raising the loan in question, the first defendant was in fact the agent of his coparceners and his acts as such bound the second defendant who expressly assented to the transactions. If any authority were needed for the view that a coparcener, who is not the manager, may, under certain circumstances, bind the other coparceners, reference may be made to *Sheo Pershad Singh* v. *Saheb Lal* (1), where Pigot and Rampini, JJ., referring to the junior members whose acts were in question there, observe "Lalji and Sitaram, though not the managers of the family, were yet "its accredited agents in the management of the money-lending business, "and as such had the authority of the other members to pledge the family "property for a joint debt contracted apparently in the [601] ordinary "course of that business." It follows therefore that the second defendant

(1) 20 C. 453 (461).

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was from the first one of the persons liable for the debt. As to his sons, even if all of them were under age when the money was borrowed, they also must be held to be responsible for the debt to the extent to which they are interested in the family property. For though, according to *Waghela Rajsanji* v. *Shekh Masludin* (1), *Indur Chunder Singh* v. *Radhakishore Ghose* (2), *Maharana Shri Ranmalsingji* v. *Vadilal Vekhatchand* (3), and *Radhanath Mookerji Muthoormohun Roy* (4), cited in Trevelyan's 'Law relating to Minors' 2nd edition page 186, defendants Nos. 3 to 9, assuming they were minors, would not be liable for the amount of the note as coparceners of the first defendant, yet it must be held that the fact that the second defendant also had become a debtor in respect of the amount imposed, under the Hindu Law, on defendants Nos. 3 to 9, as his sons, the duty of paying the debt so far as their interest in the joint property is concerned. I would, therefore, dismiss the second appeal with costs.

DAVIES, J.—I think the appellants' objection that only the first defendant can be held liable on the promissory note, upon which the suit is brought, as he alone is the maker thereof, is unanswerable. There can be no doubt that the document sued on is a promissory note within the definition of Section 4 of the Negotiable Instruments Act, and cannot therefore be treated as a mere bond (although under the Stamp Act it had to be stamped as a bond).

Had it been a bond that was sued on or had the suit been brought on the debt, of which the promissory note afforded evidence, other members of the first defendant's family might have been held liable as well as himself on the ground that the first defendant represented them; but in the case of a promissory note, no such representation can be pleaded, unless the persons said to be represented appear on the face of the document by name (*vide* Section 27 of the Negotiable Instruments Act). The name of no one but the first defendant appears in the plaint promissory note, and he does not purport to make it on behalf of any one else but himself. Therefore no one but the first defendant can be held liable to discharge it. I would therefore allow the second appeal, and reverse [602] the decree of the Lower Appellate Court and restore that of the Munsif with the appellant's costs in this and in the Lower Appellate Court.

[Under Section 575 of the Code of Civil Procedure the judgment of Subrahmania Ayyar, J., prevailed and the second appeal was dismissed with costs.]

Against the above order of dismissal the appellants preferred this appeal, under Section 15 of the Letters Patent, and the case was re-argued before the Court constituted as above.

V. Krishnasami Ayyar, for appellants.—The contention of the plaintiff is that a promissory note binds the family of which the maker may be shown *aliunde* to be the manager. This contention is directly opposed to Section 27 of the Negotiable Instruments Act, and would render meaningless the words "acting in his name" in that section. See also Clauses 2 and 3 of Section 28. The policy of the law merchant, of which the law of Negotiable Instruments is a branch, is that the holders in due course and endorsees

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(1) 14 I.A. 89=11 B. 551. (2) 19 I.A. 90=19 C. 507.
(3) 20 B. 61.
(4) [Calcutta] Original Side Appeal No. 48 of 1881 (unreported).

should not be put to the necessity of looking beyond the instrument or what appears on the face of it. In *Basivi Reddi* v. *Tammanna*(1) this High Court has held that a suit on a note lies only as against the executant or other persons that are bound on the face of the instrument and that proof *aliunde* is inadmissible to show undisclosed principals bound by the promissory note. The provisions of the Contract Act relating to undisclosed principals do not apply to Negotiable Instruments. That Act is not exhaustive (*The Irrawaddy Flotilla Company* v. *Bugwandas* (2)), [SUBRAHMANIA AYYAR, J.—The liability of the family would arise, if at all, under the Hindu Law.] Where negotiable instruments are concerned, the law which governs the parties is the Negotiable Instruments Act, and not the Hindu Law. The liability of a partnership, under the general law, for the acts of one of the partners, has been superseded by the Negotiable Instruments Act (*Basivi Reddi* v. *Tammanna* (1)). Moreover, the note sued on is not a negotiable instrument. Section 27 refers in express terms to promissory notes. The question of negotiability is immaterial. That is an incident attaching to a promissory note under the law merchant. The question is whether the note is a commercial **[603]** paper and not whether it is a negotiable instrument, (*Jetha Parkha* v. *Ramchandra Vithoba* (3)). It is further to be observed that this suit has not been brought on the debt but only on the note. The plaint does not refer to the existence of the debt, nor does it allege that the maker of the note was the manager of the family. The nature of the action should not be allowed to be changed (*Bowring* v. *Shephard* (4)).

Sivasami Ayyar, for respondents.—The suit is not only on the note but also on the debt. [DAVIES, J.—In the plaint the cause of action is stated to have arisen on the date of the note, and not on that of the debt.] The plaint sets forth also the consideration. It prays for a decree against all the defendants. Issue 2 speaks distinctly of the plaint-debt and the suit-note. The facts found by the Subordinate Judge point distinctly to the suit having been treated by the Courts and the parties as a suit on the consideration. The case of *Basivi Reddi* v. *Tammanna* (1) cited for the appellant is similar. It must be conceded that a Hindu son is liable to pay the debt of his father under a promissory note (*Laljee Sahay* v. *Fakeer Chand* (5)). The son's liability is the same as that of the family. Both are incidents of the Hindu Law, which is not abrogated by the provisions of Section 27 of the Negotiable Instruments Act. The provisions of the Act are in no way so stringent as the wording of similar provisions in the English Bills of Exchange Act; and yet see note at page 65 to illustration (2) to Section 23; see also illustrations 8 and 9 to Section 23. A principal allowing an agent to contract in his name is bound by the instruments executed by him (*Edmunds* v. *Bushell* (6)); see also *Yorkshire Banking Company* v. *Beatson* (7) where the principal and agent had one and the same name. The name of a Hindu family may be said to be the name of its manager, or the family may be said to have authorised the manager to act in his own name. *Sheo Pershad Singh* v. *Sahib Lal* (8) speaks of the manager as the accredited agent of the family. He borrows, sells, purchases and executes documents for the family. Under the Hindu Law the family is liable (*Krishnashet* v. *Hari Valji* (9)). The ancient texts

(1) Appeal No. 182 of 1891 (unreported).
(2) 18 C. 620.
(3) 16 B. 689 (698).
(4) 6 Q. B. 309 (331).
(5) 6 C. 135.
(6) 1 Q. B. 97.
(7) L.R. 5 C.P.D. 109.
(8) 20 C. 453.
(9) 20 B. 488.

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declare that debts contracted by any person for the [604] behoof of the family should be paid by the family—Vishnu, Chapter VI, Section 39; Manu, Chapter VIII, Section 167; Narada, Chapter I, Sections 12 and 13. In *In re Soltykoff* (1) a guardian was allowed to sue his ward for necessaries supplied, though he could not have sued on the note executed by the minor for that consideration.

V. Krishnasami Ayyar, in reply.—The plaint does not refer to the old debt. Even if it did, the suit on the old debt would be barred. When there is a note no suit lies on the consideration. (*Valiappa* v. *Mahommed Khasim* (2)) followed in *Palaniappa Chetti* v. *Periakaruppan Chetti*. (3).

JUDGMENT.

SHEPHARD, J.—The point taken on behalf of the appellants is one which, notwithstanding the frequency of cases such as the present, has never before been raised before me. No reported case is cited in support of it, and the case of *Ramasami Mudaliar* v. *Sellathammal*(4) and *Krishnashet* v. *Hari Valji*(5) are against it. The contention is that the English rule of law now expressed in the 23rd section of the Bills of Exchange Act is the rule of law enacted for this country and that this rule precludes the payee of a promissory note when suing the maker from enforcing his right against third persons who, according to Hindu Law, may, in respect of the family property in their hands, be responsible for debts incurred by him. It may be that the first of these two propositions is correct, although there is a remarkable difference between the statement of the English Law in Byles on 'Bills,' reproduced in the 23rd section of the Statute (Bills of Exchange Act) and the 27th section of the Negotiable Instruments Act. Let it be granted, however, that this section is intended to enact the English rule of law and that it applies to promissory notes, whether or not they are negotiable. Still, I am of opinion that the section does not prevent the maintenance of the present action, because the rule in question pre-supposes a case of mere agency, whereas here the respondents are not sought to be made liable on the ground that the maker of the note was their agent. The liability of persons in the position of the appellants, which arises on its being shown that a debt has been properly incurred in the management of the family affairs, is founded on Hindu Law and not on the law of agency. It is precisely similar to the liability [605] of a son for the father's debt under the same system of law. In neither case is the liability incurred such liability as would be incurred if the relation of the parties were that of agent and principal. When the father or manager of a Hindu family has incurred a debt and given a promissory note therefor, the creditor may sue him upon the note and make him personally liable; he cannot make the sons or other members of the family liable personally, nor in strictness can he sue them upon the note. Not being parties to the instrument, they could not, supposing it to be the case of a bill-of-exchange drawn by the father, plead want of notice to themselves of dishonour of the bill (see *Krishnashet* v. *Hari Valji* (5). The position of the appellants with regard to the plaintiff may usefully be compared with that of the husband under English law in reference to his wife's debts. At common law, a married woman and her husband were both liable on her contracts entered into before marriage and the

(1) [1891] 1 Q. B. 413. (2) 5. M. 166. (3) 17 M. 262.
(4) 4 M. 375 (379). (5) 20 B. 488.

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liability of the husband was in no way dependent on or limited by the existence of property derived by him from his wife. If, before marriage, she made a promissory note, an action could be brought against her husband and her (see form in Bullen and Leake's 'Pleadings,' 3rd edition; Byles on 'Bills,' page 74, citing *Mitchinson* v. *Hewson* (1). The Married Woman's Property Act, 1882, altered the law by limiting the liability of the husband to the value of his wife's property acquired by him. There is in this case no joint liability, nor is the liability of the husband that of a surety; but it resembles it, inasmuch as any defence which would be open to the debtor would equally be open to him (*Beck* v. *Pierce* (2)). It appears to me that these observations apply equally to the present case or to that of a Hindu father whose son is joined in an action for debt brought against them. If it is consistent with the English rule of law relating to bills-of-exchange that the husband may be joined in an action against his wife, it is no less consistent with the law of this country that a member of a Hindu family should be joined in an action against the manager on a promissory note made by him. In the one case, as in the other, there is a liability which is, so to speak, external to the obligation arising on the making of the promissory note, and in both cases that liability is limited, while the liability of the maker is absolute. It is [606] argued that the present suit was strictly confined to a demand for payment of the note and that the plaint did not include a demand in respect of the original debt. It appears to me on reading the plaint that it contains all the allegations that are needed in order to charge the appellants with liability. The charge is that the debt was incurred for the expenses of the family and that they are bound to discharge it. There can be no doubt that the Courts below as well as the appellants understood fully the case which the plaintiff was seeking to establish. On the facts found, no question of limitation arises. I think the appeal should be dismissed with costs; but I would amend the decree so as to make it more clear that the amount of the debt is to be recovered from the family property in the hands of the appellants.

SUBRAHMANIA AYYAR, J.—I have no doubt that in so far as the appellants—defendants Nos. 2 to 9—are concerned, the suit was based on the ground that they were liable for the debt due under the first defendant's promissory note as the debt was incurred for a purpose binding on the family of which all the defendants were undivided members. The averments in the plaint as to why the appellants were made parties to the suit, coupled with the second issue raised and tried, in my opinion, show that a different view cannot be taken in regard to the frame of the suit in so far as the appellants are concerned; and it being established, as stated in my previous judgment, that the debt in question was incurred under circumstances which made it binding on the appellants also, I do not see how the suit can be held to be unsustainable as against them. It is scarcely necessary to say that there is no rule of law which prohibits a party in the position of the plaintiff here from suing along with the maker of the promissory note other persons liable for the debt. Take, for example, a Hindu father who borrows money on a promissory note for a purpose which is not immoral. Can it be contended that the payee is not entitled to sue the father and the sons together? Certainly not. And so far as the point under consideration goes, there is unquestionably no difference on principle between the case above put and the case where a family

(1) 7 T.R. 348. (2) L.R. 23 Q.B.D. 316.

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debt is incurred by an undivided member who is not the father of the remaining coparceners. No doubt Section 27 of the Negotiable Instruments Act, on which much stress was laid on behalf of the appellants, is relevant where a person is sought to be made liable as party to a promissory note or other [607] instrument falling within the said Act. But the section referred to has no application whatever to a case where, as in the present instance, a person who is not a party to a promissory note or other similar instrument is sought to be made liable in respect of the money due thereunder, in consequence of an obligation cast upon him by his personal law in respect of such debt. It is, in my opinion, idle to argue that the section relied on abrogates obligation such as that just mentioned or in any way interferes with the rule of procedure which enables a plaintiff in a case like this to implead persons who are more or less under the law liable for the debt though they are not parties to the instrument along with the party thereto. I agree in the order proposed by my learned colleague, Shephard, J.

DAVIES, J.—I must adhere to my former opinion in this case which is supported by the ruling of a Division Bench of this Court in *Basivi Reddi* v. *Tammanna* (1) where it was held that the name of one member of a partnership on the promissory note could not be taken to represent the partnership whose name was not on it. That was a case of Hindu partners. It is urged that here the case is different, being one of a Hindu family. I cannot see how that affects the matter. There is nothing exempting any class of persons from the operation of the Negotiable Instruments Act, which is therefore applicable to all. So the only question is whether any person who has not signed a promissory note is liable thereunder. There is no doubt that the law of England is that no person is liable upon a promissory note unless his name appears thereon and the law is embodied in Sections 23 and 89 of the Bills of Exchange Act, 1882. That the law does not appear in such express terms in the Indian Negotiable Instruments Act is, in my opinion, no argument that it does not apply here, when Sections 4 and 26 and 27 will allow of such construction by implication and there is nothing to the contrary. Whether the suit can be sustained against the other members of the first defendant's family upon the consideration for the promissory note is quite another question. In my opinion the plaint was based entirely on the promissory note and it cannot now be treated as based on the original consideration as fresh questions of limitation and otherwise which have not been tried as they were not in issue would arise and the trial of the case would have to begin *de novo*.

(1) Appeal No. 182 of 1891 (unreported).

23 M. 608=10 M.L.J. 141.

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[608] APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

KRISTAYYA AND ANOTHER (*Plaintiffs*), *Appellants* v.
NARASIMHAM AND OTHERS (*Defendants*), *Respondents*.*
[8th December, 1899 and 1st March, 1900.]

Hindu Law—Suit for partial partition—Family property available for partition at the time—Property mortgaged with possession to third party not included—Maintainability of suit.

One of two undivided brothers composing a Hindu family sold the whole of a house, which was in fact joint family property, alleging family necessity in justification of the sale. The other brother subsequently sold his undivided half share to two persons who now sued as plaintiffs for partition and possession of one half of the house. The family owned another house which had, however, for some time been mortgaged with possession to a third party and was not available for partition at the time. On the plea being raised that the suit was one for partial partition and could not be sustained:

Held, that the suit was maintainable. Inasmuch as the other house was mortgaged with possession to a third party and therefore no longer available for immeditate partition, the suit was one for partition of the whole of the family property liable to partition at the time.

Narayan Babaji v. *Pandurang Ramachandra* (12 B.H.C.R. 148), followed.

[R., 34 M 269 (273)=7 Ind. Cas. 559=20 M.L.J. 743=8 M.L.T. 269=(1910) M.W.N. 380.]

SUIT for partition and separate possession of the half share in a house. A Hindu family consisted of two undivided brothers, now impleaded as first and second defendants. Second defendant sold the whole of a house, the property of the joint family, to a purchaser now impleaded as third defendant, on the ground of family necessity. First defendant, subsequently sold his undivided half share in the same house to two persons who now sued as plaintiffs and claimed partition and separate possession of first defendant's share of the said house. They alleged that third defendant's purchase was illegal; that his vendor, second defendant, had only a half share in the house, and that third defendant could not acquire more than that half by the sale deed in his favour. First defendant allowed the suit to proceed *ex parte*; and second and third [609] defendants pleaded, *inter alia*, that the suit was not maintainable inasmuch as defendants Nos. 1 and 2 had other family property, and that plaintiff could not maintain the suit for partition of a specific portion of the family property. Issues were framed on these points. The District Munsif found that the family did own another house, but that it had been mortgaged for many years with possession, to a third party. He held that the whole property must be brought into hotch-pot; and that the suit for the house alone was not sustainable. He referred to *Venkatarama* v. *Meera Labai* (1) and dismissed the suit. Plaintiffs appealed to the District Judge who confirmed the decree of the lower Court.

Plaintiffs preferred this second appeal.

Ramachandra Rao Saheb, for appellants.—Plaintiff seeks to recover the half share in the house which he has bought. Second defendant has

* Second appeal No. 1494 of 1898, against the decree of E. C. Rawson, District Judge of Vizagapatam, in appeal suit No. 173 of 1897, affirming the decree of B. Joga Rao, District of Vizianagram, in original suit No. 260 of 1896.

(1) 13 M. 275.

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23 M. 608 = 10 M.L.J. 151.

sold the whole house to third defendant. The sale is justified on the ground that second defendant had acquired the right by adverse possession and it is contended that the suit is bad as being for partial partition. It is submitted that the question whether it is partial partition or not does not arise; if it did, *Venkatarama* v. *Meera Labai* (1) would be conclusive. The house which has been mortgaged with possession for years has gone out of the category of family property apart from adverse possession. The sale by second to third defendant can only have passed the vendor's share. In *Venkatarama* v. *Meera Labai* (1) the suit was by and against members of a family; here the interests of the members of the family have passed to strangers—plaintiff and third defendant both being strangers. If second defendant had not sold his interest it would have still been family property, and the suit could not have been brought. I do not dispute that third defendant has acquired a half share, namely, the share of his vendor. I only dispute his claim to the whole. In *Subbarazu* v. *Venkataratnam* (2) the same objection on the ground of partial partition was raised, but it was held that no such question arose as the whole interest of the coparceners had passed to strangers. The only difference between the cases is that in *Subbarazu* v. *Venkataratnam* (2) the properties had passed into the same hands, whereas here different persons have become purchasers. In *Subramanya Chettyar* v. *Padmanabha Chettyar* (3), there is similar reasoning [610] though it was a converse case. Where both parties are strangers and the items of property such that no question of family property can arise, there can be no question of partition. The only property not included in the suit is the house which has been mortgaged with possession for many years. This is no bar to the suit as now framed. See *Narayan Babaji* v. *Pandurang Ramchandra* (4). The fact that the members of the family are parties is immaterial, they being impleaded *pro forma*.

Seshagiri Ayyar, for respondents Nos. 2 and 3.—In *Narayan Babaji* v. *Pandurang Ramchandra* (4) there was a general partition, and a certain item was not included because it was mortgaged. A subsequent suit was brought for the item in which it was decided that the prior suit should have been for the whole of the property under Section 7 of the then Code of Civil Procedure (Act VIII of 1859)—which corresponded with Section 43 of the present Code. It is not correct to say that no question of family property is involved here. The sale must be supported by showing family necessity, and involves an enquiry into family property generally. *Subbarazu* v. *Venkataratnam* (2) does not support the appellant. *Subramanya Chettyar* v. *Padmanabha Chettyar* (3) shows the difference between suits between a member of a family and a stranger suing for partial partition. Even if a member of a Hindu family may sue for the partition of a portion of the family property it does not follow that a stranger can do so. It is submitted that the present suit, being between a stranger and a member of a family for partial partition, does not lie. (He also referred to *Palani Konan* v. *Masakonan* (5).)

Ramchandra Rao Saheb, in reply.—In *Palani Konan* v. *Masakonan* (5) it was contended that the vendor was entitled on the ground of self-acquisition, and the question now argued was not considered. If one member of a family may maintain a suit for partial partition, so should a purchaser from him.

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(1) 13 M. 275. (2) 15 M. 234. (3) 19 M. 267.
(4) 12 B.H.C.R. 148 (155). (5) 20 M. 243.

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JUDGMENT.

The facts of the case so far as they need be stated for the purpose of this second appeal are as follows:—The first and second defendants are the only coparceners in an undivided Hindu family governed by the Mitakshara law. Some time ago [611] the second defendant sold to the third defendant the whole of a house, the property of the joint family, alleging the existence of family necessity to justify the sale. Subsequently first defendant sold to the plaintiffs his undivided half share in the same house.

Plaintiffs brought the present suit to compel the defendants to divide off and deliver to him one-half of the house.

The second and third defendants pleaded *inter alia*, that the family owned another house and that therefore a suit for partition of the plaint house alone could not be sustained.

The third and fourth issues were framed on these allegations and are as follows:—Whether the second defendant has another family house in his possession? If so, whether the suit for partition of the house in question alone is sustainable?

The District Munsif found that the family did own another house, but that it had for many years been mortgaged with possession to a third party. As to the fourth issue the plaintiffs contended that as the house was out of possession of the family and was not then available for partition, its existence formed no bar to the suit. The District Munsif disallowed this plea saying that "the equity of redemption or other rights of the mortgagor would form the subject of consideration in allotting shares." He, however, quoted no authority for his decision, but went on to remark that as the first and second defendants are undivided "there is no saying that they have not got family moveables worth even a cash. The whole property must be brought into hotch-pot."

He therefore dismissed the plaintiffs' suit and the District Judge, observing that it was not denied before him that there was "other family property" besides the plaint house, confirmed the decree. Against that decree the plaintiffs appeal.

It seems to us that the Courts below have not kept clearly in view the principles that govern a suit of this kind and have failed to ascertain the facts on which the rights of the parties depend.

If there was, as the District Munsif assumes there was, other joint family property besides the plaint house and the house mortgaged with possession to a third party, then there is clear authority that the plaintiffs could not maintain the suit for a partition of a part only of the family property (*Venkatarama* v. *Meera Labai* (1) followed in *Palani Konan* v. *Masakonan* (2) in [612] both of which cases there was other joint family property available for immediate division though in the latter case the reporter has not made this clear). We cannot admit the contention of the appellant's vakil that the real contention was only between the plaintiffs and the third defendant, who were both strangers to the family and that, therefore, the rules relating to partition of family property have no application as explained in *Subbarazu* v. *Venktaratnam* (3). On the pleadings there was a contest between the plaintiffs and first defendant on the one hand and the second and third defendants on the

(1) 13 M. 275. (2) 20 M. 243. (3) 15 M. 234.

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other hand as to whether the second defendant's sale of the whole of the plaint house was justified by family necessity. First and second defendants were therefore necessary parties. The equities between first and second defendants would have to be enquired into, and plaintiffs could only recover a half share in the house subject to the equities to which their vendor, the first defendant, was liable. In the case in *Subbarazu* v. *Vekataratnam* (1) the plaintiff was the purchaser of the whole of the rights of the joint family and the defendants were also strangers to the family. That case therefore has no application to the fact of the present case.

If, on the other hand, there was no joint family property save the plaint house and the house mortgaged with possession to a third party and therefore no longer available for immediate partition, then there is authority for holding that the suit for partition of the plaint house would be maintainable, for the suit is then one for partition of the whole of the family property liable to partition at the time (*Narayan Babaji* v. *Pandurang Ramchandra* (2) referred to with approval in the recent case of *Shivmurtappa* v. *Virappa* (3) where all the authorities are reviewed). The second and third defendants did not allege the existence of any joint family property liable to partition except the house which the District Munsif found was mortgaged with possession to a third party, but the District Munsif assumed (without any justification so far as we can see) that there must be other family property liable to partition. The District Judge appears to have made the same assumption, and the assumption has not been specifically objected to in the grounds of second appeal, though in arguing the appeal it is contended **[613]** that there is no ground for the assumption. In this state of things we think the best course is to call on the District Judge for a finding, on further evidence if either party desires it, as to whether there is any joint family property apart from the plaint house and the house outstanding on mortgage. The finding should be returned within two months from the date of the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order the District Judge submitted his finding that there was no family property except the house sued for and the house which had been mortgaged to a third party.]

The second appeal coming on for final hearing after the return of the above finding, the Court delivered the following

JUDGMENT. *

No objection is taken to the finding. We accept it and, reversing the decrees of the Courts below, we remand the suit to the Court of First Instance for disposal according to Law.

Costs throughout will abide the result.

* Final—ED.

(1) 15 M. 234. (2) 12 B.H.C.R. 148 (155.) (3) 1 Bom. L. R. 620.

23 M. 613=10 M.L.J. 214.

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23 M. 613=10 M.L.J. 214.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

TAYARAMMA (*Plaintiff*), *Appellant v.* SITARAMASAMI NAIDU AND OTHERS (*Defendants*), *Respondents.** [13th March, 1900.]

Hindu Law—Bequest for immoral consideration—Condition of future cohabitation—Invalidity of bequest—Succession Act—Act X *of* 1865, *Section* 114.

A bequest by a Hindu testator, made conditional on the continuance of immoral relations between himself and the legatee, is void.

SUIT to recover possession of a house and other property. Plaintiff had left her husband some years prior to 1894, and lived with one Appala Narasayya as his wife. By his will, Appala **[614]** Narasayya made a bequest to plaintiff of the house now sued for. The bequest was worded in the following terms:—"As your husband does not maintain you, as you came over to me and are attending on me and managing my food, &c., as suits to my convenience, and as I have none else, as wife, children, &c., I gave away the following properties with my consent:—The tiled house and all the moveable properties besides, which are under my possession. If you should look after me till the end of my life, the said tiled house and the moveable properties that may be possessed till then are assigned to you, by means of this will, as your right, after my death, with my free will and consent. Neither myself nor my heirs shall raise any disputes whatsoever in respect of the same." He died in 1896. First defendant, the brother of the testator, having obtained possession of the property, plaintiff now brought this suit against him and others. First defendant pleaded that the bequest in the will was for an immoral consideration; and an issue having been framed on that point the District Munsif said:—"I think one need not feel the least hesitation in saying that the bequest was made in consideration of future cohabitation as well as past. A promise made in consideration of future illicit cohabitation is given upon an immoral consideration and is void whether made by parole or under seal, (*Ayerst* v. *Jenkins* (1)). In a somewhat similar case, *Lachmi Narain* v. *Wilayti Begam* (2), a gift made by one to his mistress who lived with him as his wife, on condition of her continuing to be his wife and remaining obedient to him, her husband, was upheld by the High Court of Allahabad when it was called into question by a creditor of the donor three years after the gift, and that judgment was confirmed by the Privy Council (*Ram Sarup* v. *Mussumat Bela* (3)); but I think the case is clearly distinguishable from the present one. . . . . . It has been argued in this connection by plaintiff's vakil that Section 23 of the Contract Act would apply only to contracts and not to gifts or bequests by will, but I think it is a mistake; the principle would apply to bequests by will equally. (*Vide* Section 114 of Indian Succession Act.)" He held that the bequest was invalid, and that decision was upheld by the District Judge on appeal.

The plaintiff preferred this second appeal.

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* Second Appeal No. 264 of 1899 against the decree of E. C. Rawson, District Judge of Vizagapatam, in appeal suit No. 131 of 1898, affirming the decree of V. Subrahmaniam, District Munsif of Vizagapatam, in original suit No. 239 of 1897.

(1) L.R. 16 Eq. 275. (2) 2 A. 433. (3) 11 I.A. 44=6 A. 313.

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23 M. 613=
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[615] *Ramachandra Ayyar*, for appellant, contended that even if the condition in the will were construed as being for future cohabitation, and so constituted an immoral consideration at the time of execution, the will only spoke from the date of the testator's death, when the consideration had become past and performed; and it had always been held that past cohabitation is a good consideration. He referred to *Lachmi Narain* v. *Wilayti Begam* (1), *Ram Sarup* v. *Mussumat Bela* (2), *Hall* v. *Palmer* (3), *Shewell* v. *Dwarris* (4), *Ithell* v. *Beane* (5), and *In re Vallance* (6).

V. Krishnasami Ayyar, for respondent, argued that the document clearly disclosed an immoral consideration, if it were construed with reference to the surrounding circumstances. The future cohabitation was a condition precedent to the gift, which failed according to the ordinary rules, and on grounds of public policy. That was the English law and it had been adopted by the Indian Legislature in the Contract Act, section 23, the Transfer of Property Act, section 25 and the Succession Act, section 114. He referred to Williams on 'Executors,' volume II, 9th edition, page 1128; Shephard's 'Touchstone,' pages 122 and 123 and the Civil Law, and to the distinction there drawn between *malum prohibitum* and *malum in se*; the former rendering both condition and bequest void, the latter vitiating only the condition and not the bequest. No such distinction was to be found in the Indian law, so that the bequest was void.

Ramachandra Ayyar, in reply, contended that the principle expressed in section 114 of the Succession Act could not be applied to the case as that Act did not apply to Hindus in the mofussal.

JUDGMENT.

Having regard to the facts found and to the terms of the will we think that the Lower Courts were entitled to find that the bequest was made conditional on the continuance of the immoral relations between the plaintiff and the testator.

According to the principle of English law which finds expression in Section 114 of the Indian Succession Act (X of 1865) such a condition renders the bequest void. We are unable to agree to the suggestion that, as the Indian Succession Act is not applicable to Hindus in the mufassal, we should therefore regard [616] the principle to which we have referred as inapplicable to the present case. The same principle has been followed in section 25 of the Transfer of Property Act in regard to transfers *inter vivos* and in the Indian Contract Act in regard to contracts, both of which Acts apply to Hindus in the mufassal. We must therefore take it that the principle is applicable to the present case as a rule of equity and good conscience. The principle that we should follow being in our opinion thus clear, it is not necessary to notice the cases referred to in the argument of appellant's vakil.

We dismiss the second appeal with costs.

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(1) 2 A. 433. (2) 11 I. A. 44=6 A. 313. (3) 13 L.J. Ch. 352.
(4) 1 John. 172. (5) 1 Ves. Sen. 215. (6) L.R. 26 Ch. D. 353.

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23 M. 616.

23 M. 616.

APPELLATE CIVIL.

Before Mr. Justice Shephard, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

MUNISAMI NAIDU (*Defendant*), *Appellant v.* PERUMAL REDDI (*Plaintiff*), *Respondent.**
[8th and 14th March, 1900.]

Rent Recovery Act (*Madras*)—*Act VIII of* 1895, *Sections* 7, 9, 10—*Patta tendered within fasli—Suit after fasli, when patta amended—Maintainability of suit.*

A land-holder tendered a patta within the fasli. After the close of the fasli he brought a suit to enforce its acceptance, when the patta was amended. After judgment in that suit, the land-holder attached the land; whereupon the tenant sued to have the attachment set aside, on the ground that as no proper patta had been tendered within the fasli, and the suit which resulted in the rectification of the patta had been filed after the close of the fasli, the land-holder was precluded from enforcing his claim:

Held, that inasmuch as judgment had been obtained, fixing the terms of the patta, the tenant could not plead in answer to an action for rent, the incorrectness of the patta originally tendered. A land holder has a choice of two alternatives. If he satisfies himself that the patta tendered by him is the right one, he may bring his suit for rent or take other measures to recover it. He takes his chance of some flaw being discovered in the patta. If he is not so satisfied he institutes a suit under Section 10 of the Rent Recovery Act and obtains a judgment which fixes the terms of the patta for that fasli beyond all dispute.

[R., 35 M. 139=9 Ind. Cas. 738=21 M.L.J. 570=9 M.L.T. 231=(1911) 1 M.W.N. 139; D., 25 M. 613 (F.B.).]

[617] SUIT under the Rent Recovery Act (Madras), 1865, to set aside an attachment of land. Plaintiff contended that a proper patta was not tendered to him within the fasli and that therefore no attachment could be made for the arrears of that fasli. Defendant had, in fact, tendered a patta to plaintiff within the fasli, and had brought a suit after the close of the fasli to enforce its acceptance, when the patta was ordered to be amended. After judgment in that suit he had attached plaintiff's interest in the land. The Acting Head Assistant Collector held that there had been no tender of a proper patta within the fasli, because, by *Sobhanadri Appa Row* v. *Chalamanna* (1), an amended patta relates back to the date of the suit brought to enforce acceptance of patta; which, in this case, had been filed after the close of the fasli in question. He held, therefore, that the attachment was invalid: and set it aside. The Acting District Judge, on appeal, said:—"The question is whether the defendant was entitled to attach the plaintiff's land for arrears of rent of Fasli 1305. In summary suit No. 745 of 1896 the defendant sued to enforce the acceptance of the patta tendered by him to the plaintiff. The revenue Court amended the patta. The said suit No. 745 was filed on 18th August 1896, *i.e.*, after the close of the Fasli 1305. The defendant attached the plaintiff's interest in the land after judgment in that suit. The objection is that the landlord is not entitled to attach unless he had tendered a proper patta within the fasli. It has been held (*Sobhanadri*

* Second Appeal No. 231 of 1899 against the decree of A. Venkataramana Pai, Acting District Judge of North Arcot, in Appeal Suit No. 30 of 1898, affirming the decision of J. W. Hughes Acting Head Assistant Collector of North Arcot, in Summary Suit No. 481 of 1897.

(1) 17 M. 225 (228).

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Appa Rau v. *Chalamanna*(1)), that the amendment relates back to the date of the suit. So, there was no tender of a proper patta within the fasli. It would even appear that the suit brought after the fasli was of no effect. In *Ramasami Mudaliar* v. *Rathna Mudaliar* (2), it has been held that a tenant's suit for patta brought after the fasli was barred by time. The objection that no summary suit lies against an attachment of land is groundless. Section 40 expressly allows a summary suit in such cases. The appeal is dismissed."

The defendant preferred this second appeal.

Seshagiri Ayyar, for appellant.—It is submitted that the Acting District Judge is wrong. *Sobhanadri Appa Rau* v. *Chalamanna*(1) has been overruled by *Sriramulu* v. *Sobhanadri Appa Rau* (3). **[618]** The Court below has confused the case of a landlord tendering a patta with that of the Court settling the patta. [DAVIES, J.—Under Section 7 of the Act, no proceedings can be taken unless a proper patta is tendered within the fasli.] But that does not affect the provisions of Sections 9 and 10. Otherwise Sections 9 and 10 would be ineffective. The Judge is also wrong in holding that no suit can be brought after the fasli. *Ramasami Mudaliar* v. *Rathna Mudaliar* (2) is distinguishable. It mainly rests on the ground that there had been no demand for a patta within the fasli. *Papamma* v. *Subbanna*(4) is in point. There is no objection to a suit after the fasli, provided that whatever should have been done within the fasli has been done. Moreover this was a mere attachment and no more, and there is no provision of law under which a suit can be brought to contest an attachment. There is no cause of action.

Sundara Ayyar and *Subbayya Mudaliar*, for respondent.—Section 7 covers all classes of cases and the first requisite is that a proper patta should have been tendered within the fasli. Section 10 simply enables a party to get the terms of a patta settled. Proceedings are taken under Section 7. This case is the converse of the case in *Ramasami Mudaliar* v. *Rathna Mudaliar*(2) and the District Judge is right in holding that the suit should be brought within the fasli. The observations in *Papamma* v. *Subbanna* (4) were not necessary for the decision of that case.

[The case, having been posted for re-argument, came on before a Court constituted as above.]

Seshagiri Ayyar, for appellant (after recapitulating the argument already set out).—The question relates to the fasli ending with June 1896. The landlord, not feeling sure that all the terms of the patta were correct, brought a suit on the 18th August 1896. The Collector modified the patta in regard to minor particulars and directed the tenant to accept it in June 1897. Under Section 10 of the Rent Recovery Act, this order of the Collector is equivalent to the tender of a proper patta for the previous Fasli 1305. Then the landlord attached the land with reference to the patta as settled by the Collector. The **[619]** present suit is by the tenant to set aside the attachment. His complaint is that there was no proper patta tendered within the fasli and consequently the attachment is illegal. [DAVIES, J.—Did you tender a proper patta within the fasli ?] By the decision of the Collector, it must be deemed that the tenant was bound to regard the amended patta as having been tendered to him within the fasli. It must be admitted that the patta actually tendered was

(1) 17 M. 225 (228).
(2) 21 M. 148.
(3) 19 M. 21.
(4) 22 M. 318.

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not proper in every respect. But that is not necessary. The observations of their Lordships in *Rangayya Appa Rau* v. *Venkata Reddi* (1) show that even though a suit may be brought on a wrong patta, after the settlement by the Collector of the terms of the patta, rent may be recovered as if the suit had been based on the amended patta. The decision in *Court of Wards* v. *Darmalinga* (2) shows that no fresh tender of patta is necessary after the decision of the Collector. Therefore the original patta in the hands of the tenant must be deemed to have been amended by the proceedings of the Collector. *Zemindar of Devaracota* v. *Vemuri Venkayya* (3) shows that the original patta need not be, in all respects, a proper one. Moreover Sections 7 and 10 must be read as providing for different classes of cases. Section 7 enables a landlord to take proceedings upon his own initiative. If he is satisfied as to the correctness of the patta and does not wish to wait for a judicial determination on it, he takes the risk of losing everything in case it be found that he has tendered an improper patta. Section 10 deals with a case where a landlord is not so sure of his position and prefers to place his case before the Collector and to abide by his decision; after which, he is entitled to the benefit of that decision and to take action on it. Otherwise Section 10 is out of place in the Act. Sections 10 and 72 make it clear that the patta amended is the patta tendered—see also *Maruthappa* v. *Krishna* (4) and *Appa Rau* v. *Ratnam* (5). In *Ramasami Mudaliar* v. *Rathna Mudaliar* (6), there had been no demand at all for a patta within the fasli. The demand was after the fasli and the suit was after the fasli. If there be a proper demand within the fasli, the suit after the fasli is maintainable (*Papamma* v. *Subbanna* (7)).

[620] *Subbayya Mudaliar* (with him *Sundara Ayyar*), for respondent, contended that *Court of Wards* v. *Darmalinga* (2) did not apply. Suits filed under Section 7 differ from those filed under Sections 8 and 9. Under the latter, tender of patta is unnecessary. Under Section 7, only three things are provided for: (1) tender, (2) exchange and (3) waiver. He referred to *Alagirisami Naiker* v. *Innasi Udayan* (8) and argued that suits under Section 9 are for settling the terms of the tenancy, whereas suits under Section 7 are for enforcing its terms.

JUDGMENT.

SHEPHARD, J.—There is no dispute between the parties as to the terms of the plaintiff's holding or as to the merits of the claim for rent which the defendant is seeking to make good against his tenant. But it is said that, because a proper patta was not tendered within the fasli, and the suit which terminated in the rectification of the patta tendered was brought after the expiration of the fasli, the defendant is precluded by the provisions of the Rent Recovery Act from enforcing his claim. The first point is disposed of by the decision in *Court of Wards* v. *Darmalinga* (2). The landlord has a choice of two alternatives. If he satisfies himself that the patta tendered by him is the right one he may without more ado bring his suit for rent or take other measures to recover it. He takes his chance of some flaw being discovered in the patta. If he is not so satisfied, he institutes a suit under Section 10 of the Rent Recovery Act and obtains a judgment which fixes the terms of the patta for that fasli beyond all dispute. When this judgment has been obtained, the tenant cannot afterwards plead in answer to an action for rent the incorrectness of the

(1) 22 M. 249n. (2) 8 M. 2. (3) 1 M. 389. (4) 12 M. 253.
(5) 13 M. 249. (6) 21 M. 148. (7) 22 M. 318. (8) 3 M. 127.

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patta originally tendered. That is the point decided in *Court of Wards* v. *Darmalinga* (1), and that ruling, in my opinion, is practically decisive of the present case.

The plaintiff is really seeking to go behind the judgment which, according to his contention, ought not to have been given. I do not think it is shown that the judgment is wrong, because the Act does not require the suit under Section 10 to be instituted before the expiration of the fasli, and even if it were wrong, I do not think it could now be questioned. A judgment passed under Section 10 of the said Rent Recovery Act would be futile and serve **[621]** no useful purpose if, notwithstanding it, the objections taken in this case could be urged against the landlord's claim. In my opinion the appeal ought to be allowed with costs. The case must go back to the Head Assistant Collector for trial. The costs hitherto incurred in the Courts below will abide and follow the result.

SUBRAHMANIA AYYAR, J.—I concur.

DAVIES, J.—I agree.

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23 M. 621.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

MURGESA MUDALIAR (*Plaintiff*) *v.* JATTARAM DAVY AND ANOTHER (*Defendants*).* [29th and 30th January, 1900.]

Limitation Act—Act XV of 1877, Section 14, Articles 29, 49—Time occupied in prosecuting suit in another Court—Dismissal of suit through defect of jurisdiction or other cause of like nature—Court unable to entertain suit because misconceived.

Defendants having attached certain goods on 12th June 1895, in execution of a decree obtained by them against M, a claim was preferred by plaintiff, on 19th June 1895, and disallowed. Plaintiff thereupon brought a declaratory suit on 2nd August 1895 in the City Civil Court, Madras, and obtained an injunction to stop the sale of the goods, which, however, was dissolved on 27th August 1895, the goods being sold on 5th October 1895, while the suit in the City Civil Court was pending. On 4th December 1896 the City Civil Court declared plaintiff to be the sole owner of the property, which decree was upheld by the High Court on 7th February 1898. On 4th December 1897, plaintiff brought a a suit in the Court of Small Causes, Madras, to recover from the defendants the goods or their value, which was dismissed on 2nd May 1898. The dismissal was upheld by a Full Bench of the Court of Small Causes on 22nd October 1898 and by the High Court, on 13th April 1899. In these decisions it was held that plaintiff's suit was not maintainable. Plaintiff filed the present suit on 28th April 1899, in the Court of Small Causes, Madras, and claimed that the cause of action had arisen on 7th February 1898, the date on which plaintiff's right to the specific moveable property had been finally declared. He also claimed that the time occupied in the proceedings in the Court of Small Causes should be deducted under Section 14 of the Limitation Act:

[622] *Held*, that the suit was barred; and that plaintiff was not entitled to have the time spent in prosecuting the previous small cause suit deducted from the period of limitation. That suit had been dismissed, not because the Court, through defect of jurisdiction or other cause of a like nature, was unable to entertain it, but because it was misconceived.

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* Referred Case No. 23 of 1899, stated under Section 617, Civil Procedure Code, and Section 69, Presidency Small Cause Courts Act, by the Second Judge of the Court of Small Causes, Madras, in Suit No. 8093 of 1899.

(1) 8 M. 2.

[F., 29 A. 615=4 A.L.J. 548=A.W.N. (1907) 194; R., 31 M. 431=18 M.L.J. 590=4 M L.T. 271; 16 Ind. Cas. 914=23 M.L.J. 519=12 M.L.T. 453=(1912) M.W.N. 1179 (1183); 4 N.L.R. 49.]

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AT the request of the plaintiff a case was stated, for the opinion of the High Court, as follows :—"The plaintiff's undermentioned specific goods were rented out and were in possession of one Manicka Mudali, judgment-debtor in suit No. 4062 of 1895 on the file of the Madras Court of Small Causes, in which the defendants herein were judgment-creditors. The said Manicka Mudali hired the goods on a rental agreement, dated the 3rd January 1895. The defendants herein attached the said goods on the 12th June 1895 in execution of the said decree in the said suit No. 4062 of 1895. The plaintiff thereupon preferred a claim on the 19th June 1895 and the said claim was disallowed on the 10th July 1895, on the ground that the goods did not belong to the plaintiff, and the attachment was confirmed. Thereupon the plaintiff brought a declaratory suit on the 2nd August 1895, in the City Civil Court, No. 171 of 1895, and obtained an injunction to stop the sale of the goods, which, however, was subsequently dissolved on 27th August 1895. The defendants raised frivolous objections to the plaintiff's application to stop the sale of the goods, and to the plaintiff's getting possession of them, got the goods sold on the 5th October 1895 and realised the sale-proceeds while the suit in the City Civil Court was pending. The said defendants also filed a written statement that the goods belonged to Manicka Mudali, the third defendant therein in the City Civil Court. Subsequently a decree was passed by the Judge, on the 4th December 1896, declaring that the plaintiff is the sole owner of the property, and the same was upheld by the High Court in City Civil Court Appeal No. 4 of 1897 on the 7th February 1898. The plaintiff now seeks for damages to the extent of Rs. 163, out of which Rs. 615 is the value of the goods and Rs. 248 is the rent on the goods from June 1895 to February 1898 at the aforesaid rate of Rs. 8 per month occasioned by the defendants' wrongful taking and converting of the plaintiff's specific moveable goods from the hands of the said Manicka Mudali. The plaintiff herein has been prosecuting civil proceedings in the Small Cause Court, City Civil Court and [623] High Court *bona fide* and with due diligence from 16th June 1895 or thereabouts up to 13th April 1899 with regard to the property in question. The cause of action arose on 7th February 1898, the date on which the plaintiff's right to the specific moveable property was finally declared, and the defendants' wrongful taking and conversion of the said property was finally decided unlawful. The plaintiff therefore prays for judgment for Rs. 863 as damages sustained by him for the wrongful taking and conversion of the under-mentioned goods by the defendant without allowing the plaintiff to get possession of his goods, for costs, and for such other reliefs as this Honourable Court may seem fit to grant and the nature of the case may require." Subsequent to the decree in City Civil Court Appeal No. 4 of 1897, plaintiff, on 4th December 1897, brought a suit in the Madras Court of Small Causes to recover from the defendants the goods or their value. The suit was dismissed by the Chief Judge on 2nd May 1898; and the decision was upheld on 22nd October 1898 by a Full Bench of the Madras Court of Small Causes (one Judge dissenting) which held that the plaintiff's suit to recover the goods from the decree-holders after they were sold by auction and purchased by third parties was not maintainable, and that the alternative prayer in the plaint for the value of the goods was not a claim for compensation, but ancillary to the main relief asked for with

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reference to Section 202 of the Code of Civil Procedure. The decision of the Madras Court of Small Causes was upheld by the High Court on 13th April 1899 on a reference under Section 69 of the Presidency Small Cause Courts Act (1). The present suit was filed on 28th April 1899.

Defendant, among other pleas, contended that the suit was barred by limitation. Plaintiff claimed that the period of limitation should be calculated from the time when plaintiff's rights were finally declared by the High Court in City Civil Court Appeal No. 4 of 1897 on 7th February 1898; or at any rate, that the time occupied in the proceedings connected with small cause No. 23026 of 1897 should be deducted under Section 14 of the Limitation Act. On the latter point the Judge of the Madras Court of Small Causes said:—"Section 14 appears to me to be clearly inapplicable. It applies to a case which the Court, from [624] a defect of jurisdiction or other cause of a like nature, was unable to entertain. This Court was not precluded by any such cause from entertaining plaintiff's suit (No. 26026 of 1897). On the contrary, the suit was entertained and decided." He dismissed the suit.

Narayana Rao and *Visvanadha Sastri*, for plaintiff.

Vekataramayya Chetti, for defendants.

JUDGMENT.

In this case our opinion has been asked as to whether the suit in question is barred by limitation. The material facts and dates are as follows:— The defendants attached certain goods on the 12th June 1895 in execution of a decree obtained by them in the suit No. 4062 of 1895 against one Manicka Mudali. The plaintiff thereupon preferred a claim on the 19th June 1895 and the said claim was disallowed on the 10th July 1895, on the ground that the goods did not belong to the plaintiff, and the attachment was confirmed. Thereupon the plaintiff brought a declaratory suit on the 2nd August 1895 in the City Civil Court (No. 171 of 1895), and obtained an injunction to stop the sale of the goods, which, however, was subsequently dissolved on the 27th August 1895. The goods were sold on the 5th October 1895 while the suit in the City Civil Court was pending.

Subsequently a decree was passed by the City Civil Judge on the 4th December 1896 declaring that the plaintiff is the sole owner of the property, and the same was upheld by the High Court in City Civil Court Appeal No. 4 of 1897 on the 7th February 1898.

Subsequent to the decree in City Civil Court Appeal No. 4 of 1897, plaintiff on 4th December 1897 brought a suit in the Small Cause Court to recover from defendants the goods or their value. The suit was dismissed by the Chief Judge on 2nd May 1898, and the decision was upheld on 22nd October 1898 by a Full Bench of the Small Cause Court (one Judge dissenting), which held that the plaintiff's suit to recover the goods from the decree-holders after they were sold by auction and purchased by third parties was not maintainable, and that the alternative prayer in the plaint for the value of the goods was not a claim for compensation, but ancillary to the main relief asked for with reference to Section 208 of the Civil Procedure Code. The decision of this Court was upheld by the High Court on 13th April 1899 on a reference under Section 69 of the Presidency Small Cause Courts Act (1). The present suit was filed on 28th April 1899.

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(1) *Murugesa Mudali* v. *Jotharam Davy*, 22 M. 478.

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[625] In our judgment the plaintiff's cause of action accrued on the 12th June 1895. The present suit was instituted on the 26th April 1899. Unless, therefore, by virtue of the earlier proceedings taken by the plaintiff he can claim the benefit of Section 14 of the Limitation Act, the question whether the period of limitation is the one year's period prescribed by Article 29 or the three years' period prescribed by Article 49 is immaterial. It could not be seriously argued that either the claim proceedings, which began on the 19th June 1895, when the plaintiff preferred his claim and terminated on the 10th July 1895, when the claim was disallowed, or the suit in the City Civil Court which was commenced on the 2nd August 1895, and terminated on the 7th February 1898, in which the plaintiff obtained a declaratory decree, affirmed by the High Court, declaring his title to the goods in question, were proceedings within the scope of Section 14. The section clearly has no application to these proceedings. As regards the suit in the Small Cause Court for the recovery of the specific goods seized by the defendants which was instituted on the 4th December 1897, and terminated on the 13th March 1899, and which the High Court held was not maintainable, we do not think the plaintiff is entitled to have the time during whch he was prosecuting this suit deducted from the period of limitation. This suit was dismissed on the ground that it was a suit for the recovery of specific property, that the claim for the value of the goods was merely ancillary, and that the suit was not maintainable. No doubt a liberal construction has been placed by the Courts on the words "or other causes of like nature" contained in Section 14. But, in our judgment, the section cannot be construed so as to apply to this case. The suit was dismissed not because the Court through defect of jurisdiction or other cause of a like nature was unable to entertain it, but because it was misconceived. Unless we were prepared to go so far as to say that whenever a plaintiff mistakes his remedy he is entitled to the benefit of Section 14, it would be impossible for us to hold that the plaintiff was entitled to the benefit of it in the present case.

In the view which we take with regard to Section 14 it is not necessary to consider whether the period of limitation is one year under Article 20 or three years under Article 49, since, in either [626] view, the cause of action having accrued on the 12th June 1895, the plaintiff's suit is time-barred.

But it has been argued on behalf of the plaintiff that a distinction must be drawn between a claim for compensation for wrongful seizure of moveable property where the compensation sought is merely the value of the goods seized, in which case it is argued that Article 49 applies, and a claim for compensation by way of damages which are consequential on the wrongful seizure and are independent of any question of compensation for the value of the goods, in which case it has been argued the period of limitation is one year under Article 29. There is no reason in principle for this distinction and, in our judgment, the Legislature never intended that any such distinction should be drawn. Article 29 is quite general in its terms and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process. The case of *Manavikraman* v. *Avisilan Koya* (1) may be distinguished on the ground that, in that case, the wrong complained of was the institution of a suit without reasonable grounds followed by an attachment of the goods of the

(1) 19 M. 80.

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defendant in the suit; whereas in the present case the goods belonged to a person who was not a party to the suit in which the attachment was made. In our judgment the suit is barred by limitation and we answer the first question submitted to us in the affirmative.

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23 M. 626 = 2 Weir 310.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

QUEEN-EMPRESS *v.* CHENCHAYYA AND OTHERS.*
[2nd February, 1900.]

Criminal Procedure Code—Act V of 1898, *Section* 248—*Withdrawal of complaint—"Complainant."*

A complaint having been made to the police, the latter caused charges to be preferred under Sections 143 and 504 of the Indian Penal Code against certain [627] accused. The person who had complained to the police subsequently filed a petition praying the Second class Magistrate to withdraw the charges under Section 248 of the Code of Criminal Procedure. The Magistrate permitted the withdrawal and directed the accused to be set at liberty :

Held, that the order was bad, there being no " complainant " in the case and that consequently the Magistrate in purporting to act under Section 248 had exceeded his powers.

APPEAL by the Public Prosecutor against the following order of acquittal of sixteen accused persons, purporting to be passed by a Second-class Magistrate under Section 248 of the Code of Criminal Procedure:—"Complainant Mocherla Ramayya having satisfied the Court that there are sufficient grounds for withdrawing his complaint, the Court permits the same and directs that they be set at liberty under Section 248 of the Criminal Procedure Code." This order had beed passed on the petition of M. Ramayya as follows:—"Petition on behalf of the complainant most respectfully showeth:—(1) That the complainant has instituted a charge under Section 143 of the Indian Penal Code against the accused; (2) that the complainant is unwilling to proceed with the case against the accused; and (3) that the complainant therefore prays this Honourable Court might be pleased to permit him to withdraw the charge against the accused under Section 248, Criminal Procedure Code." The Magistrate had taken cognizance of the case against the accused under Sections 143 and 504 of the Indian Penal Code, upon the report of the police, made in consequence of a complaint to them by the said M. Ramayya.

Mr. *N. Subrahmaniam*, for the Acting Public Prosecutor, for the Crown.

Sivasami Ayyar, for accused No. 1.

JUDGMENT.

In this case we are constrained to hold that the order of the Magistrate permitting the case to be withdrawn is bad on the ground that there is no " complainant " in the case and that consequently the Magistrate,

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* Criminal Appeal No. 744 of 1899, under Section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Calendar Case No. 36 of 1899 on the file of the Taluk Second-class Magistrate of Sirvel.

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in purporting to act under Section 248 of the Code of Criminal Procedure has acted in excess of his powers. It has been argued that, for the purposes of Section 248, "complainant" has not the restricted meaning of a person who files a "complaint" as defined by Section 4 of the Code of Criminal Procedure, and that it applies to a person who sets the police in motion by making a complaint to them. *Prima facie* this seems a reasonable construction to place upon the word. But, reading Sections 248 and 249 of the Code of Criminal Procedure together, [628] it seems impossible to come to any other conclusion than that Section 249 was intended to apply to cases instituted otherwise than upon "complaint" and that Section 248 was intended to apply to cases instituted upon "complaint." In the present case there was no "complaint," because it is clear from the record that the Magistrate took cognizance of the case upon the police report. We accordingly allow the appeal and we remit the case to the Magistrate in order that he may deal with it according to law.

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23 M. 628.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

MADRASAH MARACAYAR (*Defendant-petitioner*), *Appellant* v. PALANIAPPA CHETTI AND OTHERS (*Agent to Plaintiff No.* 2 *and Purchasers—Counter-petitioners*), *Respondents.**
[5th February, 1900.]

Civil Procedure Code—Act XIV *of* 1882, *Sections* 287, 311—"*Material irregularity.*" *in publishing or conducting a sale—Omission to state amount of Government tax payable—Right of person complaining to prove substantial loss.*

In a proclamation of intended sale issued under Section 287 of the Code of Civil Procedure, the omission to state the amount of Government tax payable in respect of the land to be sold is a material irregularity within the meaning of Section 311 of the Code. On such an irregularity being committed, the judgment-debtor whose lands have been sold is *prima facie* entitled to be given an opportunity for proving that he has sustained substantial loss by reason of it.

PETITION under Section 311 of the Code of Civil Procedure asking that a sale might be set aside and a fresh sale held. The chief ground relied on was that the amount of Government tax payable in respect of the land had been omitted from the schedule to the sale proclamation. The District Judge held that the omission was not a material one as an intending purchaser could ascertain the amount of the tax from the settlement register or other sources. He declined to interfere and dismissed the petition.

[629] Petitioner preferred this appeal.

Mr. *John Adam*, for appellant.

Sundara Ayyar and *Krishnamachariar*, for respondents.

JUDGMENT.

In this case the District Judge has held that the omission of the amount of Government tax in the schedule to the sale proclamation is not

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* Civil Miscellaneous Appeal No. 77 of 1899 against the order of D. Broadfoot, District Judge of South Arcot, in Civil Miscellaneous Petition No. 173 of 1899 (Original Suit No. 13 of 1897).

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a material omission. We do not agree with this view. Paragraph (*c*) of Section 287 of the Civil Procedure Code expressly requires that the proclamation should state as fairly and accurately as possible the revenue assessed upon the estate. In our opinion the omission to state the amount of Government tax is a "material irregularity" within the meaning of Section 311 of the Code. *Prima facie* therefore the judgment-debtor is entitled to be given the opportunity of proving that he has sustained substantial loss by reason of the irregularity. In the present case, however, we think it would be idle to remit this case to the District Court to give the judgment-debtor an opportunity of proving substantial injury. He tendered no evidence of injury before the District Court, and it seems clear from the record that he was not then, and is not now, in a position to prove any injury.

The appeal is dismissed, but as, in our view, there was a material irregularity in the sale proclamation, it is dismissed without costs.

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23 M. 629.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

KUTTI ALI (*Plaintiff*), *Appellant v.* CHINDAN AND ANOTHER (*Defendants*), *Respondents.** [6th February, 1900.]

Civil Procedure Code—Act XIV *of* 1882, *Section* 13—Res judicata—*Suit for land based on plaintiff's title—Previous suit as lessor—Omission to make title a ground of attack in previous suit—No denial of plaintiff's title as landlord—Maintainability of suit.*

In a previous suit, brought in 1890, plaintiff had sued for the recovery of certain land which he alleged to have been let verbally to the defendants in 1886. Defendants denied the verbal letting and pleaded that they held the land from [630] plaintiff's predecessor under a written agreement of 1876. The Court passed a decree in plaintiff's favour, holding that the lease under the written agreement had expired prior to 1886, and that the subsequent enjoyment of the land was under a verbal agreement. No steps were taken to execute that decree. Plaintiff now sued defendants for the recovery of the same land, together with arrears of rent, basing his claim on the same written agreement of 1876, and also on his title as owner thereof. The District Court held the claim on the written agreement to be *res judicata*, and that plaintiff could not now sue upon his title as that should have been made a ground of attack in the former suit. On appeal to the High Court:

Held, that inasmuch as plaintiff's title as landlord was recognised in the suit of 1890, the defendants could not have acquired a prescriptive title as against him in 1898, when the present suit was filed; and that plaintiff was therefore entitled to recover the land upon his title independently of any letting by him to the defendants. That the claim for arrears of rent under the old written agreement was *res judicata* by reason of the former suit but that plaintiff's omission to sue on the strength of his general title in the former suit was no bar to the present suit, inasmuch as his title as landlord had never been disputed.

Zamorin of Calicut v. *Narayanan Mussad* (I.L.R. 22 Mad. 323) referred to.

[R., 13 M.L.J. 448 (465).]

SUIT to recover, with arrears of rent, land let on lease by plaintiff's predecessor to the predecessor of defendants in May 1876. Plaintiff also

* Second Appeal No. 113 of 1899 against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 273 of 1898, affirming the decree of K. Ramanatha Ayyar, District Munsif of Panoor, in Original Suit No. 93 of 1898.

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claimed to recover on his title as owner. First defendant, among other pleas, contended that the suit was *res judicata* by reason of the decree in original suit No. 89 of 1890; and that plaintiff had lost all right to the land. On the question of *res judicata* an issue was framed by the District Munsif, who said:—"The letting sued on is evidenced by Exhibit A, a duly registered instrument (dated 14th May 1876), and it is for a period of four years only from its date. Ten years after the expiry of the term of this lease, plaintiff brought original suit No. 89 of 1890, in the Tellicherry Munsif's Court for recovery of this land and another, on the basis of a verbal letting of 22nd November 1886, said to have been made by him to the lessee under Exhibit A. The latter, denying the verbal letting sued on therein, pleaded holding of the land by him under the terms of Exhibit A itself, but the Court nevertheless passed a decree in plaintiff's favour in that action. The material portion of the judgment runs as follows:—'The written lease of 1876 (the one sued on here) terminated 'prior to 1886, and therefore the subsequent enjoyment of the land is 'indisputably under an oral agreement express or implied.' This shows that the Court has held that the letting sued on long ago terminated or was superseded by another on which the former action was brought and a decree obtained therein, **[631]** by this very plaintiff for recovery of this land. He has allowed that decree to be time-barred and he is not now in a position to recover the land in execution proceedings. Plaintiff has himself determined the lease sued on prior to 1886 and he cannot, therefore, be allowed to say that the land is still held under this lease. The lease of 1886 made by plaintiff after the determination of the plaint letting is also determined by the decree obtained by himself. Neither the lease sued on nor the one of 1886 is now available for plaintiff to come to Court thereon for recovery of this land, and Exhibit A is itself evidence that the land came to defendants' predecessor's possession for the first time only under that document. Defendants and their predecessor having been holding the land for more than twelve years and plaintiff having by his own acts and laches lost the means whereby he could claim recovery of the land from them, I must find this issue against him." He dismissed the suit. Plaintiff appealed to the District Judge who said:—"Plaintiff brought original suit No. 89 of 1890 to recover the land on a verbal letting of 1886 and obtained a decree, the execution of which is now time-barred. In that suit, the defendant contended that he held under a letting of 1876, which is the one that plaintiff now sues upon, but the District Munsif found that defendant did not hold under that letting, but under an express or implied subsequent verbal letting. It having been found in the prior suit that defendant did not hold under the letting of 1876, plaintiff is barred by Section 13, Civil Procedure Code, from bringing his present suit on that letting. Explanation II to Section 13 shows that plaintiff cannot now sue upon his title as that should have been made a ground of attack in the former suit (*Haji Hasam Ibrahim* v. *Mancharam Kaliandas* (1), *Ummatha* v. *Cheria Kunhamed* (2)), does not apply as in that case the former suit was brought on title as well as on the letting. I agree with the finding that the present suit is *res judicata* and therefore not maintainable." He dismissed the appeal.

Plaintiff preferred this second appeal.

Ryru Nambiar, for appellant.

Mr. *C. Krishnan*, for respondent No. 2.

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(1) 3 B. 137. (2) 4 M. 308.

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JUDGMENT.

It was found in the suit (original suit No. 89 of 1890) that the defendants were then tenants in possession under [632] the plaintiff—that is, the title of plaintiff as landlord was recognized. The defendants being tenants in 1890 cannot have acquired a prescriptive title in 1898 when this suit was brought. The plaintiff is, therefore, entitled to recover the land upon his title independently of any letting by him. The question of *res judicata* would apply only to the rent claimed under the old lease Exhibit A. The Judge was right in disallowing this part of the claim, but he was wrong in not giving the plaintiff a decree for the land on the strength of his general title, the omission to sue on which in the previous suit was no bar to this, his title as landlord never having been disputed (compare *Zamorin of Calicut* v. *Narayanan Mussad* (1)). We must, therefore, reverse the decrees of both the Courts below and allow the appeal to the extent of giving the plaintiff a decree for the possession of the land. We make no order as to mesne profits as they are not claimed. We direct the parties to bear their own costs throughout.

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23 M. 632=2 Weir 331 and 709.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS *v.* GANAPATHI VANNIANAR AND OTHERS.*
[7th February, 1900.]

Criminal Procedure Code—Act V of 1898, *Sections* 269 (1), 536 (2)—*Order directing trial by jury—"Particular class of offences"—Revocation of order—Jury case tried by assessors—Omission to take objection before finding recorded—Validity of trial.*

By Section 269 of the Code of Criminal Procedure the local Government may, with the previous sanction of the Governor-General in Council, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Sessions, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

In the "Fort St. George Gazette," dated 30th August 1899, it was notified that, whereas by orders previously made the trial of persons charged with certain offences should, in certain districts of the Presidency, including that of Tinnevelly, be by jury; and whereas disturbances known as the anti-Shanar [633] disturbances had taken place in the Districts of Tinnevelly and Madura, and certain persons stood committed for trial and others might thereafter be similarly committed in connection therewith, the Governor in Council, with the previous sanction of the Governor General in Council, directed, under Section 269 of the Code of Criminal Procedure, that the said previous orders be revoked as regards the persons referred to, and that such persons should be tried with the aid of assessors and not by jury.

Certain persons having been so tried for offences under Sections 148, 454, 395 and 323 of the Indian Penal Code, one assessor gave it as his opinion that none of them were guilty: the other assessor finding some of them not guilty. The Additional Sessions Judge convicted and sentenced all the accused, whereupon the objection was taken, on appeal, in the High Court, that the trial should have been by jury and not with the aid of assessors and that the conviction should therefore be set aside. The objection was not taken at the trial:

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* Criminal Appeal No. 730 of 1899 against the sentence of F. D. P. Oldfield, Additional Sessions Judge of Tinnevelly, in Calendar Cases Nos. 1 and 31 of 1899.

(1) 22 M. 323.

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APPELLATE CRIMINAL.

23 M. 632=
2 Weir 331
and 709.

Held, that the omission to take objection to the trial before the Court had recorded its findings was fatal to the contention now urged that the trial was invalid.

Held, *further*, that even assuming that objection had been duly taken, the offences connected with the outbreak had been rightly treated as a "class of offences," and that it was competent to the Government, with the consent of the Governor-General in Council, to revoke the previous notification so far as it related to that class.

APPEAL from a conviction by the Additional Sessions Judge of Tinnevelly Division. The accused had been tried for the offences of rioting armed with deadly weapons, house-breaking and theft, dacoity and voluntarily causing hurt under Sections 148, 454, 395 and 323 of the Indian Penal Code. In the opinion of the first assessor none were guilty. The second assessor found two only of the accused guilty. The Judge found all guilty and passed the sentences now appealed from. The trial was held by the Additional Sessions Judge with the aid of assessors, instead of by a jury, in pursuance of the following notification, published in an extraordinary issue of the "Fort St. George Gazette," dated 30th August 1899:—"Whereas His Excellency the Governor-in-Council has, by orders made from time to time under the powers conferred upon him in that behalf, directed that the trial before Courts of Session of persons charged with offences under certain sections of the Indian Penal Code should, in certain districts of the Presidency including the District of Tinnevelly, be by jury:

"And whereas riots and disturbances, known as the anti-Shanar riots and disturbances, have recently taken place in the Districts of Tinnevelly and Madura and certain persons now stand committed for trial to a Court of Session in Tinnevelly charged with offences under the said sections, or some of the said sections, in connection [634] with the said riots and disturbances, and other persons may hereafter be charged with offences under the said sections, or some of the said sections, in connection with the said riots and disturbances, and committed for trial to the said Court of Sessions:

"His Excellency the Governor in Council, under the powers conferred upon him by Section 269 of the Code of Criminal Procedure, 1898, and all other powers and authorities enabling him in that behalf, and with the previous sanction of the Governor-General in Council, is pleased to direct and hereby directs that the orders hereinbefore referred to shall be revoked as regards the persons who now stand committed for trial as aforesaid to the Court of Session in Tinnevelly and as regards any other persons who may hereafter be charged with offences under the said sections, or any of the said sections, in connection with the said riots and disturbances, and be committed for trial to the said Court of Session, but not further or otherwise:

"And His Excellency the Governor in Council, under the powers aforesaid and with the like sanction, is pleased to further direct and hereby directs that the trial of the persons who now stand committed for trial to the said Court of Session as aforesaid, or who may hereafter be committed for trial to the said Court of Session as aforesaid, shall be with the aid of assessors and not by jury."

In the opinion of the first assessor none of the accused were guilty. The second assessor found that only two were guilty. The Judge, differing from the assessors, convicted all the accused, and sentenced them to different terms of imprisonment.

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23 M. 632 = 2 Weir 331 and 709.

The accused preferred this appeal.

V. Krishnasami Ayyar and *K. Srinivasa Ayyangar*, for the accused.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and the Acting Public Prosecutor (*C. Sankaran Nayar*) in support of the conviction.

JUDGMENT.

It is objected on behalf of the appellants that the trial of this case ought to have been by the Sessions Judge and a jury, and not by the Judge and assessors, and that for that reason the conviction must be set aside. The appellants' vakil admits that the objection was not taken at the trial, but contends that inasmuch as his clients have been prejudiced by the alleged error the trial is invalid notwithstanding the language of Section 536 (2) of the Criminal Procedure Code. His clients are [635] prejudiced, as he contends, because the opinion of the assessors was in their favour and that opinion, if it had been taken in the form of a verdict from a jury, would have been conclusive as far as regards the facts. In other words he contends that full effect is to be given to the words of the sub-section only in the case in which the assessors agree with the Judge in finding the prisoner guilty.

If it had been the intention of the Legislature so to limit the operation of the sub-section, we think they would have used words such as are used in the next Section 537 to make it clear that the omission to take the objection at the trial is to conclude the prisoner only in the case above stated. We think the omission is fatal to the appellants' contention, and for that reason alone should have to overrule it.

But the Advocate-General being desirous of having the main point settled has argued this case on the assumption that the objection was duly taken. The contention on the main point is that the "class of offences" referred to in Section 269 of the Criminal Procedure Code must be ascertained according to some classification recognized by the Legislature —such as is found in the Penal Code, *e.g.*, offences against the State, against the person, or in the Criminal Procedure Code, *e.g.*, bailable offiences, cognizable offences. There is no reason shown for putting his narrow construction on the words. No reason is suggested why offences should not be classified according to the persons who commit them, *i.e.*, the offences, the offenders, or according to the person or property against whom or which the offences are committed, or in regard to the particular occasion in connection with which they are committed. Thus, the fact of offences having been committed by old offenders or members of criminal tribes, or having been committed against women or against public property, would afford reasonable ground for a classification.

Here, the fact with reference to which the distinction is made is the fact of an outbreak having taken place directed against a certain section of the population. The offences connected with the outbreak are treated as a class of offences, and in our opinion rightly so. It was accordingly competent to the Government with the consent of the Governor-General in Council to revoke the previous notification so far as it related to that class.

On the merits, we see no reason to doubt the truth of the case for the prosecution. The appeal is dismissed.

23 M. 636=2 Weir 253.

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APPELLATE CRIMINAL.

23 M. 636=
2 Weir 253.

[636] APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* PANDARA TEVAN (AND ANOTHER).*
[12th February, 1900.]

Criminal Procedure Code—Act V of 1898, *Section* 209—*Examination of accused before committal—Discretion of Magistrate.*

It is the duty of a Magistrate, before committing accused persons for trial, to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of Section 209 of the Code of Criminal Procedure is that it is not left to the discretion of the Magistrate who intends to commit to examine the accused. He is bound to examine them, and if he makes an order of commitment without such examination, the order is irregular.

PETITION to revise an order committing certain accused persons for trial. In a preliminary enquiry against the petitioners, who were charged with having committed offences under Sections 436 and 395 of the Indian Penal Code, the Special Magistrate, after taking the evidence of eight prosecution witnesses, formed the conclusion that a *prima facie* case had been made out, and committed the accused for trial before the Sessions Court on charges under Sections 148, 454, 436 and 397 of the Indian Penal Code. The accused were not examined before committal, and one of them filed an affidavit to that effect adding that they had waited for an opportunity to make statements, and that such statements by way of explanation would have satisfied the Magistrate that committal was unnecessary.

Against this order of committal the accused preferred this criminal revision petition.

Mr. *W. Barton*, (for Mr. *John Adam*), for petitioners.

Mr. *N. Subrahmaniam* (for the Acting Public Prosecutor) on behalf of the Crown.

JUDGMENT.

[637] In our opinion, it was the duty of the Magistrate, before committing the accused persons for trial to have examined them for the purpose of enabling them to explain any circumstance appearing in the evidence against them. The effect of Section 209 of the Code of Criminal Procedure is that it is not left to the discretion of a Magistrate who intends to commit to examine the accused person. He is bound to examine him, and if he makes an order of commitment without examining him the order is irregular.

Before, however, we can quash the order of commitment, we have to be satisfied that the irregularity has occasioned a failure of justice.

We have carefully considered the evidence before the Magistrate, and having regard to the nature of this evidence and also to the fact that the accused persons have allowed four months to elapse before applying to quash the order, we cannot say that any failure of justice has been occasioned and we accordingly dismiss the application.

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* Criminal Miscellaneous Petition No. 8 of 1900, praying the High Court to set aside the order of A. Thompson, Special Magistrate of Satur, in Reference Case No. 30 of 1899, committing the petitioners for trial by the Sessions Court of Tinnevelly in Sessions Case No. 32 of 1899.

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ORIGINAL CIVIL.

23 M. 637.

23 M. 637.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

THE COMMERCIAL BANK OF INDIA (LIMITED) (*Plaintiffs*) v. ATEENDRULAYYA AND OTHERS (*Defendants*).*
[13th February, 1900.]

Transfer of Property Act—Act IV of 1882, *Sections* 86, 88—*Decree for sale—Provision for interest at contract rate until six months from date of decree.*

Defendants promised to pay plaintiffs a sum of money for value received with interest thereon from the date of the promise until demand at the rate of 8 per cent. per annum, and, after demand, at the rate of 15 per cent. per annum until payment in full; and as further security for such re-payment deposited with plaintiffs the title deeds of certain immoveable property. Demand was made, but was not complied with; whereupon plaintiffs informed defendants by letter that their account carried interest at the higher rate provided for in the promissory note. Plaintiffs now sued for the amount due in respect of principal and interest at the rate of 15 per cent. per annum from the date of their letter till payment: and asked that in default of payment on a day to be fixed by the Court the property might be sold. A decree having been passed in plaintiffs' [638] favour provision was made therein ordering defendants to pay the amount of principal and interest due at the date of the decree, with interest thereon at the rate of 15 per cent. per annum from that date to a date six months thereafter. Objection having been taken to the form of this decree on the ground that payment of interest at the contract rate was only provided for up to the termination of six months from the date of decree, instead of till payment:

Held, that the decree was correctly drawn. In principle there is no difference between a mortgage decree which has become absolute and an ordinary decree for money. After the day fixed for payment, or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and afterwards there is no more reason for giving interest at the contract rate in the one case than in the other.

Ramaswar Koer v. *Syed Nawab Mehdi Hossein Khan*, (L.R. 25 I.A. 179; I.L.R. 26 Cal. 39), and *Bakar Sajjad* v. *Udit Narayan Singh*, I.L.R. 21 A. 361), referred to.

[F., 29 M. 176=16 M.L.J. 133.]

SUIT to recover money secured by the deposit of title-deeds of immoveable property. Plaintiffs alleged that defendants had, on 29th August 1898, jointly and severally promised to pay the plaintiffs the sum of Rs. 9,000, for value received, with interest thereon from that date until demand at the rate of 8 per cent. per annum, with half-yearly rests; and, after demand, at the rate of 15 per cent. per annum until payment in full: that as further security for the re-payment of the said sum the first defendant had deposited with the plaintiffs the title-deeds of a piece of land and buildings thereon; that the rules and by-laws of the plaintiffs' bank, which the defendants agreed to be bound by, provided amongst other things, that constituents who failed either to pay off or renew a bond, bill or promissory note in terms of a letter demanding payment would be liable to pay interest at the rate of 15 per cent. per annum upon the balance of the account from the date of such letter. The plaint averred that by a letter, dated 24th August 1899, demand had been made from each of the defendants of the balance of principal and interest then due on the said promissory note, but that such defendants had failed to pay such balance or any part thereof and that subsequently by their letter, dated 1st September 1899, plaintiffs had informed each of the defendants that the account then

* Civil Suit No. 250 of 1899.

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carried interest at the higher rate provided for in the said promissory note. On 30th June 1899 a sum of Rs. 9,330-12-10 was due to plaintiffs from defendants and between that date and 18th November 1899, plaintiffs made payments on behalf of the defendants, the amount due to plaintiffs on the latter date on the security of the said promissory note and title-deeds [639] for principal, and interest and payments being Rs. 9,861-11-10. Plaintiffs prayed that a decree might be passed as against both defendants for that amount with further interest on the sum of Rs. 9,330-12-10 at the rate of 15 per cent. per annum from 31st August 1899, until payment and for costs; that the property referred to might be decreed to be well charged with the payment of the said principal, interest and payments and costs; that in default of payment by the defendants or one of them on a day to be fixed by the Court the said property might be sold and the proceeds applied in and towards payment thereof; and that if such proceeds should not be sufficient for the payment in full of such amount the defendants or some or one of them should pay the plaintiff the amount of the deficiency with interest thereon.

The case came on for settlement of issues on 13th February 1900, in the presence of the attorneys for the plaintiffs, the defendants not appearing in person or by pleader.

A decree was then passed, of which the following are the material portions :—" Claim for Rs. 9,861-11-10 due in respect of a promissory note in the plaint mentioned with interest on Rs 9,330-12-10 at the rate of 15 per cent. per annum from 31st August 1899 until payment and for costs of suit; and in default of such payment the property in the plaint mentioned be sold. . . . . . . It is declared that by virtue of the deposit of title-deeds in the plaint mentioned the sum of Rs. 10,226-7-10 and costs and further interest hereinafter mentioned are charged on the immoveable property in the schedule hereto mentioned and it is ordered and decreed that. . . . , the defendants, do pay to the plaintiffs the sum of Rs. 10,226 7-10. with interest thereon at the rate of fifteen per cent. per annum from this day (13th February 1900) to the 13th day of August 1900, and also the costs of this suit when taxed and noted in the margin hereof together with interest thereon at the rate of six per cent. from the date of taxation to the date aforesaid. . . . . . ; but in default of the defendants paying into Court such principal, interest and costs as aforesaid by the date aforesaid, then it is ordered that the said mortgaged premises be sold with the approbation of the Registrar to the best purchaser that can be got for the same, provided the officer or other person conducting the sale shall consider that a sufficient sum has been offered and that the money to arise by such sale be paid into Court to the credit of [640] the suit. And it is further ordered that upon payment into Court as aforesaid, the plaintiffs shall be at liberty to apply in chambers for payment of the amount due for principal, interest and costs as aforesaid and for further interest on the said principal sum and costs, and the defendants shall be at liberty to apply in chambers for payment of the balance (if any) of the said monies. And it is further ordered that if the money to arise by such sale shall not be sufficient for the payment in full of the amount of principal, interest and costs payable under this decree the defendants do pay the amount of deficiency."

Objection being taken to the form of the decree in so far as it related to interest, it was referred to the Court, whereupon his Lordship passed the following

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JUDGMENT.

Exception is taken to the form in which this decree is drafted on the ground that interest at the contract rate is given only up to the end of the six months, whereas interest at that rate ought, according to the contention on behalf of the plaintiff, to run up to the date of payment. The contention is founded upon some observations of the Judicial Committee in a recent case *Rameswar Koer* v. *Syed Nawab Mehdi Hossein* (1), and on the interpretation which has been put upon them by the Allahabad High Court (*Bakar Sajjad* v. *Udit Narain Singh* (2)). In the case before the Judicial Committee the defendants appealed on the ground that the High Court had varied the decree against them by ordering 12 per cent. instead of 4 to be paid from the date of suit up to the date fixed for payment, interest from that date until payment at 4 per cent. being allowed (see copy of decree in *Bakar Sajjad* v. *Udit Narain Singh* (2)). Inasmuch as 12 per cent. was the contract rate the Judicial Committee held that it was rightly allowed and accordingly the appeal was dismissed. It is observed with regard to Sections 86 and 88 of the Transfer of Property Act that they clearly indicate "that the ordinary decree in a suit of the kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization," and then after four sentences which are omitted in the citation made in the Allahabad judgment comes this passage:—"No peculiarity has been shown to exist in this case for cutting down the mortgage [641] rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay." The judgment of the Judicial Committee affirms two propositions, one of which is that a mortgagee is entitled to interest at the contract rate up to the date fixed in the decree, the other that the Court may award subsequent interest. Neither of those propositions has, as far as I am aware, been disputed in this Court. In Allahabad the latter proposition was for some time denied and the effect of the decision in *Bakar Sajjad* v. *Udit Narain Singh* (2) is to re-establish it. It does not appear to have been necessary in that case any more than it was in the case before the Judicial Committee to decide at what rate subsequent interest should be allowed. The learned Chief Justice however considers that in the observations above quoted the Judicial Committee did decide that question in favour of the mortgagee and quoting the words "If the High Court has allowed something less," he says they must mean something less than the mortgage rate of 12 per cent. from the date fixed for payment until realization. With great deference to the learned Chief Justice, I am unable to agree with him. I think the words just quoted may well refer to some point taken in the argument, but not mentioned by the reporter, regarding the sum allowed by the Subordinate Judge as to which evidently some question had arisen (see *Rameswar Koer* v. *Syed Nawab Mehdi Hossein* (1)). There is nothing to show that they refer to subsequent interest. If the paragraph had stopped with the sentence that precedes, the question could hardly have been raised, for in the rest of the paragraph including that sentence the Judicial Committee were dealing solely with the contention that 12 per cent. ought not to have been allowed up to the date fixed for payment. In that statement of the case (*Rameswar Koer* v. *Syed Nawab Mehdi Hossein* (1)) no notice is taken of the 4 per cent. interest allowed by the

(1) 25 I.A. 179 (181) = 26 C. 39. (2) 21 A. 361 (371, 372).

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High Court after that date. Lord Hobhouse refers to the Sections 86 and 88 of the Transfer of Property Act in order to show that the decree of the High Court was in accordance with the law there enacted, and in paraphrasing Section 86, which is the section prescribing the form for foreclosure decrees, he speaks of the date of [642] realization as the date up to which accounts on the footing of the mortgage are directed to be taken. It is simply because the phrase "date of realization," instead of date fixed by the Court for payment, is used that it is thought that the Judicial Committee had in mind subsequent interest. The context, in my opinion, shows that this cannot have been the case, for the only dates mentioned in the section are the date of the decree and the day fixed by the Court, and the section contains no reference to subsequent interest. Redemption or foreclosure follows according as the amount calculated up to the day fixed by the Court is or is not paid. By date of realization I think Lord Hobhouse must have meant the date mentioned in the section to which he was referring, and I cannot believe that there was any intention to sanction an abrupt departure from well-established practice (see *e g.*, *Muthura Das* v. *Raja Narindar Bahadur* (1) ; *Orde* v. *Skinner* (2)). In principle I conceive there is no difference between a mortgage decree which has become absolute and an ordinary decree for money. After the day fixed for payment or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and afterwards there is no more reason for giving interest at the contract rate in the one case than there is in the other. For these reasons, I am of opinion that the decree which is drawn in the form that has been current for some time past in this Court is not open to objection.

Messrs. *Barclay*, *Orr & David*.—Attorneys for the plaintiffs.

(1) 23 I. A. 138=19 A. 39.

(2) 7 I.A. 196=3 A. 91 (107).

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(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 125.

(2) See PENAL CODE (ACT XLV OF 1860), 23 M. 155.

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See ALLUVION, 22 M. 464.

1.—Imperial Acts.

Act XXIV of 1839 (Ganjam and Vizagapatam Agency Courts).

(1) *Agency Rules passed under the Act—Agent's Court at Vizagapatam—Court of lowest grade—Jurisdiction.*—The Agent to the Governor at Vizagapatam has jurisdiction over all suits of a civil nature arising in the Agency. The rule regarding the institution of suits of a lesser pecuniary value than Rs. 5,000 in the Divisional Assistant's Court is, like the analogous rule contained in s. 15 of the Code of Civil Procedure, one of procedure and not of jurisdiction. GOURCHANDRA PATNAIKUDU v. VIKRAMA DEO, 23 M. 367=9 M.L.J. 263 ... 658

(2) *Validity of Agency Rule No.* XXII *passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court—Indian Councils Act—24 & 25 Vict., cap.* 67, *s.* 25*—Letters Patent*, s. 15—An order was made by a single Judge, by consent of the parties, transferring a case from the Court of an Agent to the Governor, Vizagapatam, to a District Court. A further order was made by a single Judge which, though in form an order dismissing a review petition against the first-mentioned order, was in substance an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of such an Agent to a District Court: *Held*, (1) that both orders were "judgments" within the meaning of s. 15 of the Letters Patent and that an appeal lay therefrom; (2) that the High Court has no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam; (3) that Agency Rule No. XXII, made in 1840, under the powers conferred by Act XXIV of 1839, is a valid rule. MAHARAJA OF JEYPORE v. PAPAYYAMMA, 23 M. 329 ... 631

Act XXXII of 1839 (Interest).

S. 1—*Notice of intention to claim interest—Demand of interest already due.*—A letter demanding interest on an outstanding debt, from which the intention of the creditor to claim interest up to date of payment is made clear, is a sufficient notice, within the meaning of the Interest Act, 1839, to entitle the creditor to claim interest prospectively from the date of the letter, though the demand be made retrospectively in respect of interest alleged to be then already due. KUPPUSAMI PILLAI v. MADRAS ELECTRIC TRAMWAY COMPANY, LIMITED, 23 M. 41 ... 423

Act XXII of 1850 (Caste Disabilities Removal).

S. 1—*Hindu Law—Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit.*—The step-son of a deceased Hindu widow sued as her heir for possession of certain property. The defence was that the widow had deserted her husband in his lifetime and lived a life of unchastity and that the plaintiff's right of inheritance was in consequence destroyed: *Held*, that assuming the widow to have been guilty of unchastity and to have been actually degraded for it, plaintiff's right to inherit her property

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in the absence of nearer heirs could not be affected by such degradation. *Held also*, that though Act XXI of 1850 gives relief against the forfeiture of rights of persons deprived of caste on other grounds besides that of renouncing or being excluded from the Hindu religion, it does not restore to an outcaste all the rights which he, as a casteman, could have civilly enforced; nor does it contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste; nor does it interfere with the forfeiture of such a right, as *e g.*, to participate with other members of a caste in the benefits of a religious institution appropriated to the members of the caste, or to participate jointly with fellow castemen in the benefit of a caste institution; nor can it apply where the question is, not as to the rights of a degraded person, but as to who is entitled to the property of a degraded person. *Held further*, that though under the Hindu law a loss of caste by expulsion for specified reasons causes forfeiture of rights, it has never broken the relationship of the person expelled to those who remain within the caste, degradation having merely the effect of rendering the tie of kindred but dormant; and, *e g.*, the degradation of either spouse does not dissolve the tie of marriage. It is impossible to construct out of the smritis and commentaries a consistent doctrine of "civil death" or "fiction of death." Prostitution does not sever the legal relation, and therefore the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. Nor does a wife's adultery unattended by degradation, dissolve the marriage, referred to: *Held*, therefore, that the step-son was entitled to inherit the property, as sapinda of the widow's late husband in the absence of nearer heirs. SUBBARAYA PILLAI v. RAMASAMI PILLAI, 23 M. 171 ... 518

Act XII of 1851 (Land Revenue, Madras).

Ss. 1, 17—*Act* VI *of* 1867, *Ss.* 4, 31—*Penal assessment—Jurisdiction of Civil Court—Limitation.*—The plaintiff was in occupation of certain land in Madras, and in May 1895 he received a notice from the Collector stating that the land belonged to the Government and that a penal assessment of Rs.100 a month was imposed upon him for the current month, and calling upon him to pay that sum within three days, failing which his property would be destrained, and stating that if he did not vacate the land at once a further penal assessment would be imposed and levied every month. In June 1896 a like notice was served upon the plaintiff, calling upon him to pay Rs. 1,300, the amount chargeable up to date. The plaintiff having appealed to the Board of Revenue without success, paid under protest the penal assessment in various sums amounting together to Rs. 3,004-1-0. He now sued to recover that amount and prayed for a declaration of his title: *Held*, by BODDAM, J., that the High Court had jurisdiction to entertain the suit in respect of the claim for money, but that the suit was barred as to so much of it as had been paid more than six months before the institution of the suit: *Held*, by SHEPHARD, OFFG. C.J., and MOORE, J (affirming the judgment of BODDAM, J.), that the land belonged to Government and the plaintiff was in occupation without title; and that it was accordingly competent to Government to impose the assessment. In order to enable one having paid money under protest to recover money so paid, it is necessary for him to show that the payment was made under illegal coercion. MUTHAYYA CHETTI v. SECRETARY OF STATE FOR INDIA, 22 M. 100 ... 70

Act XIII of 1859 (Criminal Breach of Contract).

(1) *S.* 2—*Money advanced on account of work to be performed—Loan on condition that the workman should enter into a contract of service.*—A workman agreed in writing to work for the proprietors of an estate for four years and one month, from 1st March 1899 to 31st March 1903, for an initial advance of one rupee, which was not to be repaid till after the expiration of the agreement. The same person subsequently obtained an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from his wages. He worked from 1st March 1899 till 18th September 1899 when he ceased to work, leaving in all a sum of Rs. 5

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to be accounted for in the adjustment of the total advance. He was subsequently charged and convicted under s. 2 of the Criminal Breach of Contract Act XIII of 1859: *Held* that the initial advance of one rupee was not money advanced on account of work to be performed, but rather a loan made without interest on the condition that the workman would enter into a contract of service for the duration of the loan; and that the Criminal Breach of Contract Act, 1859 was inapplicable to this case; that, with reference to the ten rupees to be repaid out of wages, the Act applied and an order should be made directing the workman to work until the expiration of the term of the contract on account of which this sum had been advanced. TANGI JOGHI v. HALL, 23 M. 203=1 Weir 687 ... 541

Act XX of 1863 (Religious Endowments).

(1) *Trustees—Dismissal for breach of duty—Failure to submit accounts—Meetings of committee—Number of members present—Resolution appointing quorum—Resolution by three out of seven.*—Though committees constituted under the Religious Endowments Act, 1863, are not strictly corporations, their procedure in matters relating to the management of properties and trustees under their control should be governed by the rules applicable to regular corporations. In 1879, when a committee consisted of seven members, a meeting was held at which five were present, and a resolution was unanimously passed that at future meetings, three should form a *quorum*. This resolution had never been rescinded, and had always been acted upon. In 1895, when the committee also consisted of seven, a meeting was held after due notice to all its members, at which three were present, and a trustee of the temple was, on valid grounds, dismissed from office and called upon to hand over charge of the temple and its properties. The resolution of dismissal was unanimous and was confirmed at a subsequent meeting: *Held*, that the meeting as constituted was competent to pass the resolution removing the trustee. Whether unanimity of the whole committee might not have been necessary in the event of business having been transacted otherwise than at a meeting, *Quære*.—Failure on the part of a trustee to submit accounts to the committee is a breach of one of the most important duties cast upon him by law and is sufficient to justify his dismissal. ANANTANARAYANA AYYAR v. KUTTALAM PILLAI, 22 M. 481=9 M L.J. 203 ... 345

(2) *Ss. 2, 13, 14, 16—Regulation VII of 1817 (Madras)—Joinder of purchasers in a suit against trustee.*—A temple having been endowed with immoveable property after the passing of Regulation VII of 1817 (Madras), and before the Religious Endowments Act (XX of 1863), and the trustee having without authority sold the same, a suit was instituted under Act XX of 1863 against the trustee and the purchasers of the property, to annul the sales and to declare the right of the temple thereto: *Held*, (1) that a transferee of trust property, under a transaction which amounts to a breach of trust on the part of the trustee of the institution cannot be proceeded against under the provisions of the Religious Endowments Act, 1863; and (2) that the trustee of a public religious institution can be sued under the provisions of the Religious Endowments Act, 1863, notwithstanding the fact that the institution came into existence after Regulation VII of 1817 was passed. SIVAYYA v. RAMI REDDI, 22 M. 223. 159

(3) *S. 14—Suit by persons interested for breach of trust and neglect of duty—Refusal by trustee without adequate reason to accept and utilize offerings for celebration of festivals—Misfeasance and breach of trust in s.14 explained.*—In a suit against the trustee of a religious institution under Act XX of 1863 for alleged breaches of trust and neglect of duty by reason of the non-performance of ceremonies, it is not necessary, in order to give jurisdiction to Civil Courts, for the plaintiffs to show that there are any special funds constituting an endowment of the institution. If it be proved that the ceremonies in question have been conducted as a custom for a series of years and that the defendant trustee was not absolutely unable, owing to lack of funds, to carry on those ceremonial observances in the customary manner, he must be held to have been guilty of neglect of duty rendering

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him liable to a suit under s. 14 of the Act. Where it has been usual for the trustee to celebrate festivals with the aid of voluntary contributions it is a breach of duty on the part of the trustee to refuse to celebrate them without adequate reasons if funds are available, and the trustee ought not, contrary to usage, to refuse to receive such offerings and perform the ceremonies for which they are tendered. *Per* SUBRAHMANIA AYYAR, J.—Having regard to the fact that funds voluntarily given to public religious institutions not only enrich the institutions but promote the interests of public worship, it must be regarded as part of the proper functions of the trustee to utilize such income for the purposes of the institution whenever it is available. It is his duty to accept the money and apply it for the specified purpose unless there are proper grounds for its rejection. Though a trustee may exercise a discretion and cannot be charged with misconduct if he acts with an absence of indirect motive, with honesty of intention and a fair consideration of the subject, he may be proceeded against if, from corrupt or improper motives, he refuses to allow voluntary contributions offered for purposes not inconsistent with the principles, rules or usages of the institution to be applied to those purposes. The Courts are bound to restain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. The ground upon which the Courts exercise such jurisdiction over him is that such departure on his part amounts to a breach of legal duty incumbent on him. Though the Courts cannot be called upon to decide questions of ritual and worship unconnected with civil rights, it is perfectly competent for them to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights. ELAYALWAR REDDIAR v. NAMBERUMAL CHETTIAR, 23 M. 298=10 M.L.J. 86. 610

(4) Ss. 14, 15, 18—Civ. Pro. Code—Act XIV of 1882, ss. 15, 539—Suit by a general trustee and a worshipper for removal of trustees—See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 537.

Act III of 1873 (Civil Courts, Madras).

Ss. 12, 13—*Civ. Pro. Code—Act* XIV *of* 1882, *s.* 566—*Appeal—Transfer to Subordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal—Jurisdiction is not conferred by waiver when Court has no inherent jurisdiction.*—An appeal, having been entered in a District Court, against the decision of a District Munsif, was heard in part by the District Judge, who remanded the suit to the District Munsif for findings on fresh issues. Findings having been duly returned, the District Judge transferred the appeal to the Subordinate Judge, who heard and determined it:—*Held*, that the District Judge had no power to transfer to a Subordinate Judge an appeal which was part heard and pending before him. The only inherent jurisdiction that a Subordinate Judge has is in original suits, under s. 12 of the Civil Courts Act. In appeals he only acquires jurisdiction under the last clause of s. 13 of the said Act, which enables a District Judge to transfer appeals to him, and unless that section is complied with the Subordinate Judge has no jurisdiction to hear or determine any appeal. Section 13 does not authorize the transfer to a Subordinate Judge of an appeal part heard and pending before the District Judge. The fact that objection was not taken to the jurisdiction of the Subordinate Judge did not confer jurisdiction upon him, the Subordinate Court not having inherent jurisdiction. KUMARASAMI REDDIAR v. SUBBARAYA REDDIAR, 23 M. 314=10 M.L.J. 51 ... 621

Act X of 1873 (Oaths).

Ss. 9 *to* 11—*Offer by party to be bound—Conclusive proof of the matter stated.*—Defendant in a suit, before trial, filed a petition under s. 9 of the Indian Oaths Act, 1873, to the effect that if the plaintiff should make an oath according to law regarding certain facts, "this defendant will forfeit his right of contesting this suit." He subsequently desired to withdraw the petition on insufficient grounds, but the plaintiff took the oath, and on

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the strength thereof all the issues were decided, and a decree passed, in plaintiff's favour. The suit was, however, remanded, on appeal, for disposal after recording evidence on both sides. On appeal by plaintiff against this order of remand: *Held*, (1) that there is nothing in ss. 9 to 11 of the Indian Oaths Act, 1873, which allows a party who has agreed to the administration of an oath under those sections to retract after the opponent has accepted the proposal; (2) that the Act gives the Court a discretion to administer the oath or not, and though it should not administer it if good grounds be shown for retracting, it is justified in so doing, notwithstanding the retractation if the grounds are frivolous; (3) that if "the matters stated," as referred to in s. 11 of the Act, affords sufficient material for the decision of the suit, a decree may be passed on the facts so proved. But if the facts so proved are not sufficient for the decision of the case, such further facts as are necessary should be proved by evidence adduced on both sides. The Act provides, not for the adjustment of a suit in an arbitrary way, but merely for the conclusive proof of facts; such facts, if not sufficient for the decision of the suit, should be supplemented by facts duly proved by evidence; and (4) that the facts proved by the special oath are conclusively proved, and any further evidence that may be taken should be limited to matters not proved by the oath. THOYI AMMAL v. SUBBAROYA MUDALI, 22 M. 234 ... 167

Act V of 1881 (Probate and Administration).

(1) *Ss. 2, 4—Document in form of will passing no property and only appointing guardians.*—A document in the form of a will, which was presented for probate, dealt with no property, the petition stating that the family of which the testator had been managing member was undivided, and that the testator's property had devolved by survivorship on his sons and nephews. The document, however, appointed persons to manage the family business during the minority of the said minors;—*Held*, that it was not a document of which probate could be granted. *In re* BUKHTHAWAR MULL SOWCAR, 23 M. 133 ... 490

(2) *Ss. 35, 43, 62—Executrix—Letters of administration with will annexed.*—A petitioner prayed for a grant of probate of her deceased son's will. No executrix had been appointed therein, but the petitioner was directed that out of certain property she should pay certain debts:—*Held*, that such a direction was insufficient to show an intention on the testator's part that for the general purposes of administration the petitioner should be executrix; and that the petition should have been for letters of administration with the will annexed; that the petition should state all assets likely to come to the petitioner's hands; and that proof of execution and of the consciousness of a testator is insufficient, is insufficient, and that it should be further shown that he knew of and understood the contents of the document which he signed. KUPPAYAMMAL v. AMMANI AMMAL, 22 M. 345 ... 246

(3) *S. 104—Equal and rateable distribution—Civ. Pro. Code—Act XIV of 1882, s. 234—Execution of decree against deceased judgment-debtor.*—The right of a decree-holder, under s. 234 of the Civil Procedure Code, to have his decree executed against the legal representative of a deceased judgment-debtor, is not affected by s. 104 of the Probate and Administration Act, which directs debts to be paid equally and rateably out of the assets. VENKATARANGAYAN CHETTI v. KRISHNASAMI AYYANGAR, 22 M. 194 ... 138

Act II of 1882 (Trusts).

S. 56—Suit by two out of eleven beneficiaries for possession of trust property—Maintainability of suit—Succession Act—Act X of 1865, s. 271—See SUCCESSION ACT (X OF 1865), 23 M. 239

Act IX of 1887 (Provincial Small Cause Courts).

(1) *S. 15, sch. II, art. 8—Suits for rent—"Suits of the nature cognizable in Courts of Small Causes"—Second appeal—Civ. Pro. Code—Act XIV of 1882, s. 586.*—A suit for the recovery of rent other than house-rent does

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not become a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the local Government with authority to exercise jurisdiction with respect thereto under s. 15 and sch. II, art. 8, of Provincial Small Cause Courts Act, 1887. A second appeal will lie in such a suit, though the amount or value of the subject-matter of the original suit does not exceed Rs. 500. VEDACHALA MUDALI v. RAMASAMI RAJA, 22 M. 220 ... 164

(2) *S.* 15, *sch.* II, *art.* 35 (*j*) – *Civ. Pro. Code—Act* XIV *of* 1882, *s.* 646-*B—Suit for the value of property illegally retained—Jurisdiction of Small Cause Courts.*—Certain moveable property having been distrained under s. 15 of the Rent Recovery Act (Madras) 1865. such distraint was set aside and the property ordered to be restored to the owners. That order not having been carried out, the owners filed suits on the Small Cause side of the Courts of the Subordinate Judge and the District Munsif, for the value of the property so illegally retained: *Held*, that the suits were not excepted from the jurisdiction of the Small Cause Courts by art. 35 (*j*) of sch. II of the Provincial Small Cause Courts Act, 1887. CHAKRADHARUDU v. VENKATARAMAYYA, 22 M. 457 ... 327

(3) S. 25—See LETTERS PATENT, 23 M. 169.

(4) *Sch.* II, *art.* 7—*Suit for damages for use and occupation of land.*—A suit for damages for use and occupation of land is cognizable by a Court of Small Causes. VIRA PILLAI v. RANGASAMI PILLAI, 22 M. 149 ... 106

(5) Sch. II, art. 31—Jurisdiction—Suit for mesne profits under Rs. 500—Civ. Pro Code—Act XIV of 1882, s. 586—Second appeal—See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 196.

Act IV of 1889 (Merchandise Marks).

S. 15—*Use of counterfeit trademark—Prosecution after one year from first discovery of offence—Limitation—Penal Code—Act* XLV *of* 1860, *ss.* 482, 486.—A complainant having, in 1893, discovered that goods were being sold marked with what was alleged to be a counterfeit trade-mark, called upon the persons so selling to discontinue the use of the said alleged counterfeit trade-mark and to render an account of sales. The right to proceed further was reserved, but no action was then taken. In 1898, upon its being ascertained that the same trade-mark was being used, a prosecution was commenced: *Held*, that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time-barred under s. 15 of the Indian Merchandise Marks Act, 1889; and that the complainant must enforce his remedy by civil process. RUPPEL v. PONNUSAMI TEVAN, 22 M. 488=1 Weir 558 and 821 ... 349

Act VIII of 1890 (Guardians and Wards).

(1) *Ss.* 29, 30—*Mortgage by guardians on estate of minor—"Previous permission of the Court"—Contract Act—Act* IX *of* 1872, *s.* 64—*Transfer of Property Act—Act* IV *of* 1882, *s.* 35.—Guardians duly appointed under the Guardians and Wards Act, 1890, having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mortgagee sued to recover the amount of principal and interests due. The necessity had been urgent, the terms of the deed fair, and the money had been duly applied; but the guardians had not obtained the sanction of the Court as directed by s. 29 of the Guardians and Wards Act, 1890. On its being contended that the mortgage was invalid and incapable of being enforced: *Held*, that a mortgage so executed was not void but only voidable; and that the defendant was entitled to avoid the mortgage, but only on the condition of restoring any benefit received by him thereunder to the person from whom it had been received. The fact that the person who had received the benefit was the defendant did not alter his position. SINAYA PILLAI v. MUNISAMI AYYAN, 22 M. 289=9 M.L.J. 64 205

Act VIII of 1890 (Guardians and Wards)—(*Concluded*). PAGE

(2) *Ss.* 33, 43, 47, 48 and 49—*Civ. Pro. Code—Act* XIV *of* 1882, *ss.* 492, 503—*Appeal—Order purporting to be passed under appealable section—Appeal entertained though Judge had no power to pass orders under the section as he purported to do.*—By s.43 (4) of the Guardians and Wards Act.1890 in case of disobedience to an order passed under sub-sections (1) and (2) of that section in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under s. 492 or s. 493 of the Code of Civil Procedure. On a petition being presented to a District Court, asking that the guardians of certain minors, who had been appointed by the Court under the Guardians and Wards Act, might be removed, the Judge passed an order in which he purported to issue an injunction under s. 492 of the Code of Civil Procedure for the attachment of the estate of the minors and to appoint a receiver to manage the estate. On an appeal being preferred against the said orders it was contended that the Judge must be taken to have acted under the Guardians and Wards Act, 1890, and that inasmuch as no appeal was provided by that Act in respect of such an order, no appeal lay: *Held*, that though both orders were passed without jurisdiction, the Judge purporting to have acted under s 492 of the Code of Civil Procedure as regards the issue of an injunction, and under s. 503 as regards the appointment of a receiver, inasmuch as orders under either of these sections were appealable, the fact that the Judge had no power in this case to pass orders under them did not bar the High Court from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against the orders, since there was no provision of law under which the Judge could pass orders attaching property or appointing a receiver without such orders being subject to appeal. ABDUL RAHIMAN SAHEB v. GANAPATHI BHATTA, 23 M. 517=10 M.L.J. 305 ... 768

Act IX of 1890 (Railways).

Ss. 77, 140—*Notice to Railway administration—Service on Traffic Manager.*—In a suit against the South Indian Railway Company to recover the value of a parcel delivered to the defendant company for carriage, it appeared that the plaintiff had within two months of the delivery given notice of the suit to the Traffic Manager of the defendant company at Trichinopoly: *Held*, that the notice was a good notice if it, in fact, reached the agent of the defendant company within the period of six months. PERIANNAN CHETTI v. SOUTH INDIAN RAILWAY COMPANY, 22 M. 137 ... 97

Act X of 1897 (General Clauses).

S. 10 (1)—General Clauses Act (Madras)—Act I of 1891, s. 11—Rent Recovery Act (Madras)—Act VIII of 1865, ss. 15, 18, 51—Summary suit to set aside distraint—"Within thirty days"—Sunday — See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 179.

2.—Madras Acts.

Act II of 1864 (Revenue Recovery, Madras).

(1) *S.* 37—*Tender of full amount of arrears of revenue—Sale for arrears accrued since attachment.*—When a defaulter, whose land has been attached and is being brought to sale for arrears of revenue, tenders the full amount of the arrears of revenue on account of which the land was attached, together with interest and charges under Revenue Recovery Act, 1864, s. 37, the Collector is bound to stay the sale. When, therefore, a Collector, notwithstanding such tender, proceeded to sell on the ground that arrears had accrued between the date of attachment and the date of tender:—*Held*, that the sale was invalid. SECRETARY OF STATE FOR INDIA v. RAJAH GOUNDAR, 22 M 5=8 M L.J 224 ...

(2) *Ss.* 38, 59—*Sale for arrears of peishcush—Material irregularity or mistake in conduct of sale—Grounds for setting sale aside—Posting notice of sale in Collector's office—Jurisdiction of Civil Courts.*—A person whose application that a sale of land may be set aside under s. 38 of the Revenue Recovery Act II of 1864 (Madras) is refused by a Collector, is a person aggrieved within the meaning of s. 59 of that Act, and is entitled to seek redress in a Civil Court; and a Civil Court has jurisdiction to entertain

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such a suit and may set aside such a sale. When a party seeks to set aside a sale in a Civil Court on the ground of material irregularity or mistake in the conduct of the sale, he must establish, as in proceedings under s. 38, that substantial injury has been caused by such irregularity or mistake. A Civil Court cannot cancel the sale unless such substantial injury has been established. The words "except as otherwise is hereinafter provided," which occur in clause (1) of s. 38, refer to the action which the Collector is empowered to take *suo motu*, under clause (3) of the same section, and have no relation to the remedy provided by s. 59 Direct evidence is not necessary to connect inadequacy of price realised with a material irregularity, where the latter has been proved; and the relation of cause and effect between the two may be inferred where such inference is reasonable. But where the only irregularity shown was an omission to display the notice of sale in the Collector's office, and there was no evidence to show that this affected the attendance of buyers at a place many miles distant, where the sale actually took place, the inadequacy of price being susceptible of other explanations: *Held*, that it was not shown that the irregularity referred to had caused substantial loss and that there was therefore no ground for setting the sale aside. BOMMAYYA NAIDU v. CHIDAMBARAM CHETTIAR, 22 M. 440 ... 315

(3) *Ss.* 52, 54—*Madras Hereditary Village Offices Act (Madras)—Act* III *of* 1895, s. 21—*Emoluments due to village officers—Demand for payment under s.* 52 *of Revenue Recovery Act—Payment under protest—Suit to recover amount paid—Legality of demand—Limitation.*—By the custom of a zemindari its tenants brought their produce to the threshing-floor, where it was divided, *inter alia*, among the village servants. The lessees of the zemindari altered this system, directing the tenants to bring their produce direct to the granaries of the lessees, who promised to pay the village servants their fees from the said granaries. These fees having been only partly paid, the village servants complained to the Government revenue officials, who applied to the lessees for payment of the arrears, a demand for the same being ultimately issued under s. 52 of the Revenue Recovery Act (Madras), 1864. The lessees thereupon paid the amount of the arrears under protest, and a year later filed a suit against the Secretay of State to recover the money so paid: *Held*, that the lessees had made themselves liable for the fees, and the Collector was entitled to proceed under s. 52 of the Revenue Recovery Act (Madras), 1864, to recover them. *Held also*, that inasmuch as the suit had not been brought within six months of the time when the alleged cause of action had arisen, it was barred under s. 59 of the Revenue Recovery Act (Madras), 1864. ORR v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 23 M. 571=10 M.L.J. 261 ... 801

Act VIII of 1865 (Rent Recovery, Madras).

(1) *Regulation* XXV *of* 1802, *S.* 8—*Non-registration of landholder—Subsequent registration of undivided brother of landholder—Maintainability of suit.*—Suits for exchange of patta and muchalka for fasli 1306 ending June 30th, 1897, were dismissed in the Sub-Collector's Court in August 1897 on the ground that the plaintiffs were not the registered landholders. Patta had been tendered in June 1897. Plaintiffs appealed. Subsequent to the filing of such appeals, namely, in December 1897, the Collector registered the undivided brother of the plaintiffs (who had died in April 1897) and it was contended at the hearing of the appeals that such registration covered all the undivided members of the family:—*Held*, that in the absence of registration under s. 8 of Regulation XXV of 1802, the landholder was not entitled to enforce acceptance of patta under the provisions of the Rent Recovery Act, and that there was no cause of action under that act. The original defect of title was not cured by the subsequent registration of the landholder in the name of the plaintiff's undivided brother. RAGHAVA REDDI v. KANNI GRAMANI, 23 M. 221 ... 557

(2) *S.* 4—*Validity of patta—Omission to sign by landholder.*—A suit was brought to set aside a sale of lands on the ground, among others, that a patta which had been tendered was illegal. One of the clauses objected to in the patta contained an erroneous reference to punja lands which had inadvertently not been erased: another provided only in an indirect manner for the rent

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payable in respect of any other land that might be cultivated. The patta was not signed or sealed:—*Held*, that the clauses referred to were unobjectionable: and the fact that the patta tendered had not been signed by the landlord did not necessarily render it invalid. RAJAH ESWARA DOSS v. BABU RAJAN, 22 M 353 ... 252

(3) S. 4—See LIMITATION ACT (XV OF 1877), 22 M. 32.

(4) Ss. 7, 9, 10—*Patta tendered within fasli—Suit after fasli, when patta amended—Maintainability of suit.*—A landholder tendered a patta within the fasli. After the close of the fasli he brought a suit to enforce its acceptance, when the patta was amended. After judgment in that suit, the landholder attached the land; whereupon the tenant sued to have the attachment set aside, on the ground that as no proper patta had been tendered within the fasli, and the suit which resulted in the rectification of the patta had been filed after the close of the fasli, the landholder was precluded from enforcing his claim:—*Held*, that inasmuch as judgment had been obtained, fixing the terms of the patta, the tenant could not plead, in answer to an action for rent, the incorrectness of the patta originally tendered. A landholder has a choice of two alternatives. If he satisfies himself that the patta tendered by him is the right one, he may bring his suit for rent or take other measures to recover it. He takes his chance of some flaw being discovered in the patta. If he is not so satisfied, he institutes a suit under s. 10 of the Rent Recovery Act and obtains a judgment which fixes the terms of the patta for that fasli beyond all dispute. MUNISAMI NAIDU v. PERUMAL REDDI 23 M. 616 ... 838

(5) Ss. 9. 50. 51- *Tender of patta during fasli—Suit commenced after fasli.*—A suit to enforce acceptance of patta under s. 9 of the Rent Recovery Act, 1865, may be instituted after the expiration of the fasli to which the patta relates, provided that the patta has been tendered during the continuation of the fasli. PAPAMMA v. SUBBANNA, 22 M. 318 ... 226

(6) Ss. 9. 51—*Refusal by tenant to accept patta—"Cause of action"—Period within which summary suit must be brought.* On 17th June 1897 a landholder tendered a patta to a tenant who, on the same day, refused to accept it. On 5th August 1897 the landholder brought a suit to enforce its acceptance:—*Held* that the suit was brought in time. MUNISAMI NAIDU v. KRISHNA REDDI, 23 M. 474=10 M.L.J. 258 ... 783

(7) S. 10—*Limitation Act—Act XV of 1877, sch. II, art. 110—Suit to recover arrears of rent—Suit to enforce acceptance of patta pending—Time from which period of limitation is computed.*—The cause of action, with reference to limitation, in a suit for rent, accrues on the date on which the rent is payable by custom or contract, irrespective of whether patta has been tendered or a suit to enforce acceptance of patta under the Rent Recovery Act (Madras), 1865, is pending. KUMARASAMI PILLAI v. PRESIDENT, DISTRICT BOARD OF TANJORE, 22 M. 248 ... 177

(8) Ss. 10, 69, 73—*Decision of Collector ejecting tenant—Appeal.*—An appeal lies from the decision of a Collector ejecting a tenant under s. 10 of the Rent Recovery Act (Madras), 1865. Such a decision, notwithstanding the use of the word 'order' in the section referred to, is a judgment within the meaning of s. 69. NARASIMHASWAMI v. LAKSHMAMMA, 22 M. 436 ... 312

(9) S. 11—*Reduction of rent—Registration Act—Act III of 1877, ss. 17, 18.*—A document given by the owner of land to his tenant varying the terms of tenancy with reference to the amount of rent to be paid, is not an instrument relating to an interest in immoveable property and does not require registration. Where a landholder has granted a reduction of rent otherwise properly payable in respect of land, the mere fact that the tenant has made some improvements subsequent to the grant does not bring the case within the exception to the proviso of s. 11 of the Rent Recovery Act (Madras), 1865, so as to be binding on the landholder's successor. OBAI GOUNDAN v. RAMALINGA AYYAR, 22 M. 217=8 M L.J. 256 ... 155

(10) S. 15—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 22 M. 457.

Act VIII of 1865 (Rent Recovery, Madras)—(*Concluded*). PAGE

(11) *Ss.* 15, 18, 51—*Summary suit to set aside distraint—"Within thirty days"—Sunday—General Clauses Act—Act* X *of* 1897, *s.* 10 (1)—*General Clauses Act* (*Madras*)—*Act* I *of* 1891, *s.* 11.—Suits to set aside a distraint under s. 15 of the Rent Recovery Act (Madras), 1865, were filed on the thirty first day after the distraint complained of, the thirtieth day being a Sunday, and the Court closed. On objection being taken that the suits were barred under ss. 18 and 51 of the Act:—*Held*, (1) that the suits were filed in time; (2) that the provisions of the Limitation Act do not extend the period of thirty days limited by ss. 18 and 51 of the Rent Recovery Act (Madras), 1865, for bringing a summary suit to set aside a distraint; neither does s. 10 of the General Clauses Act, nor s. 11 of the General Clauses Act (Madras), inasmuch as the latter Acts are not retrospective: and (3) that there is a generally recognised principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunity. SAMBASIVA CHARI v. RAMASAMI REDDI, 22 M. 179=8 M.L.J. 265 ... 127

(12) *S.* 72—*Refusal to execute muchalka—Suit for rent.*—By s. 72 of the Rent Recovery Act, when a judgment is given for the delivery of a muchalka, if the person required by the decree to execute such muchalka shall refuse to do so the judgment shall be evidence of the amount of rent claimable from such person, or a copy of the judgment under the hand and seal of the Collector shall be of the same force and effect as a muchalka executed by the said person. A landholder, having tendered a patta and obtained confirmation of it by summary suit, sued for rent. The tenant in his written statement denied that the patta was a proper one and contended that he was not bound to accept it:—*Held*, that this amounted to a refusal to execute the muchalka for the delivery of which judgment had been given within the meaning of s. 72, and that the requirements of that section had been complied with. VENKATARAMAYYA v. SUBBANNA, 23 M. 565 ... 797

Act VI of 1867 (Land Revenue Amendment, Madras).

Ss. 4, 31—See ACT XII OF 1851 (LAND REVENUE, MADRAS), 22 M. 100.

Act I of 1876 (Assessment of Land Revenue, Madras).

(1) Regulation XXV of 1802 (Madras), s. 9—Regulation XXVI of 1802 (Madras), S. 2—See REGULATION XXV OF 1802 (THE PERMANENT SETTLEMENT, MADRAS), 22 M. 438.

(2) *Separate registration and assessment of a village alienated from a zamindari—Regulation* XXV *of* 1802 (*Madras*), *s.* 8—*Invalid order of Government—Declaratory decree—Specific Relief Act—Act* I *of* 1877, *s.* 42—*Construction of agreement.*—By the effect of ss. 5 and 6 of the Madras Act I of 1876 the decision of the Collector, in a case within his jurisdiction, whether for or against separate registration of a portion alienated from a zamindari, when once duly sanctioned as provided by that Act, can only be questioned in a Civil Court. Under ss. 7 and 8, the apportionment of the assessment may be appealed from the Collector to the Board of Revenue, and power is reserved to the Governor in Council to order re-adjustment of the separate assessment if fraud or material error should appear. Separate registration, on the other hand, is a matter of private right. The grantee of the perpetual lease of a village, alienated thereby from a zamindari, sued for a declaration of the invalidity of an order of the Government, inasmuch as it directed the cancellation of the Collector's order, after sanction by the Board, for the separate registration of the village:—*Held*, that this declaration should be decreed. The objection that the suit was contrary to the law enacted in s. 42 of the Specific Relief Act, 1877, was not sustainable. No further relief could have been required by the plaintiff The effect of the declaration itself, for which he had sued, would be sufficient to maintain the Collector's original order which was valid in law, while the order of the Government directing its cancellation was not legal and was void. Nor was the suit defective for want of parties. Another suit, heard on

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appeal with the above, having been brought by the lessees of the entire zamindari, against the same grantee, raised the question,—what was the obligation entered into by him in respect of payment of the revenue upon separate registration and separate assessment of the village. This involved the construction of terms in the documents entitling the grantee to the village, and these according to the plaintiffs, obliged him to pay a fixed sum to the zamindari:—*Held*, that he was only liable, after the registration and assessment, for burdens lawfully incident to the separate holding, and that they were to be discharged by direct payment by him to the Collector. ROBERT FISCHER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 22 M. 270 (P.C.)=3 C.W.N. 161=26 I.A. 16=7 Sar. P.C.J. 459 ... 193

Act I of 1884 (City of Madras, Municipal).

(1) *Ss. 103, 110—Profession-tax—Liability of member of a firm to pay separate tax in respect of a Government appointment, his qualification for such appointment being the profession which he also carries on jointly with the firm—Meaning of "person" under the Act.*—A member of a firm of Attorneys-at-Law and Notaries Public which paid the profession-tax leviable under s. 103 of the City of Madras Municipal Act, 1884, also held the appointment of Government Solicitor. He practised no other profession or business than that exercised by his firm; and the duties of Government Solicitor could not be performed by any person other than a practising attorney. The Municipality of Madras having demanded profession-tax in respect of the appointment of the Government Solicitor in addition to the tax paid by the firm of which the holder of the appointment was a member:—*Held*, that the tax was rightly levied. BARCLAY v. PRESIDENT, MUNICIPAL COMMISSION, MADRAS, 23 M. 529 ... 772

(2) *S. 190—Profession-tax.*—The Inspector-General of Police, whose official place of business with the main body of clerks is in Madras, went on tour, and during his absence the Assistant Inspector-General in Madras signed letters for him:—*Held*, that the Inspector-General was not assessable to profession tax under the City of Madras Municipal Act in respect of the period when he was absent on tour. HAMMICK v. PRESIDENT, MADRAS MUNICIPAL COMMISSION, 22 M. 145=8 M.L.J. 164 ... 103

(3) *S. 307—Prohibition against depositing stable refuse in a street—Deposit of stable refuse in a dust bin—Liability of person so depositing.*—By the first clause of s. 307 of the City of Madras Municipal Act, 1884, the president of the municipality "shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust, dirt, ashes, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which shall be removed by the owner thereof." By the second clause of the same section "whoever, after such provision has been made, deposits any of the said matters or any building, stable or garden refuse in any street, pavement or verandah of any building" . . . is rendered liable to fine. Petitioner having deposited stable refuse in one of the dust-bins provided in accordance with the Act was charged before a Magistrate and fined under the latter clause of the said section:—*Held*, that the dust-bin was not a part of the street and that the throwing of stable refuse into the dust-bin was not a deposit of such refuse in the street so as to constitute an offence under the said section. PERUMAL v. MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS, 23 M. 164 ... 513

Act IV of 1884 (District Municipalities, Madras).

(1) *Bye Law No. 48—District Municipalities Act Amendment Act (Madras)—Act III of 1897—Covering a drain without municipal permission.*—A bye-law of a municipality had been framed under the powers conferred by an Act of 1884 as amended by an Act of 1897, and was to the following effect:—"No public drain shall be covered without the permission of the municipal council." It had come into force in 1890. Prior to its coming into operation an earlier bye-law had subsisted, in substantially the same terms. An occupier of premises, who had covered a drain during the subsistence of the earlier bye-law, was charged with having committed an offence under the later bye-law, and contended by way of defence that he could not be convicted inasmuch as the act complained of had been committed before the passing of the Act under which the complaint was laid. He

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was convicted by a Bench of Magistrates:—*Held*, that the conviction was right. *Per* ARNOLD WHITE, C.J.—The bye-law applies to all drains which existed in a covered state at the time when it came into operation. The word "shall" is used throughout the bye-laws in the imperative, and not with reference to time, and this is the sense in which it is used in the bye-law in question. *Per* BENSON, J.—A bye-law similar in terms to that under which the accused had been convicted having been in existence under the then Municipal Act at the time when the accused first covered the drain in question, the liability then incurred by him continued, under the General Clauses Act (Madras) unaffected by the passing of the present Municipal Act. The contention that the accused could not be convicted because the act complained of was committed before the present Municipal Act was passed, therefore, failed. PARIMANAM PILLAI v. CHAIRMAN, MUNICIPAL COUNCIL, OOTACAMUND, 23 M. 213 ... 548

(2) *Ss.* 71 (2), 262 (2)—*Not ce of intended insertion of name or property on assessment books—Substantial compliance with Act—Action to recover money paid in respect of tax.*—By s. 71 of the Madras District Municipalities Act, 1884, the Chairman may, at any time amend the assessment book in manner therein provided, but no person's name or property shall be inserted, nor any increase of assessment made unless notice thereof has been served on such person not less than thirty days previous to a day to be specified in such notice as the day upon which such notice will be revised. By s. 262, no assessment made under the authority of the Act shall be impeached and no action shall be maintained in any Court to recover money paid in respect of any tax levied under the Act provided that the directions and provisions of the Act shall have been substantially complied with. A notice which was served upon plaintiffs by a municipal council purported to be issued under s. 71 (2) of the Madras District Municipalities Act, 1884, and was as follows:—"I have the honour to forward herewith a list showing the amount of land and water taxes due for 1895 1896 on devastanam lands within the limits of this municipality, and to request that you will be good enough to cause the amount to be remitted to this office at your earliest convenience":—*Held*, that the notice was bad, that the terms of s. 71 (2) had not been substantially complied with, and that consequently s. 262 (2) had no application. MUNICIPAL COUNCIL, TANJORE v. UMAMBA BAI SAHEB, 23 M. 523=10 M.L.J. 138 ... 768

(3) *Ss.* 188, 189—*Keeping a private-cart stand without a license.*—In a prosecution for using a place as a cart-stand without a license, under the Madras District Municipalities Act, 1884, it was proved that carts resorted daily to the premises of the accused, laden with produce for sale to the general public and not only to the accused, who acted as a broker and permitted the carts to stand on his premises until the sale and removal of the goods was completed:—*Held*, that the place was used as the cart-stand within the meaning of s. 188, and that the accused had committed an offence punishable under s. 189 of the Act. QUEEN-EMPRESS v. AYYAKANNU MUDALI, 22 M. 455=1 Weir 739 ... 327

Act V of 1884 (Local Boards).

Ss. 64, 73, 155 *Tax payable on land—Favourable tenure—Claim by landholder of more than one-half of the tax from tenant—Invalidity of custom for tenant to pay whole tax.*—A tenant paid an annual rent of Rs. 64 to the landholder, the tenure being of a nature dealt with by sub-s. (iii) of s. 64 of the Local Boards Act (Madras), 1884. The landholder distrained on the tenant's property in respect of the whole amount of local cess payable in respect of the land, contending that it should be calculated on the rent value, which was admittedly Rs. 710. It was found that under a custom subsisting in the District the whole amount of the local cess was payable by the tenant:—*Held*, that having regard to s. 73 of the said Act, such a custom must be unreasonable and invalid. The words 'favourable rent' in s. 64, sub-s. (iii), of the Act, mean rent which at the time of the assessment being fixed is favourable as compared with the ordinary rent of similar lands in the vicinity, and has nothing to do with the question whether the rent, as fixed at the time when the lease was granted, was favourable or unfavourable. BHUPATIRAZU v. RAMASAMI, 23 M. 268 ... 586

Act I of 1886 (Abkari, Madras). PAGE

S. 56 (*b*)—*License to keep toddy shop—Failure to keep shop open—Omission not constituting an act.*—By s. 56 (*b*) of the Abkari Act (Madras), 1886, whoever, being the holder of a license or permit granted under the Act, "does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act" may be punished with fine or imprisonment or with both. The holder of a license to keep a shop for the sale of toddy having been convicted for failing to keep his shop open, in breach of one of the conditions of the license:—*Held*, that even if the licensee was under an obligation to keep open his shop (which did not appear to be the case) an omission to do so did not amount to an act in breach of the conditions of the license; and that the conviction must in consequence be set aside. QUEEN-EMPRESS v. VENKATASAMI NAIDU, 23 M. 220 ... 556

Act II of 1886 (Harbour trust, Madras).

(1) Ss. 33, 60, 61, 87—*Maintenance of harbour causing encroachments on seashore—Liability of a public body for maintaining works authorised by statute—Common law liability where not expressly excluded by statute—Limitation.*—A harbour, which was in the first instance constructed by Government, was, by the Madras Harbour Trust Act, 1886, vested in trustees, together with the foreshore within the limits of the port. Prior to the date of the Act, an erosion, by the action of the sea, of a portion of the foreshore had commenced, in consequence of the existence of the harbour, and a revetment or barrier of stones had been built to counteract it. The trustees subsequently, but prior to 1891, extended the arms of the harbour, and in 1895 the result of the continuous encroachment of the sea was that a part of the said revetment or barrier of stones and some land was washed away. Plaintiff was the owner of land adjoining that which was so washed away, and the sea also encroached upon and injured plaintiff's land and the buildings upon it. The Madras Harbour Trust Act contains no provision for the payment of compensation by the trustees. By s. 61 the trustees are empowered to perform all works necessary to carry out the objects of the Act. Plaintiff sued the trustees to recover damages for the injury caused to his land by their maintaining and extending the arms of the harbour, as erected when the Board of Trustees was created, without taking steps to erect such buildings as would prevent the sea from encroaching upon and injuring the plaintiff's land:—*Held* (affirming Shephard, J.), that the plaint containing the above averments of fact disclosed no cause of action. The dates upon which damage to the plaintiff's buildings was alleged to have occurred were 25th December 1897, and 9th and 10th April 1898, respectively. By s. 87 of the Madras Harbour Trust Act, no suit shall be commenced against any person under the Act after six months from the accrual of the cause of such suit. The plaint was originally presented on 9th July 1898, and it was amended on 13th September 1898. On the day upon which the six months from 25th December 1897 expired, and until the day before the plaint was presented, the Court was closed. By the same section, it is provided that no suit or other proceeding shall be commenced against any person for anything done or purporting to have been done in pursuance of the Act without giving to such person one month's previous notice in writing of the intended suit or proceeding, and of the cause thereof. Two letters had been written on behalf of the plaintiff. The first of these, dated 14th April 1898, represented the damage caused to plaintiff's property as above set out, and notified, under s. 87, if that section should apply, that if the amount of damage suffered and assessed by plaintiff in the said letter should not be paid on or before the expiry of one month from the date thereof, legal proceedings would be instituted to recover the damage without further notice. The second letter, dated 11th May 1898, referred to further damage suffered, and called upon defendants to pay an increased sum, failing which action would be brought to recover such sum together with a further sum representing any further damage that might be done to the property by the sea before the suit should be filed or heard. The letter stated the ground of complaint to be that the encroachment of the sea was the result of the harbour groynes by which the action of the sea had been affected,

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that defendants had acted illegally and negligently in maintaining and extending those groynes and so causing the encroachment, and that by so doing they had caused the foreshore vested in them to be washed away and the sea to be let into the plaintiff's premises, thus causing the damage complained of, which defendants had taken no steps to prevent:—*Held*, *per* SHEPHARD, J., that the plaintiff must be deemed to have commenced the suit in due time, since it was owing to the act of the Court itself that he was prevented from presenting his plaint till the day upon which it was filed. *Also*, that the notice was sufficient; and that on the facts of the case s. 87 had no application. *Semble*, that though a special rule of limitation was prescribed by the Act, s. 5 of the Limitation Act applied. *Per* O'FARRELL, J.—That the last clause of s. 87, which provides that neither the Board nor any of its officers or servants shall be liable in damages for any act *bona fide* done or ordered to be done in pursuance of the Act, had no reference to the present case. That section applied only to cases of acts done without legal authority or in excess of legal authority, but under the *bona fide* belief that they were covered by such authority. *Per* BODDAM, J.—That the cases in which it has been held that that no action lies for non-feasance apply only to highways and have no application to the present case. *Per* DAVIES, J.—The liability of the trustees, in the absence of any statutory duty cast upon them to insure plaintiff from loss, was confined to the maintenance of the particular work they took over, and, if there was any general obligation to protect the plaintiff's property, it lay on the Government, who constructed the harbour, the legislature not having imposed it on the trustees. HAJI ISMAIL SAIT v. TRUSTEES OF THE HARBOUR, MADRAS, 23 M. 389= 9 M.L.J. 270 ... 673

(2) Ss. 70, 87—*Immunity from action—Breach of contract—Contract Act—Act* IX *of* 1872, *ss.* 151, 152—*Liability of bailees for hire for loss of goods—Negligence*—Onus *of proof*.—When goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss. *Per* SHEPHARD, J.—The provision in s. 87 of the Madras Harbour Trust Act, 1886, to the effect that the Board, its officers and servants shall not be liable in damages for any act *bona fide* done or ordered to be done by them in pursuance of the Act, does not apply to all causes of action, and *inter alia*, to a suit in respect of a breach of contract against the Board. The immunity there given applies only to those cases in which there is an act done or purporting to be done in pursuance of the Act. The fact that the Board has worked under the provisions of a statute does not prevent it from entering into a contract; and the section does not apply in a case where the party aggrieved complains of the breach of such a contract on the part of the Board. By s. 70 of the Madras Harbour Trust Act, 1886, the Board is empowered to make bye-laws for the reception, removal and porterage of goods. A bye-law framed under this section provided that importers desiring to store cargo must apply to the Secretary of the Board for such space as they might require, and that such applications would be granted on such terms as the Board might approve, and concluded with the reservation that the Board, while taking all reasonable precautions, would accept no responsibility in respect of property stored upon its premises, which would remain at the risk of the consignees or owners:—*Held*, (*Per* COLLINS, C.J. and BODDAM, J.), that this provision was not a bye-law for the reception of removal of goods, with the meaning of s. 70 of the Act. and was *ultra vires*. TRUSTEES OF THE HARBOUR, MADRAS v. BEST & CO., 22 M. 524 ... 375

Act III of 1889 (Towns Nuisances, Madras).

S. 3, cl. 10—Penal Code—Act XLV of 1860, ss. 65, 67—Imprisonment in default of fine—See PENAL CODE (ACT XLV OF 1860), 22 M. 238.

Act I of 1891 (General Clauses, Madras).

S. 11—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 179.

Act III of 1895 (Hereditary Village Offices, Madras). PAGE

(1) S. 5—*Attachment of growing crop.*—By s. 5 of the Madras Hereditary Village Offices Act, the emoluments of village offices are not to be liable to attachment:—*Held*, that an attachment by a decree-holder of a crop growing on certain lands in a zamindari, which were the inam service lands held by the judgment-debtor as a village servant, had been rightly set aside. KANNAM NAIDU v. LATCHANNA DHORA, 23 M. 492.

(2) S. 21—Revenue Recovery Act (Madras)—Act II of 1864, ss. 52, 54—Emoluments due to village officers—Demand for payment under s. 52 of Revenue Recovery Act—Payment under protest—Suit to recover amount paid—Legality of demand—Limitation—See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 23 M. 571

Act III of 1897 (District Municipalities Amendment, Madras).

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 23 M. 213.

Actionable Claim.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 301.

Administration Suit.

See SUCCESSION ACT (X OF 1865), 23 M. 216.

Adverse Possession.

(1) See HINDU LAW (RELIGIOUS ENDOWMENTS), 23 M. 439.

(2) See LIMITATION ACT (XV OF 1877), 23 M. 271.

Advocate-General.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 28.

Agency Rules.

(1) See ACT XXIV OF 1839 (GANJAM AND VIZAGAPATAM AGENCY COURTS), 23 M. 329, 367.

(2) See COURT FEES ACT (VII OF 1870), 22 M. 162.

Alluvion.

Gradual accretion to a formation of dry land already existing, and appropriated to an owner of land, on a river's bank—The ownership of the bed of the river was not the subject of contest below—Variation of claim disallowed:—Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land, to which the accretion is made, following the ownership of that land, the rule is equally well established in both those provinces. Both parties were riparian proprietors of adjoining estates on both banks of the river Godavari. The plaintiff claimed the right to newly-formed land in mid-stream, which she alleged to have been formed by accretion upon an already existing lanka or alluvial island which belonged to her. On that point there were concurrent findings against her. The accretion had taken place upon a lanka owned, not by her but by the Government, and higher up stream than hers:—*Held*, that the plaintiff must abide by the ground of claim which she had presented below, that being that the new land was formed by gradual accretions to definite and visible portions of a lanka previously belonging to her. This she could not now vary to a claim founded on an ownership of the river-bed on the strength of her being zamindar and owner of the land on both banks of the river, without either issue or evidence directed to such sub-aqueous ownership. SRI BALUSU RAMALAKSHMAMMA v. THE COLLECTOR OF THE GODAVARI DISTRICT, 22 M. 464 (P.C.)=1 Bom. L.R. 696=3 C.W.N. 777=26 I.A. 107=7 Sar. P.C.J. 534 ... 333

Alteration.

See DOCUMENT, 23 M. 137.

Amaram Tenure.

See EJECTMENT, 23 M. 262.

Amendment. PAGE

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 293, 364.

Appeal.

1.—GENERAL.

2.—SECOND APPEAL.

——1.—General.

(1) *Execution proceedings—Order made in the course of execution proceedings and not appealed against—Right to raise the question as to its propriety in the appeal against the final order.*—A decree having, in 1894, been passed in favour of the plaintiff in a suit against a number of defendants for the recovery of land with mesne profits, the amount of such mesne profits was ordered to be fixed in execution. In 1897, an order was passed declaring that all the defendants were liable jointly and severally for such mesne profits, which order was not appealed against. Later in the same year a Commissioner was appointed to ascertain the amount of the said mesne profits, and in due course a final order in execution was passed by the District Court. At the time when the last-mentioned order was passed, certain of the defendants desired to re-open the question of their joint liability, but were not permitted to do so:—*Held*, that even assuming that the order declaring the defendants to be jointly and severally liable was one from which an appeal could have been preferred—as to which there might be some doubt—it was a determination of one of the questions which had to be determined before the particular application for execution could be finally disposed of; and the question of the propriety of the order was one that need not be at once raised by appeal, but could be raised in the appeal against the final order. GODAVARI SAMULO v. GAJAPATI NARAYANA DEO, 23 M. 494 ... 746

(2) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 436.

(3) See ACT III OF 1873 (CIVIL COURTS, MADRAS), 23 M. 314.

(4) See ACT VIII OF 1890 (GUARDIANS AND WARDS), 23 M. 517.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 131, 155, 172, 187, 202, 221, 293, 299, 344, 364; 23 M. 55, 101, 125, 195, 260, 568.

(6) See COMPANIES ACT (VI OF 1882), 22 M. 291.

(7) See COURT FEES ACT (VII OF 1870), 22 M. 162; 23 M. 84, 490.

(8) See LETTERS PATENT, 22 M. 68, 109; 23 M. 169.

(9) See LIMITATION ACT (XV OF 1887), 23 M. 60.

——2.—Second Appeal.

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 22 M. 229.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 196; 23 M. 547.

Arbitration.

See CIV. PRO CODE (ACT XIV OF 1882), 22 M. 299.

Arrears of Revenue.

See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 22 M. 5, 440.

Assessors.

See CRIM. PRO. CODE (ACT X OF 1882), 22 M. 15; 23 M. 632.

Attachment.

(1) See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 22 M. 5.

(2) See ACT III OF 1895 (HEREDITARY VILLAGE OFFICES, MADRAS), 23 M. 492.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 241; 23 M. 478.

Attorney. PAGE

(1) *Rules of Madras High Court, rule No. 320—Leave of Court for proposed change of attorney — Grounds upon which leave will be given or withheld—Payment of costs due to attorney.*—Leave will not be given by the Court for a change of attorney under rule No. 320 of the Rules of the Madras High Court (which provides that leave must be obtained before such a change of attorney can be made) until the costs of the attorney are first paid or provided for. RAMASAMI CHETTI v. SUBBU CHETTI, 23 M. 134 ... 491

(2) See ACT I OF 1884 (CITY OF MADRAS MUNICIPAL, MADRAS), 23 M. 529.

Award.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 172.

(2) See LIMITATION ACT (XV OF 1877), 23 M. 593.

Bankruptcy Rules of 1848.

Rule XXV—See INSOLVENT ACT (11 AND 12 VICT., CAP. XXI), 23 M. 26.

Bottomry Bond.

Owner's covenant to pay—Construction of deed of hypothecation—Uncertainty of agreement.—The owners of a vessel for the purpose of repairing it borrowed a sum of Rs. 10,000 from the plaintiff and executed an instrument stating the purpose of the loan and hypothecating the vessel to him and promising to repay the principal with interest by the 12th of March 1891. The instrument proceeded as follows:—"You have no connection with the "security or seaworthiness (yogyam) of the said ship up to the above "stipulated time. If the money is not paid in the said stipulated time "we shall add vattam at Rs. 20 per cent. per annum on the amount of "principal and interest accruing on that date, adding vattam once in "twelve months until date of payment after the said stipulated time on "the hypothecation security (adamana yogyam) of the said ship, and "shall get back this mortgage bond." The money was not repaid on the stipulated date and the vessel after making several voyages subsequently foundered in port: *Held*, that the instrument was not a bottomry bond, and the plaintiff was not entitled under it, regarded as an instrument of hypothecation merely, to recover the enhanced interest referred to in the passage above quoted, because that part of the agreement was void for uncertainty. ASAN KUTHU SAHIB MERCOYAR v. RAMANATHAN CHETTI, 22 M. 26=8 M.L.J. 159 ... 20

Breach of Contract.

(1) *Agreement to discharge a debt due by debtor to a third party—No time fixed for performance—Failure to perform within a reasonable time—Cause of action—Measure of damages.*—Defendant agreed to discharge a debt due by plaintiff to a third party, secured by a mortgage of a village which was held by plaintiff on lease and which had been sub-let by him to defendant after the mortgage to the third party had been granted. The agreement provided that if the defendant failed to discharge the debt he should be liable to plaintiff for any damage which the latter might sustain. No time was fixed for the performance by the defendant of this obligation, and he, in fact, failed to perform it for a period of nearly three years, whereupon this suit was brought: *Held*, that the agreement was not a mere contract to indemnify; that defendant was bound to discharge the debt within a reasonable time, and that his failure to do so during three years was a breach of the contract, notwithstanding the fact that the third party had not enforced his claim against the plaintiff. The measure of damages payable in consequence of such breach would be the amount of the debt which defendant had undertaken to discharge. DORASINGA TEVAR v. ARUNACHALAM CHETTI, 23 M. 441 ... 709

(2) See ACT II OF 1886 (HARBOUR TRUST, MADRAS), 22 M. 524.

(3) See LIQUIDATED DAMAGES, 22 M. 453.

Breach of Trust.

(1) See ACT XX OF 1863 (RELIGIOUS ENDOWMENT), 23 M. 298.

(2) See EVIDENCE ACT (I OF 1872), 22 M. 1.

Burden of Proof. PAGE

(1) See ACT II OF 1886 (HARBOUR TRUST, MADRAS), 22 M. 524.

(2) See EJECTMENT, 22 M. 264.

(3) See HINDU LAW (JOINT FAMILY), 22 M. 326.

(4) See LIMITATION ACT (XV OF 1877), 23 M. 10.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 318.

Cart-stand.

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 22 M. 455.

Cause of action.

(1) See BREACH OF CONTRACT, 23 M. 441.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 259.

(3) See LIMITATION, 23 M. 292.

(4) See LIMITATION ACT (XV OF 1877), 22 M. 20 ; 23 M. 583.

(5) See MUHAMMADAN LAW (PARTITION), 22 M. 494.

Certified Copy.

See EVIDENCE ACT (I OF 1872), 23 M. 499.

Chairman.

See LIMITATION ACT (XV OF 1877), 22 M. 342.

Champerty.

Purchase for an inadequate consideration—Speculative suit not necessarily champertous.—A suit having been dismissed on the ground that a sale upon which it was based had been made for a consideration is so inadequate as to support the belief that it was in the nature of champerty : *Held*, that the elements required to bring the case within the authorities on the law of champertous transactions in this country were wanting. It was not a case in which an improper interest had been acquired in the unrighteous litigation of other people. The fact that a suit may be speculative does not render it champertous. SIVA RAMAYYA v. ELLAMMA, 22 M. 310=9 M.L.J. 17 ... 221

Civ. Pro. Code (Act XIV of 1882).

(1) *Ss.* 2, 244, 588—*Application to stay sale in execution proceedings on ground of under-valuation—Order dismissing application— Appeal against order of dismissal—Decree.*—An application was made by certain defendants, against whom a decree had been passed, for an order that a sale at the instance of the decree-holder, in execution of his decree, should not be proceeded with, on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge held the under-valuation to be immaterial and dismissed the application, whereupon the judgment-debtor appealed to the High Court. On the preliminary objection being there taken that no appeal lay from the order of dismissal : *Held*, that an appeal lay, the order having been made with reference to a question which related to the execution, and the question being one arising between the parties to the suit in which the decree was passed and relating to its execution, within the meaning of s. 244 of the Code of Civil Procedure. On a sale of property in execution of a decree the value stated in the sale proclamation is a material fact within sub-s. (*e*) of s. 287 of the Code of Civil Procedure. Under-valuation of such property is a material irregularity in publishing or conducting the sale. SIVASAMI NAICKAR v. RATNASAMI NAICKAR, 23 M. 568=10 M.L.J. 314 . 799

( ) *Ss.* 12, 48, 244—*Proceeding in execution—Pending suit.*—A suit, according to s. 48 of the Code of Civil Procedure, must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot, on that ground alone, be deemed to be a suit within the meaning of the Code, if it has not commenced with

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a plaint. Such a proceeding is, in strictness, only a proceeding in a suit: *Semble*, that a proceeding under s. 244 is not a suit within the meaning of s. 12 of the Code of Civil Procedure. VENKATA CHANDRAPPA NAYANIVARU v. VENKATARAMA REDDI, 22 M. 256 ... 182

3) *S.* 13—Res judicata—*Suit for land based on plaintiff's title—Previous suit as lessor—Omission to make title a ground of attack in previous suit —No denial of plaintiff's title as landlord—Maintainability of suit.*—In a previous suit, brought in 1890, plaintiff had sued for the recovery of certain land which he alleged to have been let verbally to the defendants in 1886. Defendants denied the verbal letting and pleaded that they held the land from plaintiff's predecessor under a written agreement of 1876. The Court passed a decree in plaintiff's favour, holding that the lease under the written agreement had expired prior to 1886, and that the subsequent enjoyment of the land was under a verbal agreement. No steps were taken to execute that decree. Plaintiff now sued defendants for the recovery of the same land, together with arrears of rent, basing his claim on the same written agreement of 1876, and also on his title as owner thereof. The District Court held the claim on the written agreement to be *res judicata*, and that plaintiff could not now sue upon his title as that should have been made a ground of attack in the former suit. On appeal to the High Court: *Held*, that inasmuch as plaintiff's title as landlord was recognized in the suit of 1890, the defendants could not have acquired a prescriptive title as against him in 1898, when the present suit was filed; and that plaintiff was therefore entitled to recover the land upon his title independently of any letting by him to the defendants. That the claim for arrears of rent under the old written agreement was *res judicata* by reason of the former suit, but that plaintiff's omission to sue on the strength of his general title in the former suit was no bar to the present suit, inasmuch as his title as landlord had never been disputed. KUTTI ALI v. CHINDAN, 23 M. 629 ... 842

(4) *S.* 13—Res judicata—*Suit for land based on plaintiff's title—Prior suit alleging that defendants held on lease from plaintiff—Dismissal of prior suit no bar to subsequent claim.*—In a previous suit in which plaintiff had been a party, it had been attempted to assert plaintiff's title to a piece of land occupied by the defendants by proving that they held the same by virtue of an alleged specific lease. The Court had held that no such lease had been executed. Plaintiff now claimed the land as belonging to his devasom, and sued to recover it on the strength of his title; he also set up the alleged lease once more: *Held*, that, though the question of the validity of the lease was *res judicata*, plaintiff was at liberty to sue also on the strength of his title, independently of the lease, and he was not estopped from so suing by the fact that the former suit had been based on the lease alone. If the relation of landlord and tenant were shown to have existed prior to the specific lease sued upon, it was for the tenant to prove that such relation had ceased to exist. In the absence of such proof the relation would be presumed to continue, and the tenant's possession in that case could not be adverse. ZAMORIN OF CALICUT v. NARAYANA MUSSAD, 22 M. 323 ...

(5) *Ss.* 13, 43, 244—Res-judicata—*Trespass on land—Conversion of moveables lying on land—Grounds of attack.*—Defendants having forcibly taken possession of plaintiff's land upon which was (1) standing timber and (2) logs of timber lying stored on the ground, plaintiff had, in a prior suit, recovered possession and damages. Subsequently to the institution of such prior suit defendants (1) cut and removed certain standing trees, and (2) removed the logs which lay stored on the ground. Upon plaintiff bringing a second suit to recover damages on both grounds, objection was raised (1) as to the standing timber, that plaintiff's remedy was under s. 244 of the Civ. Pro. Code, and (2) as to the logs, that a claim for their value might have been included in the former suit, since their conversion was effected when the plaintiff was dispossessed of the land upon which they lay and that, under s. 43, no claim could now be made in respect of them: *Held*, (1) that the proceeds obtained from cutting and removing saleable timber on the land were in the nature of mesne profits, and these having been taken since the institution of the previous suit, plaintiff could recover;

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(2) that a trespass on a piece of land is by itself no proof of any conversion of moveables lying upon the land at the time that the trespass takes place; that notwithstanding plaintiff's eviction from the land, possession of the timber lying stored upon it should be presumed to have continued in him in the absence of proof of any act on the part of the defendant with special reference to such timber and showing unequivocally that the plaintiff was entirely deprived of the use of it; and that conversion of the logs was not effected by the trespass, but only by their removal subsequently to the institution of the previous suit; and (3) that the causes of action now relied on were therefore different from those relied on before, and the previous suit did not operate as a bar to the present claim under s. 43 of the Civ. Pro. Code. MOYI v. AVUTHRAMAN, 22 M. 197 ... 140

(6) S 15—See ACT XXIV OF 1839 (GANJAM AND VIZAGAPATAM AGENCY COURTS), 23 M. 367.

(7) *Ss.* 15, 539—*Religious Endowments Act—Act* XX *of* 1863, *ss.* 14, 15, 18—*Suit by a general trustee and a worshipper for removal of trustees.*—A suit was filed in a District Court by the general trustee of a temple and a worshipper therein praying that certain trustees might be declared incompetent and removed, that others might be appointed in their place, that the properties belonging to the endowments of the temple might be vested in them, and that a scheme might be settled for the management of the trust. Leave to file the suit had been obtained under the Religions Endowments Act, 1863, and under s. 539 of the Code of Civil Procedure: *Held*, that the suit was maintainable. NARAYANA AYYAR v. KUMARASAMI MUDALIAR, 23 M. 537=10 M.L J. 106 ... 777

(8) *S.* 17—*Suit on a foreign judgment—"Carrying on business" within the jurisdiction—Business carried on by the managing member of a Hindu family—" Principal and agent " with reference to s.* 17 *of Civ. Pro. Code—Application of Civ. Pro. Code to non-resident foreigner.*—Plaintiff having obtained judgment against defendant in a suit on a bond in the Civil Court at Pondicherry, sued him on the said judgment in a District Court in British India. The date of the foreign judgment was 20th March 1896, and that of the suit in British India, 9th October 1896; but in the meanwhile, namely, on 20th July 1896, defendant had been declared an insolvent in Pondicherry, and a syndic had been appointed to take charge of and administer his property. The ground of jurisdiction relied on by plaintiff was that defendant was carrying on a business within the jurisdiction of the District Court, the said business being conducted by his cousin; and that, the cousin being the manager of a Hindu family, the presumption was that the business was carried on with the consent of the defendant as well as for his benefit: *Held*, that the District Court had no jurisdiction to entertain the suit. Inasmuch as defendant and his cousin had, as a fact, become partially divided prior to the commencement of the business, and as there was no evidence of his consent, the presumption contended for could not arise. But even if the facts had been otherwise, and the defendant had been entitled to claim an interest in the business on the ground that it was carried on by one who was the managing member of his family at the time, defendant would not be "carrying on business" within the meaning of s. 17 of the Code of Civil Procedure. To bring a principal within the operation of s. 17, the person acting as the agent within the jurisdiction should be an agent in the strict and correct sense of the term. *Semble*, that a member of a joint family who actually consents to a trade being carried on within the jurisdiction on his behalf, or by his conduct puts himself in the position of a joint trader, carries on business within, though he may live outside the jurisdiction. By s. 443 of the Code de Commerce the effect of an adjudication of insolvency in French territory is to deprive the insolvent of the possession and management of his property, which is entrusted to a syndic, against whom alone all suits in respect thereof must be brought: *Held*, that though the debt of an insolvent might not be extinguished by such a declaration of insolvency, so as to exempt him from future liability in respect of property which he might subsequently obtain, no suit could be brought against him in French territory, and, for that reason, outside French territory, so long as the adjudication of insolvency remained in force. *Quelin* v. *Moisson* (1 Knapp., 265*n*), followed.

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Whether s. 17 of the Code of Civil Procedure should be construed so as to exclude from its operation non-resident foreigners, even though they carry on business in British India through agents; and, if such construction be inadmissible, whether the said section of the Indian Legislature should be held with reference to such foreigners to be *ultra vires*,—*Quære*. MURUGESA CHETTI v. ANNAMALAI CHETTI, 23 M. 458 = 10 M.L.J. 39... 722

(9) *S. 30—Religious endowment, suit relating to—Suit by worshippers—No leave to sue—Non-joinder of Advocate-General—Maintainability of suit.*—Four worshippers at a temple, who were also entitled to vote at the election of dharmakartas, filed a suit for a declaration that the election of certain persons to that office was void. Notice had not been given to the other worshippers, nor had leave of the Court been obtained prior to the institution of the suit: *Held*, that the suit was maintainable notwithstanding that the Advocate-General had not been joined as a party; that s. 30 of the Code of Civil Procedure being permissive and not prohibitive and dealing with procedure only, and not affecting substantive rights, the omission to state in the plaint that the suit was instituted on behalf of other worshippers having similar rights to sue as the plaintiffs was not fatal to the maintainability of the suit; that the Court was competent, with a view of adjudicating completely and definitively on the matter in dispute, to require an amendment of the plaint, and that the suit need not necessarily be dismissed; that the omission to apply for leave unedr s. 30 of the Code of Civil Procedure is not in itself ground for dismissing a suit, but, on objection being taken, the suit should not be allowed to proceed except on the terms of the plaint being amended and the requisite leave being obtained; and that the granting of leave under s. 30 is not a condition precedent, and may take place after the institution of the suit. SRINIVASA CHARIAR v. RAGHAVA CHARIAR, 23 M. 28 = 7 M.L.J. 281 ... 414

(10) *S. 30—Worshipper's suit to recover land—Trustee not a plaintiff—Non-maintainability of suit.*—An individual worshipper in a mosque is not entitled to sue for the recovery of possession of land belonging to the mosque. While there is a trustee who has not been removed from his office he is the only person entitled (irrespective of s. 30 of the Code of Civil Procedure) to sue for the recovery of land belonging to the institution. KAMARAJU v. ASANALI SHERIFF, 23 M. 99 ... 463

(11) *S. 43—Decree for specific performance of a contract for sale of land—Subsequent suit for possession.*—The defendant having agreed to sell land to the plaintiff but failed to execute a conveyance, the plaintiff sued for specific performance and obtained a decree and the Court executed a conveyance of the land to him. He now sued for possession: *Held*, that the right to possession having arisen at the same time as the right to the execution of a conveyance, the suit was not maintainable. NARAYANA KAVIRAYAN v. KANDASAMI GOUNDAN, 22 M. 24 = 8 M.L.J. 147 ... 18

(12) *S. 43—Relinquishment by guardian of minor of part of claim—Subsequent suit for part relinquished.*—While plaintiff was a minor, his guardian had sued for and obtained a decree for arrears of shrotriem in respect of Faslis 1290 and 1291. Having attained his majority, plaintiff now sued for similar arrears alleged to be due in respect of the previous Faslis 1287, 1288 and 1289, contending that the relinquishment of a portion of a claim in a suit by a guardian could not preclude a suit for the portion relinquished from being subsequently brought, on the attainment of his majority, by the person on whose behalf the guardian had acted: *Held*, that it cannot be said that s. 43 of the Code of Civil Procedure has no application to a suit in which the plaintiff is a minor. The acts of a guardian in the conduct of a suit must be upheld unless it be shown that they were unreasonable or improper. GOPAL RAO v. NARASINGA RAO, 22 M. 309 ... 220

(13) *S. 43—Whole claim in respect of cause of action—Mortgage—Redemption—Mortgage sued on not proved—Admissions by defendants of mortgage right—Subsequent suit on admission.*—In a previous suit plaintiff had sued to redeem a kanom of 1859. The kanom not being established, the suit failed. At the time of bringing the suit, plaintiff was aware that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. On the plaintiff

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now bringing a suit based on the admissions referred to: *Held*, that plaintiff could and should in the previous suit have based his claim in the alternative on the admissions instead of confining that suit to the specific mortgage which he failed to prove. Having chosen to take the course which he did, he was barred from bringing a fresh suit by s. 43 of the Civil Procedure Code, as it must be taken that he abandoned or relinquished his claim on the basis of the admissions when he brought his first suit on the kanom specifically alleged. RANGASAMI PILLAI v. KRISANA PILLAI, 22 M. 259 ... 184

(14) *Ss.* 96, 102, 103—*Order dismissing suit for default of appearance—Appeal.*—The decision of a Court passed under s. 102 of the Civ. Pro. Code, dismissing a suit in default of appearance by a plaintiff, is an order and not a decree, and there is no first or second appeal therefrom. GILKINSON v. SUBRAMANIA AYYAR, 22 M. 221=8 M.L.J. 287 ... 159

(15) *Ss.* 108, 540—*Decree passed* ex parte *through non-attendance of defendants—Appeal—Order for re-trial* de novo *on ground that defendants had insufficient opportunity for being heard—Illegality of such order.*—The defendants in a suit for possession of property and an injunction filed written statements but failed to appear, either in person or by pleader, when the suit came on for hearing in the District Munsif's Court. Evidence adduced by the plaintiff was taken and a decree passed in plaintiff's favour as prayed. Some of the defendants applied to the District Munsif for an order to set aside the *ex-parte* decree, which application was refused; and the defendants then appealed against the original *ex-parte* decree, when the Subordinate Judge reversed the said decree and remanded the suit for re-trial *de novo* on the ground that the defendants had not had a proper opportunity for being heard: *Held*, that it was not competent for the Subordinate Judge to pass such an order that he could only deal with the case on the materials on the record; and that the decree of the District Munsif must be restored. CAUSSANEL v. SOURES, 23 M. 260 ... 584

(16) *S.* 206—*Finding in judgment not embodied in decree—Amendment of decree—Appeal against amended decree—Time how calculated.*—In a suit for a declaration of title to land and for possession, which was based upon a will alleged to have been made in plaintiff's favour, the Subordinate Judge, finding the document to be a forgery, dismissed the suit. The fourth defendant had been made a party inasmuch as he claimed a portion of the land as alienee. Though the case for the plaintiff failed, the Subordinate Judge, on the above finding, dealt in his judgment with an issue which had been framed regarding the validity or otherwise of the alleged alienation to the fourth defendant. He held that it had been made for no consideration and found the issue against the fourth defendant. The decree dismissing the suit, which bore date the 22nd of June 1896, contained no reference to the finding against the fourth defendant on that issue. The fourth defendant applied for a review of the judgment, complaining that as the suit had been dismissed, the reference in the judgment to the alleged alienation in his favour was unnecessary, and might, if permitted to stand, operate against him as *res judicata* in any subsequent suit that might be brought; and praying that the finding might be either expunged or modified in his favour. Upon this being refused, fourth defendant applied, under s. 206 of the Code of Civil Procedure, that the decree might be brought into conformity with the judgment, and an order was made on 27th October 1896, adding to the decree a clause to the effect that the issue referred to had been found against the fourth defendant. On 12th December 1896, fourth defendant preferred an appeal against the decree of the Subordinate Judge, but the District Judge rejected as being out of time: *Held*, that the decree being in conformity with the judgment, the Subordinate Judge had no power to vary it; and that the words which had been added must be expunged, and the decree restored to its original state. Also, that the finding on the issue against the fourth defendant was, in fact, no finding except with regard to the question of consideration. *Per* SUBRAMANIYA AYYAR, J.—That where a decree which is at variance with the judgment is brought into conformity with the latter under s. 206 of the Code of Civil Procedure, the date of the rectification is immaterial with reference to the

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calculation of the time of which any appeal may be preferred against such decree. But where a decree is wrongly varied a party affected by such variation should be entitled to calculate the time during which an appeal may be preferred as commencing from the date of the variation. PARAMESHRAYA v. SESHAGIRAPPA, 22 M. 364 ... 260

(17) *Ss.* 206, 551—*Amendment of decree—Power of Court of First Instance after appeal.*—On the hearing of an appeal by a District Court, certain special costs were directed to be paid by the defendant, but, by a clerical error, that direction was omitted from the decree when it was drawn up. Plaintiff applied to the District Judge under s. 206 of the Code of Civil Procedure for rectification of the error in the decree, but the Court refused to amend, it appearing that defendant had appealed to the High Court, which had dismissed his appeal and confirmed the decree of the District Court. The appeal had in fact been dismissed under s. 551 of the Code of Civil Procedure. Plaintiff then petitioned the District Court to review its order refusing to amend. This was rejected, the District Court holding that the decree, of which amendment was asked, was the decree of the High Court, which a District Court had no power to amend. On plaintiff petitioning the High Court to revise this order of the District Court: *Held*, (1) that the case was governed by the ruling of the Full Bench in (I.L.R. 8 Mad. 214) where it was held that the jurisdiction of a Court of First Instance to amend a decree under s. 206 was ousted by the confirmation of that decree on appeal; (2) that the decision referred to applies equally to second appeals dismissed under s. 551 of the Code of Civil Procedure, and to second appeals tried after notice to the respondent. MUNISAMI NAIDU v. MUNISAMI REDDI, 22 M. 293 ... 208

(18) S. 208—Limitation Act—Act XV of 1877, Sch. II, art. 49—Claim to recover goods in hands of third parties—Alternative claim for value as compensation—Specific Relief Act—Act I of 1877, ss. 10, 11—See SPECIFIC RELIEF ACT (I OF 1877), 22 M. 478.

(19) *Ss.* 211, 212, 244—*Parties to the suit in which the decree was passed—Application for sale of property of next friend in suit* in forma pauperis—*Dismissal—Appeal against order of dismissal.*—An order having been made, in a decree dismissing a suit against the next friend of a minor plaintiff, to pay the Court fee due to Government in respect of the suit, the Collector attached the property belonging to the said next friend with a view to bringing it to sale. While the attachment was subsisting, the next friend died, and his son was thereupon brought upon the record. An application for an order for sale of the property of the son, as the legal representative of his father having been dismissed, the Collector appealed against the order of dismissal: *Held*, that the Collector was not a party to the suit in which the decree was passed within the meaning of s. 244 (c) of the Code of Civil Procedure and that he had, therefore, no right of appeal; also that in proceedings relating to the enforcement of an order under s. 412 against a next friend, the next friend cannot be considered to be a party to the suit, and that, in consequence, there is no appeal under s. 244 (c) of the Code of Civil Procedure from an order passed in such proceedings. Nor does s. 440 apply to a case of an order passed under s. 412. COLLECTOR OF TRICHINOPOLY v. SIVARAMAKRISHNA SASTRIGAL, 23 M. 73=9 M.F.J. 265 ... 445

(20) S. 220—Practice—Costs of guardian *ad litem*—Advance by plaintiff for costs of minor defendants—Contract Act—Act IX of 1872, ss. 68, 70—Right to recover amount advanced—See CONTRACT ACT (IX OF 1872), 22 M. 314.

(21) *S.* 230—*Execution of decree prevented by "fraud or force" of judgment-debtor—Period of limitation.*—Where a judgment-debtor, knowing that a warrant of attachment had been issued against his moveable property, locked up his house and so prevented the moveable property therein from being attached: *Held*, that his action amounted to "fraud" within the meaning of s. 230 of the Code of Civil Procedure. In order to obtain the benefit of the proviso in that section, it is not necessary that a judgment-creditor should prove that the fraud of the judgment-debtor continued so as to prevent execution of the decree at any time. "Fraud" or "force" on the part of a judgment-debtor gives a new starting point for

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the period of limitation, and on application for the execution of a decree may be granted at any time within twelve years after the date on which a judgment-debtor has by "fraud" or "force" prevented execution of a decree. VENKAYYA v. RAGHAVA CHARLU, 22 M. 320=9 M.L.J. 28 ... 228

(22) S. 234—Execution of decree against deceased judgment-debtor—Probate and Administration Act—Act V of 1881, s. 104—Equal and rateable distribution—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 22 M. 194.

(23) Ss. 234, 298—*Execution—Petition to set aside sale—Death of judgment-debtor after proclamation and before sale—Non joinder of executors.*—An order for the sale of a debt of Rs. 70,000 (previously attached) owing by H and W to the judgment-debtor was made in execution in two decrees, and on 4th May 1895 a sale proclamation for 20th idem was issued. On 11th May the judgment-debtor died leaving a will, of which W was one of the executors. W brought these circumstances to the notice of the Court stating that the executors would proceed to apply for probate and asking for an adjournment of the sale. The adjournment was refused and the sale proceeded and the decree-holders, who had previously agreed with H and W to sell the debt to them for the amount of the purchase money, purchased the debt for Rs. 30,000, the estate of the judgment-debtor being unrepresented. The Administrator-General, to whom the administration of the estate of the judgment-debtor was afterwards transferred, applied to be brought on to the record and to have the sale set aside: *Held*, that the sale was vitiated by the omission to bring the legal representative of the judgment-debtor on to the record and should be set aside on the application of the Administrator-General, no separate suit being necessary for the purpose. GROVES v. ADMINISTRATOR-GENERAL OF MADRAS, 22 M. 119=8 M.L.J. 288 ... 84

(24) S. 244—*Application by exonerated defendant.*—A defendant, against whom no decree has been passed, but whose rights are invaded in execution, is entitled to come in under Civil Procedure Code, s. 244, and to appeal against an order made in such proceedings. VIBHUDAPRIYA THIRTHASAMI v. VIDIANIDHI THIRTHASAMI, 22 M. 131 ... 93

(25) S. 244—"*Parties to the suit*"—*Subsequent suit by a defendant who had been exonerated in a former suit—Maintainability of such suit.*—A family consisted of plaintiff's father, first defendant's father, and second defendant's grandfather. Plaintiff's brother died, leaving a widow. Plaintiff's father then died and also left a widow (plaintiff's mother), him surviving. The brother's widow brought a suit for maintenance against the representatives of the first and second defendants' branches of the family, plaintiff's mother being joined as third defendant. A decree was passed against the two first-mentioned defendants. but plaintiff's mother was exonerated on the ground that, being a female, she was not liable. In execution of the decree, certain lands were brought to sale and purchased by the brother's widow, who transferred them to another person. At the death of plaintiff's mother, which occurred subsequently, the said lands would have vested in the plaintiff, who now brought this suit claiming that the sales referred to were not binding on her (plaintiff) inasmuch as her mother had not been a party to the decree under which they had taken place: *Held*, that where a party defendant in a suit is exonerated from such suit, the suit being dismissed against him and a decree passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, the latter is not entitled to maintain a suit for recovery of possession of the property, and the question of his claim to, and to recover possession of, the property is a question falling within s. 244 of the Code of Civil Procedure, so as to debar him from maintaining such suit. RAMASWAMI SASTRULU v. KAMESWARAMMA, 23 M. 361 (F.B.)=10 M.L.J. 126 ... 635

(26) S, 244—*Retention by the Court of property not the subject-matter of a decree in the course of its execution—Dismissal of petition for delivery of possession—Appeal from order of dismissal.*—A decree having been passed awarding to a plaintiff in a suit a moiety of certain jewels which were stored in family boxes in the possession of the defendant, the boxes containing the

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jewels were taken possession of by an officer of the District Court and a division was effected by a commissioner appointed for that purpose by that Court. After the division certain jewels remained which had been set aside by the commissioner as not forming part of the subject-matter of the decree, and these continued in the custody of the District Court. The defendant thereupon presented a petition to the District Court praying that the jewels so remaining undivided might be returned to him. Plaintiff resisted the application but both parties were agreed that the said remaining jewels were not part of the subject-matter of the suit and were not dealt with by the decree. The petition was dismissed; whereupon the petitioner appealed. On objection being taken that no appeal lay against the order of dismissal on the ground that, since the jewels in question were not part of the subject-matter of the suit and were not dealt with in the decree, the question was not one relating to the execution of a decree and was not governed by s. 244 of the Code of Civil Procedure: *Held*, that the question as to what should be done with the boxes and their contents arose between the parties to the suit and related to the execution of the decree; that the order was passed under s. 244 of the Code of Civil Procedure and that consequently an appeal lay. *Per* MICHELL, J.—The property having been interfered with in the course of the execution of a decree the question involved was one "relating to the execution of the decree." The general words in the section should be construed liberally. APPA RAO v. VENKATARAMANAYAMMA, 23 M. 55... 433

(27) S. 244—Transfer of Property Act—Act IV of 1882, s. 99—Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share—Hindu Law—Rights of Hindu debtor's son after attachment of sale—See HINDU LAW (DEBTS), 22 M. 372.

(28) S. 244—Transfer of Property Act—Act IV of 1882, s. 99—Sale by mortgagee in execution of decree. See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 347.

(29) Ss. 244, 258—"Court executing a decree" includes proceedings initiated by decree-holder and by judgment-debtor—Transfer of Property Act—Act IV of 1882, Ss. 60, 88, 99—Purchase by mortgagee holding decree for sale, of portion of mortgaged property, subject to mortgage—Impossibility of mortgagee freeing himself by such purchase from liability to be redeemed —See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 377

(30) *Ss.* 244, 258—*Execution of decees—Money decree—Limitation Act—Act* XV *of* 1877, *sch.* II, *art.* 173-4.—S. 258, Civ. Pro. Code, refers only to the execution of decrees under which money is payable and is not applicable to decrees for possession of immoveable property. SANKARAN NAMBIAR v. KANARA KURUP, 22 M. 182=8 M.L.J. 175 ... 129

(31) *Ss.* 244, 278 *to* 283—*Party to the suit—Order on claim by trustee for release of trust property attached under personal decree against trustee—Appeal from such order.*—A decree-holder having attached certain property in the course of execution, two of the defendants in the suit in which the decree had been passed presented a petition praying that the property might be released from the attachment on the ground that it had been set apart for charitable purposes and that it was held by defendants as trustees. The Subordinate Judge upheld the trust and ordered the properties to be released from the attachment. Plaintiff then appealed to the High Court, when objection was taken that no appeal lay against the order of the Subordinate Judge. The Court referred to a Full Bench the question whether an appeal lies against an order passed with regard to a party to a suit against whom there is a personal decree in respect of a claim he may set up to hold property, attached in execution of that decree, as a trustee, on behalf of third persons not parties to the suit: *Held*, that such a claim falls under s. 278 and not under s. 244 of the Code of Civil Procedure and that no appeal lies against any order passed on it by the Court executing the decree. The claims of third parties whether put forward by themselves or by a party to the suit, must be dealt with under ss. 278 to 283 of the Code of Civil Procedure, and not under s. 244. S. 244 presupposes that the questions with which it deals are such as can be

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finally determined in the execution proceedings. If they cannot, it has no application. The Court should look to the substance of the objection and not to the accident that it is put forward by one person rather than another. RAMANATHAN CHETTIAR v. LEVVAI MARAKAYAR, 23 M 195 (F.B.) = 10 M.L.J. 64 ... 535

(32) *Ss.* 246, 247—*Execution of decrees—Cross-decree—Parties entitled under same decree to recover from each other.*—A plaintiff obtained a decree for the surrender to him of certain mortgaged property on his paying the defendants the mortgage amount within three months together with the value of improvements, and for the payment by defendants to him of the costs of suit. He applied to recover the said costs by the arrest of the defendants: *Held*, that the defendants were entitled under s. 247 of the Code of Civil Procedure to set off the amount payable by them to plaintiff by way of costs against the mortgage amount and value of improvements payable by plaintiff to them. SANKARA MENON v. GOPALA PATTAR, 23 M. 121 ... 479

(33) *S.* 253—*Execution of decree against surety.*—A surety entered into a bond, undertaking to produce certain debt bonds in case the defendant in a suit should fail to produce them, or to pay the amount mentioned therein. Upon an application being made that execution should issue against the surety: *Held*, that a bond so worded did not make the surety liable for the performance of the decree so as to bring the case within s. 253 of the Code of Civil Procedure, and that the liability of the surety could not be enforced in execution. NARAYANAMMA v. RAMAYYA CHETTI, 22 M. 268 = 8 M.L.J. 199 ... 191

(34) *S.* 276—*Kanom granted during a subsisting attachment—Subsequent discharge of judgment-debt, and other later attachments—Claim for rateable distribution—Effect of discharge in rendering first attachment inoperative as against all creditors.*—A kanom was executed by the karnavan of a tarwad in plaintiff's favour for valuable consideration for the discharge of judgment-debts decreed against the tarwad. On or before the date of the said kanom plaintiff's father had placed under attachment the properties covered by the kanom deed in execution of one of the said decrees; but the claim having been satisfied no Court sale followed. While the said attachment was still subsisting, and at a date later than that of the kanom, first defendant and other judgment-creditors applied for and obtained orders for the attachment of the same properties. On plaintiff suing to establish the validity of his kanom, it was contended that in consequence of the said attachment first defendant would be entitled to rateable distribution, under s. 295 of the Code of Civil Procedure, and that this was a claim enforceable under the attachment within the meaning of s. 276: *Held*, that the kanom was valid. The attachment subject to which the kanom had been granted ceased to be operative both as regards the attaching creditor and the other judgment-creditors when the judgment-debt was discharged, and there could be no sale by the Court and no right on the part of the other creditors, in the circumstances, to apply for such a sale. KUNHI MOOSSA v. MAKKI, 23 M. 478 = 10 M.L.J. 98 735

(35) *S.* 285—*Execution—Sale—Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers.*—Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, s. 285 of the Code of Civil Procedure does not take away the jurisdiction of the inferior Court, and any proceedings by such inferior Court in contravention of that section will be vitiated only where there has been notice of the proceedings in the superior Court. KUNHAYAN v. ITHUKUTTI, 22 M. 295 = 9 M.L.J. 1 ... 210

(36) *Ss.* 287, 311—"*Material irregularity,*" *in publishing or conducting a sale—Omission to state amount of Government tax payable—Right of person complaining to prove substantial loss.*—In a proclamation of intended sale issued under s. 287 of the Code of Civil Procedure, the omission to state the amount of Government tax payable in respect of the land to be sold is a material irregularity within the meaning of s. 311 of the Code. On such an irregularity being committed, the judgment-debtor whose lands

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have been sold is *prima facie* entitled to be given an opportunity for proving that he has sustained substantial loss by reason of it. MADARSAH MARACAYAR v. PALANIAPPA CHETTI, 23 M. 628 ... 841

(37) S. 295, *proviso* (*b*)—*Same judgment-debtor—Sale of lands under attachment —Disposal of amount realized—Rateable distribution.*—A father and son having mortgaged certain villages, the mortgagee obtained against both mortgagors a decree for the amount due, which was transmitted for execution to a District Court. The villages were subsequently, by order of the District Court, attached, and plaintiff, as receiver representing the mortgagee then obtained an order that the villages under attachment should be sold free from the mortgage, and that plaintiff should have the same rights against the proceeds of sale, as he, as such receiver, had against the property to be sold. Some of the villages were sold accordingly and the amount realized paid into the District Court. The defendant, who had obtained a separate decree against the son alone (the father having meanwhile died) in the same District Court, applied for, and was granted, a rateable distribution of the moneys realized by the sale of the villages attached and sold as aforesaid, towards satisfaction of his decree. On plaintiff bringing a suit for the recovery of the amount so obtained by defendant from the District Court: *Held*, (1) that the judgment-debtor against whom plaintiff and defendant held decrees was the same within the meaning of s. 295 of the Code of Civil Procedure, it being immaterial that in plaintiff's suit there had been a co-defendant against whom the decree might have been separately executed; and (2) that the order for sale of the villages under attachment was illegal and invalid in so far as it gave plaintiff the same rights against the proceeds of sale as he had by virtue of the mortgage against the property to be sold. GRANT v. SUBRAMANIAM, 22 M. 241=9 M.L.J. 179 ... 172

(38) S. 310-*A*—*Execution of decrees—Transfer of Property Act—Act* IV *of* 1882, s. 88—*Application to set aside sale of mortgaged property.*—S. 310-A of the Code of Civil Procedure applies where a sale of immoveable property has taken place under a mortgage decree, so as to enable the owner of such property who duly complies with its provisions to have such sale set aside. Where the owner of immoveable property applies under that section to have a sale of property set aside, he is under a liability to deposit a sum equal to five per cent. on the purchase money, for payment to the purchaser, even where the land has been purchased by the decree-holder. TIRUMAL RAO v. SYED DASTAGHIRI MIYAH, 22 M. 286 ... 203

(39) S. 311—*Petition to have set aside a sale in execution—Position of decree-holder who has obtained leave to bid—Dissuasion of persons from bidding.*—A decree-holder who has obtained leave to bid at a judicial sale is, in regard to restrictions upon him, in the same position as any other purchaser. A charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him. The judgment of the High Court in *Wocpendro Nath Sircar* v. *Brojendronath Mundul* ((1881) I.L.R., 7 Calc., 346), though a correct decision on the case, was too broadly expressed in comprehending any dissuasion by a bidder at a judicial sale of other persons from bidding, as a ground for setting a side the sale. The property of a judgment-debtor was sold in execution to the decree-holder, who, having obtained leave to bid, was declared purchaser at the auction sale at a price below its value. This decree-holder had on the day when the sale commenced agreed with a third person that, after it should be over, if he, the decree-holder, should have become the purchaser, he would then sell the property to that person for a specified sum. And these two combined that intending bidders should be dissuaded. The Judicial Committee affirmed the decision of the High Court that, on a petition for the setting aside of the judicial sale under s. 311 of the Code of Civil Procedure, neither the fact of the above agreement, nor the dissuasion of bidders, afforded sufficient ground for making the order. But the High Court had decided, in favour of the petitioner, another point:—that there had been material irregularity, within that section, in an omission on the part of the decree-holding purchaser when he had applied for leave to bid. This had been

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that he had withheld information of the agreement from the Court which had granted the leave to bid not having been made aware of the arrangement. The omission to disclose this fact had, in the opinion of the High Court, amounted to a fraud upon the Court executing the decree, and entitled the petitioner to have the sale set aside on the ground that in point of law no leave to bid had been granted; *Held*, by the Judicial Committee, that this ground had not been established by evidence on an issue between the parties, having been taken for the first time in the Court of appeal, with a change of the matter in controversy; and that the fraud on which alone the High Court's order could be sustained had neither been alleged nor proved. MAHOMED MIRA RAVUTHAR v. SAVVASI VIJAYA RAGHUNADHA GOPALAR, 23 M. 227 (P.C.) = 2 Bom. L.R. 640 = 4 C.W.N. 328 = 27 I.A. 17 = 10 M.L.J. 1 = 7 Sar. P.C.J. 661 ... 561

(40) *Ss. 365, 366—Abatement of appeal—Decease of appellant—Application by representatives to be brought on record—"Legal representative"—More than one legal representative—Effect of application being made by some only of several legal representatives.*—During the pendency of an appeal two persons applied under s. 368 of the Code of Civil Procedure to be brought on the record as legal representatives of the appellant, who had died. In their petition they stated that there were two other persons having interests equal to their own in the representation, who did not join in the application and were not made parties by the applicants for reasons that were given. The applicants were duly placed on the record as representatives of the deceased appellant within the time limited by art. 175-A of sch. II of the Limitation Act. After the period of limitation had elapsed the respondents applied under ss. 366 and 582 of the Code of Civil Procedure for an order that the appeal had abated on the ground that the former petitioners had not added all the persons who had interests equal to their own in the representation. The Subordinate Judge held that the representation of the two applicants was sufficient to prevent the abatement of the appeal, but he made the other two representatives respondents on the record. He subsequently heard and allowed the appeal. On its being contended, on second appeal, that the appeal to the Subordinate Court had abated and should have been dismissed by reason of the non-joinder of the other two representatives: *Held*, that though, in art. 175-A of sch. II of the Limitation Act, the application is expressed to be an application under s. 365 of the Code of Civil Procedure and s. 366 is not mentioned, yet for the purpose of considering the question of abatement the two sections must be read together. When there are more than one legal representative of a deceased appellant, all those representatives must, so far as it is possible for this to be done, join in an application under s. 365 and the words "legal representative" in s. 365 of the Code of Civil Procedure (and similarly the words "any person" and "the legal representative" in s. 366), strictly construed must, in such a case, be read in the plural and as including all the legal representatives. But where all the representatives cannot be joined as applicants, ss. 365 and 366 should not be construed so as to have the effect of rendering the application no application by "the legal representative" within the meaning of the sections so that the appeal must be held to have abated. MUSALA REDDI v. RAMAYYA, 23 M. 125 = 9 M.L.J. 313 ...

) *S. 375—Razinamah not in terms of plaint—Dismissal of suit.*—A decree should not be passed in terms of a compromise where the latter does not give to the plaintiff any of the reliefs claimed in the suit, and deals with matters not forming the subject-matter of the suit. Upon such a compromise being presented, the Court should inform the parties that its terms cannot be embodied in a decree and if it appear that the compromise was arrived at conditionally upon its being incorporated in the decree, the suit should be proceeded with. MUTHU VIJAYA RAGHUNATHA UDAYANA TEVAR v. THANDAVARAYA TAMBIRAN, 22 M. 214 ... 153

(4 *Ss. 375, 622—Compromise of suit—Dispute as factum of compromise—Order dismissing suit in consequence of alleged compromise—Application to High Court by revision petition under s. 622—Right of appeal against order dismissing suit—Appeal—Practice—Acceptance of civil revision petition as appeal on Court fee being paid.*—During the pendency of an appeal in a District Court a petition was filed by the pleaders of the plaintiffs

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and defendants in the suit, praying on behalf of their clients that the case might be struck off the file on the ground that the matter in dispute had been compromised. Two of the plaintiffs then filed a counter-petition denying that a compromise had been arrived at and paying that the appeal might be heard on its merits. The Distrtct Judge, after some intermediate orders, struck off the appeal, as prayed in the petition. The two plaintiffs preferred a civil revision petition to the High Court whereupon it was objected that the petition could not be entertained as an appeal lay against the order of the District Judge inasmuch as it was not a decree in pursuance of a compromise under s. 375 of the Code of Civil Procedure, but an order passed on a dispute as to whether a compromise had in fact been arrived at. The petition had been presented within the time allowed for appeal:—*Held*, that inasmuch as the petition impeached the alleged compromise as not being a "lawful compromise" an appeal lay against the order of the District Judge; but that the petition might be treated as an appeal, on the Court-fee being paid. Where a party to a suit impugns an alleged agreement or compromise by which he would be bound the Court must satisfy itself by evidence that the agreement or compromise is a lawful one and that its terms have been consented to by the parties to the suit before it can proceed under s. 375 of the Code of Civil Procedure to record it and pass a decree in accordance therewith. SRIDHARAN SOMAYAJIPAD v. PURAMATHAN SOMAYAJIPAD, 23 M. 101=9 M.L.J. 350 ... 464

(43) S. 462—*Authority of Counsel, vakils or other agents—Abandonment of issue—Scope of authority in conduct of litigation—Compromise—Hindu Law—Impartible zamindari—Son's legal incompetence to intervene in the suit on the footing of the impartibility of the estate—Partial partition—Omission to include some joint properties in plaint in suit for partition where they can be ascertained and decree given.*—A vakil appointed to conduct a case on behalf of a client has power to ask for an issue to be framed, or to abandon one that has been framed, and, in the absence of fraud or misconduct or of express instructions prohibiting the adoption of such a course, his action will be binding on his client. There is no distinction, in this respect, between the acts of Counsel, vakils and other agents. The abandonment of an issue does not amount to a compromise, and if the suit is being conducted by a guardian on behalf of a minor, leave of the Court is not necessary under s. 462 of the Code of Civil Procedure for such abandonment. Where an estate is impartible, the sons of the present holder have, since the decision in 15 I.A. 51; 10 A. 272, recently affirmed as to this Presidency in 26 I.A. 83; 22 M. 383, no *locus standi* to question the acts of their father. In a suit for partition, plaintiff, when filing his plaint and schedules, made no mention of certain jewels in the possession of his wife. Defendant having filed a schedule in his written statement showing the existence of the said jewels, plaintiff admitted that they were with his wife but declined to allow them to be divided unless a division were also made of the jewels which were in the possession of the defendants' wives and children. He, however, before the examination of witnesses, withdrew this condition and expressed his willingness to give defendant credit for half their value: *Held*, that the suit was, on these facts, not one for partial partition. *Per* O'FARRELL, J.—That where a suit is brought for division of the whole of the family properties an omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition. VENKATA NARASIMHA NAIDU v. BHASHYAKARLU NAIDU, 22 M. 538 ... 384

(44) S. 462—*Compromise of suit by guardian* ad item—*Leave of Court not obtained—Withdrawal from compromise by guardian—Inability of Court to enforce it.*—The guardian *ad item* of three minors having agreed to compromise a suit and having signed a petition embodying the terms arrived at, undertook to present the petition at the next sitting of the Court. Leave of the Court had not been obtained; and at the time appointed the guardian declined to present the petition and opposed a decree being passed in its terms. Upon the plaintiff seeking to have the compromise enforced: *Held*, that inasmuch as leave of the Court had not been asked for, and

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the guardian had objected to the Court passing a decree in terms of the compromise, the Court had no power to enforce the compromise, even though the terms of it might appear to be beneficial to the minors. RANGA RAO v. RAJAGOPALA RAJU, 22 M. 378 ... 272

(45) Ss. 492, 503—Guardians and Wards Act—Act VIII of 1890, ss. 33, 43,47,48 and 49—Appeal—Order purporting to be passed under appealable section —Appeal entertained though Judge had no power to pass orders under the section as he purported to do—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 23 M. 517.

(46) Ss. 508, 521—*Delivery of an award.*—A suit was, at the instance of the plaintiff and defendants, referred to an arbitrator. The arbitrator made his award within the period fixed by the order of reference, but did not submit it to the Court until two days later: *Held*, that the award was valid under Civil Procedure Code, s. 508. ARUMUGAM CHETTI v. ARUNACHALAM CHETTI, 22 M. 22 ... 17

(47) S. 521—*Legality of order remitting award for re-consideration—Appeal.*— An award submitted by arbitrators to whom all matters in dispute had been referred, stated that "defendant has not produced any witnesses in "support of his contention raised in issues Nos. 1, 2, 5 and 6, hence we "have only to deal with issues Nos. 3, 4 and 7," and dealing with those issues, the arbitrators gave their finding. The award was remitted, on the ground that the arbitrators had not determined the issues Nos. 1, 2, 5 and 6: *Held*, (1) that the legality of an order remitting an award for the re-consideration of the arbitrators may be challenged on appeal against the decree ultimately passed; and (2) that the award ought not to have been remitted: there was no illegality on the face of it, and there was a decision on the whole matter in issue between the parties. GEORGE v. BASTIAN SOURY, 22 M. 202 ... 144

(48) Ss. 522, 562—"*Preliminary point*"—*Order determining validity of an award—Decree in accordance with an award—Appeal.*—Objection was unsuccessfully taken before a District Munsif to the validity of an award on the ground of the arbitrator being interested, and a decree was passed in accordance with the award. The defendant appealed and the Subordinate Judge held that the objection was well founded and should prevail; and, setting aside the award, he remanded the case for trial. The plaintiff appealed to the High Court: *Held*, (1) that the appeal to the High Court was maintainable; (2) that no appeal lay to the Subordinate Court as to the validity of the award and that the decree of the District Munsif should be restored. KRISHNAN CHETTI v. MUTHU PALANDI VACHA MAKALI TEVAR, 22 M. 172 ... 122

(49) Ss. 523, 540—*Agreement to refer—Decision thereon is a decree—Right of appeal.*—In a suit to file an agreement to refer a matter to arbitration, a decision was passed refusing a reference on the ground that the agreement to refer was not proved. On the plaintiff appealing against such refusal: *Held*, that a decision passed under s. 523 of the Code of Civil Procedure is a decree and an appeal lies therefrom under s. 540 of the Code. GOWDU MAGATA v. GOWDU BHAGAVAN, 22 M. 299=9 M.L.J. 10 ... 213

(50) S. 543—*Memorandum of appeal—Scandalous matter therein—Duty of the Appellate Court*—A memorandum of appeal presented to a District Court alleged, *inter alia*, actual partiality against the Judge whose decree was in question. The memorandum was returned for amendment on the ground that it contained language disrespectful to the Court of First Instance. The appellant's pleader presented the appeal memorandum unamended, stating that he wished to rely in the appeal on the passages objected to, and asking that the Court would, if necessary, strike them out. The District Judge thereupon rejected the memorandum of appeal under Civ. Pro. Code, s. 543. It appeared that the objectionable portions of the memorandum were separable from the rest: *Held*, that an appeal lay to High Court against the order rejecting the appeal to the District Court, *Per* SUBRAMANIA AYYAR, J.—The District Judge should have ordered the objectionable matter to be expunged and then to have admitted the appeal. *Per* MOORE, J.—(Holding that the statement which accompanied the memorandum of appeal on the representation contained expressions

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amounting to contempt of Court), the District Judge should have returned the appeal memorandum and have refused to receive it until the objectionable remarks had been expunged. *Per* SUBRAMANIA AYYAR, J.—"It is open to an appellant to set up any circumstance showing that a Judge whose decision is appealed against was disqualified from trying and deciding the case . . . When a Judge is shown . . . to stand in such a position that he might be reasonably suspected of being biased he must be held to have been disqualified. . . . In cases where any bias can be presumed the party is entitled to show the grounds which raise the presumption. . . . But where there is no such presumption the party must not be allowed to question the impartiality of the Judge." ZEMINDAR OF TUNI v. BANNAYYA, 22 M. 155=8 M.L.J. 304 ... 110

(51) *Ss.* 562, 564—Ex-parte *decision in Court of First Instance after hearing plaintiffs' evidence—Order by Appellate Court reversing decree and remanding suit for decision after hearing further evidence—Validity of such an order.*—One of three defendants failed to appear at the final hearing of a case at the Court of a District Munsif, and the other two, though they appeared, adduced no evidence. The District Munsif, after hearing witnesses for the plaintiffs, passed a decree in their favour, as prayed. The absent defendant applied, unsuccessfully, under s. 108 of the Code of Civil Procedure, that the decree might be set aside, and then appealed to the Subordinate Judge who reversed the decree and remanded the suit for decision after taking such further evidence as the said defendants or other parties might produce. On its being contended that, under ss. 562 and 564 of the Code of Civil Procedure, the Subordinate Judge had no power to remand the suit for re-trial: *Held*, that notwithstanding ss. 562 and 564 an Appellate Court has inherent power, in such a case, not only, to reverse decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case. PERUMBRA NAYAR v. SUBRAHMANIAN PATTAR, 23 M. 445=10 M.L.J. 61 ... 712

(52) *Ss.* 562, 568, 568—*Additional evidence by Appellate Court—Invalidity of order reversing decree of lower Court on account of exclusion of evidence.*—A trial took place in the Court of a District Munsif, who heard evidence, decided issues and passed a decree. On an appeal being preferred the Subordinate Judge reversed the decree and remanded the suit for re-trial on the ground that certain documentary evidence which had been tendered by a defendant had been excluded, and plaintiff's witnesses who had been cited in the list had not been wholly examined. On an appeal being preferred against that order: *Held*, that s. 562 of the Code of Civil Procedure was inapplicable to such a case; and that the proper and only legal course for the Subordinate Judge to take under the Code of Civil Procedure was to act either under s. 568 or s. 569, by himself taking the evidence which he considered to have been wrongly excluded, or to direct the District Munsif to take it. SESHAN PATTAR v. SESHAN PATTAR, 23 M. 447 ... 714

(53) S. 566—Civil Courts Act—Act III of 1873, ss. 12, 13—Appeal—Transfer to Sub-ordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal—Jurisdiction is not conferred by waiver when Court has no inherent jurisdiction—See ACT III OF 1873 (CIVIL COURTS, MADRAS), 23 M. 314.

(54) *S.* 574—*Contents of appellate judgment.*—The judgment of an Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them. SITARAMA SASTRULU v. SURYANARAYANA SASTRULU, 22 M. 12=8 M.L.J. 183 ... 9

(55) *S.* 574—*Contents of judgment in appeal—Duty of Appellate Court to hear appeal after remand for findings, though no memorandum of objections.*—On the hearing of a plaintiff's appeal against an order dismissing his suit, the District Judge, finding the issues that had been framed futile, struck them all out, substituted others, and remanded the suit for findings after evidence had been taken. On the appeal coming on for hearing after the return of those findings, neither party having filed any objections, the District Judge dismissed the suit on the ground that by his failure to file

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objections plaintiff must be taken to have consented to the new findings, which were against him: *Held*, that the Judge was not absolved from hearing the appeal by reason of the absence of a memorandum of objections. SUBBAYYA v. RAMI REDDI, 22 M. 344 ... 245

(56) *S.* 582—*Minors—Guardian* ad litem—*Appeal by a person other than guardian.*—Two defendants in a suit, being minors, were represented by a properly appointed guardian *ad litem.* Upon a decree being passed in favour of the plaintiff, an appeal was filed on behalf of the minors, by their mother, without any order obtained by constituting her guardian, and without any previous removal of the properly appointed guardian *ad litem*: *Held*, (1) that the appeal could not be heard; and (2) that the appointment of guardian in a Court of First Instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal. VENKATA CHANDRASEKHARA RAZ v. ALAKARAJAMBA MAHARANI, 22 M. 187 ... 133

(57) *S.* 583—*Property taken from petitioner by process of Court under decree—Subsequent reversal of decree—Petition for restitution—Custody of third party—Principles on which restitution is ordered.*— Two trustees of a temple having been removed from office, a suit was brought against them by the newly appointed trustees and a decree obtained restraining them from interfering with the affairs of the temple. In accordance with that decree property of the temple was taken from them by process of the Court and handed to the new trustees. On appeal to the High Court, however, the decree was reversed and restitution was now applied for by the survivor of the late trustees, from whom the property had been taken. In the meanwhile a third party had been appointed an additional trustee to the newly appointed trustees: *Held* that the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost; and it is the duty of the Courts to enforce that obligation, unless it be shown that restitution would be clearly contrary to the real justice of the case. That with reference to the position of innocent third parties, the rule that a plaintiff in an action to recover land cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant, does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of the Court: *Held*, therefore, that the trustee who had been dispossessed must be given an opportunity to prove whether any and which of the temple properties were in his custody as alleged and whether he was deprived of such custody under the decree which was reversed, and whether the newly appointed trustees acquired the custody of them thereunder; and that, if substantiated, the claim for restitution could not be successfully resisted. DORASAMI IYYAR v. ANNASAMI IYYAR, 23 M. 306=10 M.L.J. 307 ... 616

(58) S. 586—Provincial Small Cause Courts Act—Act IX of 1887, s. 15, sch. II, art. 8—Suits for rent—"Suits of the nature cognizable in Courts of Small Causes"—Second appeal—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 22 M. 229.

(59) *S.* 586—*Second Appeal—Provincial Small Cause Courts Act—Act* IX *of* 1887, *sch.* II, *art.* 31—*Jurisdiction—Suit for mesne profits under Rs.* 500.—A suit for mesne profits is cognizable in Courts of Small Causes where the value of the subject-matter in dispute is less than Rs. 500, and art. 31 of sch. II of the Provincial Small Cause Courts Act does not apply thereto. Such a suit falls within the provisions of s. 586 of the Civ. Pro. Code, and no second appeal lies from a decision in it. SESHAGIRI AYYAR v. MARAKATHAMMAL, 22 M. 196 ... 139

(60) *S.* 586—"*Suit of the nature cognizable in Courts of Small Causes*"—*Suit for rent other than house-rent—Second appeal.*—A suit for the recovery of rent other than house-rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of s. 586 of the Code of Civil Procedure, and no second appeal lies from a decision therein when the amount or

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value of the subject-matter of the original suit does not exceed five hundred rupees. So *held* (SUBRAMANIA AYYAR, J., dissenting). SOUNDARAM AYYAR v. SENNIA NAICKEN, 23 M. 547 ... 785

(61) S. 626—*Order for review—Omission to record reasons for granting—Validity of order.*—An order intended to operate as an order for review is not invalidated by an irregularity in its form by reason of which it purports to be an order made on an application to set aside a decree and restore a suit for trial. The provision in s. 626 of the Code of Civil Procedure that a Judge granting an application for a review "shall record with his own hand his reasons for such opinion," is directory and an order is not necessarily invalidated by the fact that the reasons are not recorded, though there may be cases in which it is necessary in the interests of justice that the reasons should be recorded, and in such cases the record would be essential to the validity of the order. MANICKA MUDALIAR v. GURUSAMI MUDALIAR, 23 M. 496 ... 748

(62) S. 646 B—Provincial Small Cause Courts Act—Act IX of 1887, s. 15, sch. II, art. 35 (*j*)—Suit for the value of property illegally retained—Jurisdiction of Small Cause Courts—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 22 M. 457.

Claim.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 478.

(2) See LIMITATION ACT (XV OF 1877), 23 M. 583.

Companies.

See COMPANIES ACT (VI OF 1882), 22 M. 291.

Companies Act (VI of 1882).

(1) S. 4—*Illegal contract—Bond to secure payments under a kuri—Penal Code—Act XLV of* 1860, *s.* 294*A.*—An agreement is not illegal whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of the contributions, the common fund being lent to each subscriber in turn. Nor is such an agreement rendered illegal by s. 294-A of the Indian Penal Code. VASUDEVAN NAMBUDRI v. MAMMOD, 22 M. 212 ... 151

(2) Ss. 169, 214—*Practice—Companies—Winding-up—Notice of appeal.*—Notice of an appeal from any order or decision made or given in the matter of the winding-up of a Company by the Court must, under s. 169 of the Indian Companies Act, 1882, be given to the respondent within three weeks after the order complained of has been made, unless such time is extended by the Court of Appeal. RAMANAPPA v. THE OFFICIAL LIQUIDATOR, BELLARY BRUCEPETTA STOCK AND LOAN TRANSACTING COMPANY, 22 M. 291 ... 207

Compensation.

(1) See KASAVARGAM TENANCY, 22 M. 116.

(2) See MALABAR LAW (MORTGAGE), 23 M. 86.

(3) See SPECIFIC RELIEF ACT (I OF 1877), 22 M. 478.

Compromise.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 378, 538; 23 M. 101.

Confession.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 22 M. 15; 23 M. 151.

(2) See EVIDENCE ACT (I OF 1872), 22 M. 491.

Construction.

(1) See ACT I OF 1876 (ASSESSMENT OF LAND REVENUE, MADRAS), 22 M. 270.

Construction—(*Concluded*). PAGE

(2) See BOTTOMRY BOND, 22 M. 26.

(3) See DOCUMENT, 23 M. 137.

Contract.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 24.

(2) See COMPANIES ACT (VI OF 1882), 22 M. 212.

Contract Act (IX of 1872).

(1) *S.* 25, *cl.* (3)—*Promise to pay a barred debt — Limitation Act —Act* XV *of* 1877, *s.* 19, *sch.* II, *art.* 110.—In defence to a suit for rent a tenant pleaded that a portion of the claim was barred by limitation. Plaintiff relied on a letter which had been signed by defendant, after the disputed portion had become barred, and in which the defendant, after referring to the periods in respect of which the arrears of rent were due, said "I shall send by the end of Vysakha month":—*Held*, that the document contained the ingredients required by s. 25, cl. (3), of the Contract Act, and that the claim was not barred by limitation. A document sufficiently complies with s. 25 of the Contract Act when it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a "promise." To create a "promise" within the meaning of the section it is not necessary that there should be an accepted proposal reduced to writing, a written proposal, accepted before action, becoming by the definition clause, a promise when accepted. The words of the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to. APPA RAO *v.* SURYAPRAKASA RAO, 23 M. 94=9 M.L.J. 330 ... 459

(2) S. 64—Guardians and Wards Act—Act VIII of 1890, ss. 29, 30—Mortgage by guardians on estate of minor—" Previous permission of the Court"—Transfer of Property Act—Act IV of 1882, s. 35—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 22 M. 289.

(3) *Ss.* 68, 70—*Civ. Pro. Code—Act* XIV *of* 1882, *s.* 220 — *Practice — Costs of guardian* ad litem—*Advance by plaintiff for costs of minor defendants—Right to recover amount advanced.*—Plaintiff having, in a prior suit, sued the defendants, who were minors, and their father, for specific performance, was ordered by the Court to advance money to the guardian *ad litem* of the minors (who was appointed by the Court), to enable him to conduct their defence. Plaintiff succeeded, but the Court refused to provide, in its decree, for the repayment to plaintiff of the amount so advanced. On the plaintiff bringing this suit to recover that amount:—*Held,per* SUBRAMANIA AYYAR, J. (1) that the Court in which the prior suit had been brought had power neither to direct the plaintiff to make the advances to the guardian, as had been done, nor to award the amount so paid as costs in the cause. The present suit, therefore, was not unsustainable for the reason that the subject-matter of it was one for the Court to have dealt with in the previous suit; (2) that the circumstances of the case were not such as to render the amount recoverable under s 70 of the Contract Act, inasmuch as the defendants could not be said to have enjoyed the benefit of the expenditure; (3) that payments or charges connected with legal expenses in which infants are concerned, may, in certain circumstances, come under the head of necessaries within the meaning of s. 68 of the Contract Act. Disbursements properly made in defence of the suit by the guardian *ad litem* out of the plaintiff's advances might be allowable if it be alleged and proved that there were reasonable grounds for the defence put forward, though it proved unsuccessful. But that this ground could not now be relied upon on second appeal, inasmuch as it had not been put forward in the Court below, when an issue relating to it could have been framed: *Per* DAVIES, J., that a matter of this nature can and should be settled in the suit in which it arises; and that where a plaintiff is successful, a supplementary issue should be framed and tried as to the amount due to him on account of advances made by him to the guardian *ad litem* for conducting the defence and a decree passed in his favour for the total amount of costs

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found to have been properly incurred in the case by the guardian out of such advances. VENKATA VIJAYA GOPALARAJU v. TIMMAYYA PANTULU, 22 M. 314 ... 223

(4) S. 69—Hindu Law—Liability of undivided brother of deceased Hindu to defray expenses of his niece's marriage—Improper refusal—Performance by widow—Maintainability of suit brought by widow—"Person who is interested in the payment of money."—See HINDU LAW (MARRIAGE), 23 M. 512.

(5) Ss. 151, 152—Liability of bailees for hire for loss of goods—Negligence—Onus of proof—Madras Harbour Trust Act (Madras)—Act II of 1886, ss. 70, 87—Immunity from action—Breach of contract—See ACT II OF 1886 (HARBOUR TRUST, MADRAS), 22 M. 524.

(6) Ss. 233, 234—See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881) 23 M. 597.

Contributors.

See LIMITATION ACT (XV OF 1877), 23 M. 583.

Costs.

(1) See ATTORNEY, 23 M. 134.

(2) See CONTRACT ACT (IX OF 1872), 22 M. 314.

(3) See INSOLVENT ACT 11 AND 12 VICT. CAP. XXI, 23 M. 26.

Court-fee.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 101.

(2) See COURT FEES ACT (VII OF 1870), 22 M. 162; 23 M. 84, 490.

Court Fees Act (VII of 1870).

(1) *S. 5—Appeal under Agency Rules, No. 22, under Act* XXIV *of* 1839—*Court-fee.*—An appeal preferred to His Excellency the Governor in Council under Rule No. 22 of the Agency Rules framed under Act XXIV of 1839 against the decision of the Governor's Agent at Vizagapatam and referred by Government to the High Court for disposal is not chargeable under the Court Fees Act. REFERENCE UNDER COURT FEES ACT, s. 5, 22 M. 162 ... 115

(2) *S. 5—Suit for ejectment—Claim by tenants for improvements of grater value than plaint valuation—Appeal by tenants for improvements—Court fees payable on such appeal.*—In a suit for ejectment, in which the plaint land was valued at Rs. 50 and Court-fee paid on that valuation, the tenants claimed Rs. 500 as compensation for improvements, which claim was disallowed. The tenants appealed on the ground that their claim for improvements should have been allowed, but only paid Court-fee on the plaintiff's valuation. On a reference as to whether the value of the improvements ought not to be taken into account for the purpose of levying the Court-fee:—*Held*, that as the claim for improvements was not the subject-matter of the suit, but was merely incidental to the decree for possession, and on grounds of convenience, the fee payable by an appellant in such a case should be that payable in a suit for possession of land. REFERENCE UNDER COURT FEES ACT, s. 5, 23 M. 84 ... 45

(3) *S.* 7, IV (*c*)—*Fee payable on appeal—Suit for declaratory decree—Possibility of valuing subject-matter—Original valuation by plaintiff.*—A plaintiff was granted a decree (which was affirmed on appeal to the Subordinate Court), declaring a sale deed invalid on the ground that it had been obtained by fraud, coercion, undue influence and without consideration. The suit had been originally valued by plaintiff at Rs. 800, but by an order of the Munsif's Court that figure was altered to Rs. 2,000, the amount mentioned in the deed. One of the defendants preferred a second appeal to the High Court, where a question arose as to the amount of duty payable on such appeal: *Held*, that s. 7, IV (*c*), of the Court Fees Act applied, and that the valuation given by the plaintiff was the valuation to be accepted. Whether the reference to an appeal in the sub-section

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applies to a case in which the subject-matter of the appeal is not co-extensive with the subject-matter of the suit.—*Quære.* SAMIYA MAVALI v. MINAMMAL, 23 M. 490=10 M.L.J. 240 ... 744

(4) S. 28—"Plaint"—Suit filed before period of limitation expired, but stamp duty not paid, till afterwards—Limitation Act—Act XV of 1877, ss. 4, 14—Exclusion of time of proceeding *bona fide* in Court without jurisdiction—Joinder of causes of action—Muhammadan Law—Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law—See MUHAMMADAN LAW (PARTITION), 22 M. 494.

(5) S. 31—Crim. Pro. Code—Act X of 1882, s. 423 (*d*).—See CRIM. PRO. CODE (ACT X OF 1882), 22 M. 153.

Crim. Pro. Code (Act X of 1882).

(1) *S.* 191 (*c*)—*Act* V *of* 1898, *ss.* 190, 191.—A Magistrate, when a valid objection is taken under Crim. Pro. Code, s. 191, that he cannot try a case, is not bound to transfer it, but may elect to commit the case to a Court of Session. QUEEN-EMPRESS v. FELIX, 22 M. 148=2 Weir 150 ... 105

(2) *Ss.* 269, 307, 533—*Penal Code—Act* XLV *of* 1860, *ss.* 395, 396, 412—*Verdict of jury and their opinion as assessors—Confessional statement.*—Ten persons were committed to a Sessions Court charged with offences under Indian Penal Code, ss. 395 and 396, and some of them were also charged with offences under s. 412. One of the accused had made a confessional statement before the Magistrate, who recorded it but did not make on it a memorandum to the effect stated in Crim. Pro. Code, s. 164, and did not admit it in evidence for the reasons that the accused was produced from the custody of the police in which he had been detained for five days, and there was a proposal on the part of the police to treat him as an approver. It appeared that a perusal of the preliminary register would have shown that the accused were either guilty under s. 396 or not guilty under s. 395 at all. The accused were tried by the Sessions Judge with a jury. The confessional statement was not admitted in evidence. The jury found the accused not guilty of dacoity, but the Judge disagreeing with the verdict referred the case to the High Court under Crim. Pro. Code, s. 307: *Held,* (1) that the Procedure adopted by the Judge was wrong and that he should have tried the accused with the aid of assessors under Indian Penal Code, s. 396; (2) that the Judge should have enquired under Crim. Pro. Code, s. 533, whether the confessional statement had been duly made; and (3) that under the circumstances, the High Court should determine on the evidence on record after giving due weight to the opinions of the Judge and the jury whether the accused were guilty under s. 395. QUEEN-EMPRESS v. ANGA VALAYAN, 22 M. 15=1 Weir 446=2 Weir 333 and 705 ... 11

(3) *S.* 350—*Transfer of Magistrate—Part-heard case.*—A Head Assistant Magistrate during the pendency of a criminal case of which the trial was almost finished was appointed to the office of Deputy Magistrate in another part of the same district. The case was transferred by an order of the District Magistrate to the file of the Deputy Magistrate: *Held,* that the Deputy Magistrate could proceed with the trial from the point at which he had arrived as Head Assistant Magistrate. QUEEN-EMPRESS v. SRI AHOBALAMATAM JEER, 22 M. 47=2 Weir 430 ... 34

(4) *S.* 423 (*d*)—*Court Fees Act—Act* VII *of* 1870, *s.* 31—An Assistant Magistrate having convicted the accused persons sentenced them to pay a fine, out of which Rs. 2 was to be paid to the complainant for his expenses; the Deputy Magistrate, on appeal, having confirmed the conviction, passed an order under Court Fees Act, s. 31, directing the accused to pay a further sum to the complainant: *Held,* that the order was illegal and should be set aside. QUEEN-EMPRESS v. TANGAVELU CHETTI, 22 M. 153=1 Weir 724 ... 109

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(1) S. 161—*Examination of witnesses by the Police—Legal obligation to speak the truth—Refusal to answer questions—Liability to punishment under ss.* 176, 179 *and* 187 *of the Indian Penal Code.*—A refusal to answer questions asked by a police officer under s. 161 of the Code of Criminal Procedure is not punishable under ss. 176, 179 and 187 of the Indian Penal Code. QUEEN-EMPRESS v. SANKARALINGA KONE, 23 M. 544=1 Weir 112 ... 783

(2) Ss. 190, 191—See CRIM. PRO. CODE (ACT X OF 1882), 22 M. 148.

(3) S. 195—*Sanction for prosecution—Notice to person to prosecute whom sanction is sought—Proceedings before Sessions Court—Proper exercise of discretion.*—A Sessions Court when granting sanction to prosecute under s. 195 of the Code of Criminal Procedure should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exercised unless the persons sought to be prosecuted have been given an opportunity to be heard. An order of a Sessions Judge, sanctioning a prosecution, containing nothing from which the High Court could conclude that he had directed his mind to the real questions in such cases, namely, whether there was a *prima facie* case on which a prosecution could be instituted with a fair chance of success, the High Court revoked the sanction. PAMPAPATI SASTRI v. SUBBA SASTRI, 23 M. 210=2 Weir 186 ... 546

(4) Ss. 195, 476—*Order by Deputy Magistrate sanctioning prosecution—Complaint by Deputy Magistrate—Jurisdiction of Sessions Court to interfere.*—A Deputy Magistrate having decided that certain witnesses (who had given evidence before himself and before two other Magistrates on different occasions relating to charges of ryoting and causing hurt) had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances: *Held*, that whether the Depury Magistrate had intended to pass an order under s. 476 or to make a complaint under s. 195 (1) (*b*) of the Code of Criminal Procedure the Sessions Judge had no power to interfere; also that the power of revoking given under s. 195 (*b*) is only in respect of sanctions, and not of complaints. QUEEN-EMPRESS v. ANKANNA, 23 M. 205=2 Weir 161 & 607 ... 542

(5) Ss. 195, 476—Penal Code—Act XLV of 1860, s. 193—Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate—See PENAL CODE (ACT XLV OF 1860), 23 M. 223.

(6) S. 197—*Charge against village magistrate for alleged offence while acting not in a judicial capacity—Sanction.*—A village magistrate having been apprised of a disturbance in his village forcibly separated the combatants, one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the Sub-Maistrate upon his file without any previous sanction of the Government or other authority mentioned in s. 197 of the Code of Criminal Procedure. The village magistrate raised the objection that the prosecution could not legally be proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary and kept the case on his file and commenced to enquire into it. The village magistrate presented a petition to the District Magistrate raising the same ground of objection, whereupon the District Magistrate quashed the whole of the proceedings, holding that the Sub-Magistrate had no jurisdiction to try the case against a village officer without sanction having been first obtained: *Held*, that sanction was not necessary under s. 197 of the Code of Criminal Procedure. The village magistrate, while preventing an offence, was not acting in the capacity of a Judge, or a public servant not removable from office without the sanction of Government, and therefore the section referred to had no

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application: *Held also*, that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction. *Semble*, that a village magistrate exercising jurisdiction, and trying an offender under Regulation XI of 1816 is a Judge within the meaning of s. 197 of the Code of Criminal Procedure and s. 19 of the Indian Penal Code. KANDASAMI CHETTI *v.* SOLI GOUNDAN, 23 M. 540=2 Weir 222... 780

(7) S. 209—*Examination of accused before committal—Discretion of Magistrate.*—It is the duty of a Magistrate, before committing accused persons for trial to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of s. 209 of the Code of Criminal Procedure is that it is not left to the discretion of the Magistrate who intends to commit to examine the accused. He is bound to examine them, and if he makes an order of commitment without such examination, the order is irregular. QUEEN-EMPRESS *v.* PANDARA TEVAN, 23 M. 636=2 Weir 253 ... 847

(8) S. 248—*Withdrawal of complaint—"Complainant."*—A complaint having been made to the police, the latter caused charges to be preferred under ss. 143 and 504 of the Indian Penal Code against certain accused. The person who had complained to the police subsequently filed a petition praying the Second-class Magistrate to withdraw the charges under s. 248 of the Code of Criminal Procedure. The Magistrate permitted the withdrawal and directed the accused to be set at liberty: *Held*, that the order was bad, there being no "complainant" in the case, and that consequently the Magistrate in purporting to act under s. 248 had exceeded his powers. QUEEN-EMPRESS *v.* CHENCHAYYA, 23 M. 626=2 Weir 310 840

(9) S. 260—*Charges under Penal Code (Act* XLV *of* 1860), *ss.* 147 *and* 324—*Summary procedure under Penal Code, s.* 323.—A First-class Magistrate took a case on his file and commenced a regular enquiry therein under ss. 147 and 324 of the Indian Penal Code, but, after hearing evidence, being of opinion that only an offence under s. 323 of the India Penal Code, had been made out, he proceeded to deal with the case summarily: *Held*, that inasmuch as the evidence adduced was not sufficient to justify a committal, but clearly disclosed an offence over which he had summary jurisdiction, the Magistrate was right in acting as he did. Such a course is different to disregarding part of a charge for the purpose of dealing with a case summarily. The High Court will not interfere where a Magistrate has *bona fide* acted in the interests of justice. QUEEN-EMPRESS *v.* RANGAMANI, 22 M. 459=2 Weir 254 ... 329

(10) Ss. 269 (1), 536 (2)—*Order directing trial by jury—"Particular class of offences"—Revocation of order—Jury case tried by assessors—Omission to take objection before finding recorded—Validity of trial.*—By s. 269 of the Code of Criminal Procedure the local Government may, with the previous sanction of the Governor-General in Council, by order in the Official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order. In the *Fort St. George Gazette*, dated 30th August 1899, it was notified that, whereas by orders previously made the trial of persons charged with certain offences should, in certain districts of the Presidency, including that of Tinnevelly, be by jury; and whereas disturbances known as the anti-Shanar disturbances had taken place in the districts of Tinnevelly and Madura, and certain persons stood committed for trial and others might thereafter be similarly committed in connection therewith, the Governor in Council, with the previous sanction of the Governor-General in Council, directed, under s. 269 of the Code of Criminal Procedure, that the said previous orders be revoked as regards the persons referred to, and that such persons should be tried with the aid of assessors and not by jury. Certain persons having been so tried for offences under ss. 148, 454, 395 and 323 of the Indian Penal Code, one assessor gave it as his opinion that none of them were guilty: the other assessor finding some of them not guilty. The Additional Sessions Judge convicted and sentenced all the accused, whereupon the objection was taken, on appeal, in the High Court, that the trial should have been by jury and not with the aid of assessors and that the conviction should therefore be set aside. The objection was

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not taken at the trial:—*Held*, that the omission to take objection to the trial before the Court had recorded its findings was fatal to the contention now urged that the trial was invalid. *Held further*, that even assuming that objection had been duly taken, the offences connected with the outbreak had been rightly treated as a "class of offences," and that it was competent to the Government, with the consent of the Governor-General in Council, to revoke the previous notification so far as it related to that class. QUEEN-EMPRESS v. GANAPATHI VANNIANAR, 23 M. 632=2 Weir 331 and 709 ... 814

(11) *S. 271—Evidence Act—Act I of 1872, s. 30—Confession by one of several persns jointly tried for the same offence—Plea of guilty by person so confessing—Discretion to continue trial after plea of guilty.*—The trial of an accused person does not necessarily and if he pleads guilty. Under s. 271 of the Code of Criminal Procedure, where an accused pleads guilty "the plea shall be recorded," and the accused "may be convicted" thereon; but evidence may be taken in Sessions cases as if the plea had been one of "not guilty," and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration under s. 30 of the Indian Evidence Act, 1872, as against any other person who is being jointly tried with him for the same offence. A trial does not strictly end until the accused has been either convicted or acquitted or discharged, QUEEN-EMPRESS v. CHINA PAVUCHI, 23 M. 151=2 Weir 335 and 747 ... 503

(12) *S. 436—Fresh inquiry after improper discharge of accused persons—Jurisdiction of Sessions Judge after acquittal*:—Charges under s. 304 and 147 of the Indian Penal Code were brought by the Police against certain accused in the Court of a Deputy Magistrate, who took all the evidence for the prosecution but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence insufficient to support the charges, altered them to charges under ss. 325 and 147 of the Indian Penal Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge considering the alteration in the charges improper at such a stage ordered a fresh inquiry into the offence:—*Held*, that the Sessions Judge had exercised a jurisdiction not conferred upon him by law and that his order for a fresh inquiry must be set aside. QUEEN-EMPRESS v. HANUMANTHA REDDI, 23 M. 225=2 Weir 543 ... 560

(13) *S. 488—Usage in Malabar—Order for maintenance of child—Marumakkatayam law as observed by Nayar community.*—The father of a child born during the continuance of the form of marriage known as sambandham, under the Marumakkatayam law as observed by the Nayar community in Malabar, is liable to have an order made against him for its maintenance, under s. 488 of the Code of Criminal Procedure. VENKATAKRISHNA PATTER v. CHIMMUKUTTI, 22 M. 246=2 Weir 625 ... 175

Cross Decrees.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 121.

Custom.

See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 23 M. 268.

Damages.

(1) See BREACH OF CONTRACT, 23 M. 441.

(2) See LIMITATION ACT (XV OF 1877), 23 M. 24.

(3) See SPECIFIC RELIEF ACT (I OF 1877), 22 M. 251.

Debtor and Creditor.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 184.

Declaratory Decree.

(1) See ACT I OF 1876 (ASSESSMENT OF LAND REVENUE, MADRAS), 22 M. 270.

(2) See COURT FEES ACT (VII OF 1870), 23 M. 490.

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See SPECIFIC RELIEF ACT (I OF 1877), 23 M. 385.

Deposit.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 510.

Devastanam Committee.

(1) See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 22 M. 481.

(2) See HINDU LAW (RELIGIOUS ENDOWMENTS), 22 M. 361, 23 M. 483.

Dharmakarta.

(1) See HINDU LAW (RELIGIOUS ENDOWMENTS), 23 M. 483.

(2) See SPECIFIC RELIEF ACT (I OF 1877), 22 M. 189.

Divorce.

See DIVORCE ACT (IV OF 1869), 22 M. 328.

Divorce Act (IV of 1869).

Ss. 12, 13—*Divorce—Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion—Drunkenness of wife—Leaving wife without provision for maintenance.*—Evidence adduced at the hearing of a petition by a husband for the dissolution of his marriage with his wife showed that the petitioner had left his wife voluntarily on account of her drunkenness; that he had not maintained her or contributed to her support since so leaving her; that he had no reason for believing that his wife had committed adultery during the time he had lived with her; and that she had (if the evidence were believed) been leading an immoral life since the petitioner had so left her. The petition was dismissed, whereupon the petitioner appealed: *Held*, that the petitioner having deserted his wife without just or reasonable cause, and without making any provision for her, had conduced to the adultery (if any had been committed), and the petition had been rightly dismissed, X v. X, 22 M. 328 ... 234

Document.

(1) *Construction of—Alteration in material part—Effect of alteration as vitiating document—Vesting of interest by execution of mortgage instrument.*—By an agreement entered into between plaintiff and defendants' predecessors in title plaintiff undertook to sell and convey certain lands to the purchasers and to allow half the purchase money to remain at interest for three years on security of the lands sold. Plaintiff's mother was alive, as also his son, who was then a minor. In order to protect the purchasers from any claims by the said mother or son as against the lands so agreed to be sold plaintiff further agreed to give the purchasers a bond indemnifying them from any such or other claims. Plaintiff in pursuance of the said agreement duly executed a conveyance of the lands; he also gave the purchasers an indemnity in respect of claims by his mother as against the lands. The purchasers executed a mortgage over the lands in plaintiff's favour, in which the indemnity to be furnished by plaintiff was at first referred to in general terms, but the document concluded with the words, "a security should be furnished for this sum on account of the minor only." The balance of purchase money so secured not having been paid plaintiff brought a suit for the sale of the mortgaged land and before doing so tendered an indemnity protecting the defendants against any claims that might be made as against the lands by the plaintiff's said minor son. It was found that the words "for the minor only" had been added to the mortgage instrument after its execution and without the mortgagor's consent. On its being contended that the alteration was a material one and vitiated the document, and that the suit, being based on the altered document, must fail; and that the tender of a general guarantee as originally agreed upon was a condition precedent to the plaintiff's right to sue: *Held* (O'FARRELL, J., dissenting), that on the execution of the mortgage instrument an interest in the property comprised therein at once became vested in the plaintiff; that such interest was not and could not have been divested from him by the subsequent addition of the words

Document—(*Concluded*). PAGE

referred to, and that in asking for the sale of the land plaintiff was seeking to enforce, not a right resting on the contract or covenant, but one arising by operation of law with reference to the vested interest created by the instrument having been executed ; but though reference was made in the plaint to the provisions relating to the mortgage instrument in its altered state, such reference was not an essential part of plaintiff's cause of action, and that the suit was not necessarily based on the altered instrument ; that the execution of a security bond in terms of the mortgage instrument before it was altered was not a condition precedent and the suit was sustainable though no such security had been given before the institution of the suit ; and that (the question of damages not arising) plaintiff was entitled to a decree on the mortgage instrument, which would also provide that he must furnish a proper security bond before an order absolute would be passed. *Per* COLLINS, C.J., and BENSON, J.—(in the order calling for a finding). That the mortgage instrument having provided for security to be given by plaintiff in general terms, the addition of the words "for the minor only" restricted the liability of the property to be given by plaintiff as security to claims made by the said minor son. It diminished the guarantee to be given by plaintiff against claims by the mother or others. It was thus an alteration in a material part of the document and would vitiate it as a basis for the plaintiff's suit unless the plaintiff could show that the alteration had been made with the consent of the mortgagors, who executed the document. *Per* O'FARRELL, J.—That inasmuch as the suit was based not on the transferred right but on the altered document and as no obligation had as yet attached under the unaltered document, the suit should be dismissed ; that the defendants' liability was contingent upon the prior execution by plaintiff of a general guarantee and not of the limited one which he, relying on the fraudulent alteration, had tendered ; that where an agreement has, as to one of the parties, been wholly executed, the altered contract may be given in evidence of the correlative obligations incurred by the other party ; but that here the agreement so far as it related to repayment of the purchase money was executory and contingent upon the fulfilment by the plaintiff of the prior obligation to execute a proper guarantee ; and that a conditional decree upon a proper security bond being executed could not be given. SUBRAHMANIA AYYAN *v.* KRISHNA AYYAN, 23 M. 137=9 M.L.J. 368 ... 493

(2) See EVIDENCE, 23 M. 92.

(3) See EVIDENCE ACT (I OF 1872), 23 M. 499.

(4) See MORTGAGE (GENERAL), 23 M. 114.

Drain.

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 23 M. 213.

Ejectment.

(1) *Defence of right of permanent occupancy*—Onus *of proof*—*Defence of special character*.—In suits by the trustee of a temple to recover possession of certain lands with mesne profits, defendants set up in defence that they were absolute owners of the land in question, or, at least, were entitled to rights of permanent occupancy. In support of the latter contention they relied, *inter alia*, upon certain pymash documents, which contained the word *ulavadai* the use of which term, they contended, established the alleged right of permanent occupancy : *Held*, (1) that where the occupier of land resists a suit for ejectment by setting up a claim of a right of permanent occupancy, the *onus* of establishing such a right lies on the defendant, inasmuch as by it he seeks to derogate from the ordinary incidents of property ; and (2) that the right expressed by the term *ulavadai* (which means an act or right of ploughing or cultivating lands) cannot be assumed to be a permanent right. RANGASAMI REDDI *v.* GNANA SAMMANTHA PANDARA SANNADHI, 22 M. 264 ... 188

(2) *Suit*—*Lands held on amaram tenure resumable at will on reasonable notice*—*What amounts to reasonable notice considered*.—A village and its hamlets had been given by a plaintiff's ancestors to the ancestors of the defendants on amaram service. Plaintiff now required the defendants to hand

Ejectment—(*Concluded*). PAGE

over the land, and had served two notices on them to that effect. The first of such notices had been served less than three months before the end of a fasli; in the second, suit was threatened in default of reply within ten days: *Held*, that lands held on amaram tenure are resuamble, and that the defendants had no permanent right of tenure. *Held further*, that before such resumption of lands can take place reasonable notice must be given; and that the notices which had been served were insufficient. NARASAYYA v. VENKATAGIRI RAJAH, 23 M. 262 ... 585

(3) See COURT FEES ACT (VII OF 1870), 23 M. 84.

(4) See EVIDENCE, 23 M. 89.

(5) See HINDU LAW (RELIGIOUS ENDOWMENTS), 22 M. 117.

Emoluments.

(1) See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 23 M. 571.

(2) See ACT III OF 1895 (HEREDITARY VILLAGE OFFICES, MADRAS), 23 M. 492.

(3) See LIMITATION ACT (XV OF 1877), 22 M. 351.

Enfranchisement.

See INAM, 22 M. 204.

Eviction.

See KASAVARGAM TENANCY, 22 M. 116.

Evidence.

(1) *Admissibility of receipt showing payment of money—Exclusion for want of registration—Document proving extinction of mortgage right.*—Plaintiff purchased a portion of certain land from two persons who owed him money on mortgage bonds, and took a mortgage over another portion, taking possession of the whole estate as security for the balance of his debt. He then permitted defendants to purchase a portion and to take a mortgage over the remainder of the lands, and gave them possession, on condition that they should pay to him the said balance that was due. Plaintiff, alleging that defendants had failed to pay him the balance, now filed this suit to recover possession of the land. Defendants contended that the balance had been duly paid, and in support of that contention produced a receipt which, however, was held to be inadmissible in evidence for want of registration. Oral evidence of the alleged payment was also excluded: *Held*, that the receipt had been wrongly excluded. It did not purport to extinguish the mortgage right, and even if it did so it was receivable as evidence of the payment, oral evidence as to which was also admissible. APPAMMA NAYURALU v. RAMANNA, 23 M. 92=9 M L.J. 124 ... 458

(2) *Sale of land not joined in by all coparceners—Partial application of cosideration towards debt binding on all—Suit for ejectment—Rights of purchaser.*—In a sale of land the consideration was expressed to be the discharge, by the purchaser, of a debt owing by the vendor and secured by mortgage on the land, and of sundry other debts which had been incurred by the vendor for family necessity. In a suit for ejectment by the vendor's co-parceners, who were minors at the time and had not joined in the sale, it was held that there had been no legal necessity for the sale, which was accordingly declared to be not binding on the plaintiffs. It was, however, found that a portion of the consideration had been applied to the discharge of a mortgage-debt which would have been also binding on the plaintiffs. On its being contended that plaintiffs' interest in the property comprised in the sale should be held liable to the extent of their share of the mortgage-debt: *Held* that, in making the purchase, defendant was, with reference to plaintiffs, a mere volunter, and could not, as against them, claim by way of equity a charge on their shares even though part of the consideration had been applied towards the discharge of their joint debt; also that if a purchaser wishes to stand by a sale which is only partially valid, he must be content with the vendor's share; and that if he wishes to repudiate the transaction altogether his only

Evidence—(*Concluded*). PAGE

remedy is by suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed. MARAPPA GAUNDAN v. RANGASAMI GAUNDAN, 23 M. 89 ... 456

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 447.

(4) See EVIDENCE ACT (I OF 1872), 22 M. 491.

(5) See LIMITATION ACT (XV OF 1877), 23 M. 10.

(6) See STAMP ACT (I OF 1879), 23 M. 49.

(7) See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 318.

Evidence Act (I of 1872).

(1) S. 30—Confession by one of several persons jointly tried for the same offence—Plea of guilty by person so confessing—Crim. Pro. Code—Act V of 1898, s. 271—Discretion to continue trial after plea of guilty. See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 151.

(2) Ss. 30, 114, Illus (*b*)—*Joint trial—Confession of co-accused—Plea of guilty by one—Evidence.*—On the trial of more persons than one, jointly, for the same offence, where one of them pleads guilty, the person so pleading is no longer on his trial and cannot be treated as being jointly tried with the others. A confession by that person affecting himself and others cannot, therefore, be taken into consideration as against such others under s. 30 of the Indian Evidence Act. QUEEN-EMPRESS v. LAKSHMAYYA PANDARAM, 22 M. 491=2 Weir 746 ... 351

(3) Ss. 35, 74 (1) (iii)—*Document purporting to be a certified copy of a will taken from the Protocol of record in Ceylon—No proof that it had been made from or compared with the original—Inadmissibility of document.*—In support of a claim instituted in a Court in British India for a share in her deceased father's estate, plaintiff tendered in evidence a document which purported to be a certified copy of a will executed by her late father at Colombo, where he was said to have been at the date of the execution of the alleged will. The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence. It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office. No evidence was tendered before the Subordinate Judge that the copy had been made from and compared with the original. On the question of the admissibility in evidence of the said document. *Held*, that it was inadmissible; that it was not a public document within the meaning of s. 74 (1) (iii) or (2) of the Evidence Act, and that in the absence of evidence that it had been made from and compared with the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable. Whether s. 35 of the Evidence Act applies to an entry in a public register or record kept outside British India—*Quære.* PONNAMMAL v. SUNDARAM PILLAI, 23 M. 499=10 M.L.J. 310 ... 750

(4) S. 92, Proviso 4—'*Oral agreement*'—*Variation of terms of registered instrument.*—The lessor of certain land, held by the lessee under a registered deed of lease, agreed to a reduction in the rent. The agreement was not reduced to writing, but rent was thereafter paid and accepted at the reduced rate. On a suit being brought to recover arrears of rent at the rate reserved in the registered deed: *Held*, that under s. 92 proviso 4, of the Evidence Act, an agreement to accept a reduced rent cannot be implied or inferred from the acts and conduct of the parties; and an unwritten agreement, if so implied, amounts to an oral agreement within the meaning of the proviso. The word 'oral' is used in s. 92, proviso 4. of the Evidence Act, in the sense of being not committed to writing, and the words 'oral agreement' in that section include all unwritten agreements, whether arrived at by word of mouth or otherwise. MAYANDI CHETTI v. OLIVER, 22 M. 261= 8 M.L.J. 196 ... 186

(5) S. 122—*Privileged Communication—Letter from husband to wife—Letter taken on search of wife's house.*—On a trial for the offence of breach of

Evidence Act (I of 1872)—(*Concluded*). PAGE

trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent, bythe accused to his wife at Pondicherry and had been found on a search of her house made there by the Police. *Held*, that the letter was admissible in evidence against the accused. QUEEN-EMPRESS v. DONAGHUE, 22 M. 1=2 Weir 778 ... 1

Execution of Decree.

(1) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 22 M. 194.

(2) See APPEAL (GENERAL), 23 M. 494.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 119, 182, 268, 286, 295, 320, 23 M. 121, 227, 568.

(4) See LIMITATION ACT (XV OF 1877), 22 M. 448.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 347, 23 M. 377.

Execution Proceeding.

(1) See APPEAL (GENERAL), 23 M. 294.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 256.

Execution Sale.

Sale of right, title and interest of zamindar—Impartible primogenitary zamindari—Interest taken by purchaser.—In 1873 and 1876, portions of an impartible primogenitary zemindari, which were in the possession of a lessee from the zemindar, were attached and brought to sale in execution of decrees against the zemindar. The purchase money was very inadequate as the price of the full ownership of the property (subject to the lease), but what was sold according to the sale certificate was the right, title and interest of the judgment-debtor without any restriction. The judgment-debtor died in 1881, and the lease having run out, the purchaser now sued in 1893 for possession : *Held*, that the plaintiff must be taken to have purchased an interest for the life only of the judgment-debtor. ABDUL AZIZ KHAN SAHIB v. APPAYASAMI NAIKAR, 22 M. 110 ... 77

Firm.

See ACT I OF 1884 (CITY OF MADRAS MUNICIPAL, MADRAS), 23 M. 529.

Foreign Judgment.

(1) *Suit on—Judgment not for an ascertained sum of money—Maintainability of suit.*—Plaintiff, having obtained a decree in a District Court in the province of Mysore, applied to that Court, in execution of the said decree, for an account of certain proceeds alleged to be due to him under the decree. The application having been refused, and the refusal being upheld by the Chief Court of Mysore, plaintiff now brought a suit for an account in the District Court of South Canara : *Held*, that as the foreign judgment on which the action purported to be brought was not a judgment for an ascertained sum of money, it constituted no foundation for an action. SMITH v. COELHO, 22 M. 382 ... 275

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 458.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 449.

Forma Pauperis.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 73.

Growing Crops.

See ACT III OF 1895 (HERDITARY VILLAGE OFFICES, MADRAS), 23 M. 492.

Guardian ad litem.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 187, 378.

(2) See CONTRACT ACT (IX OF 1872), 22 M. 314.

Hereditary Managers. PAGE

See LIMITATION ACT (XV OF 1877), 23 M. 271.

Hereditary Office.

See LIMITATION ACT (XV OF 1877), 22 M. 351.

Hereditary Office-holder.

See INAM, 22 M. 204.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—CUSTOM.
4.—DEBTS.
5.—IMPARTIBLE ESTATES.
6.—INHERITANCE.
7.—JOINT FAMILY.
8.—MAINTENANCE.
9.—MARRIAGE.
10.—PARTITION.
11.—RELIGIOUS ENDOWMENTS.
12.—REVERSIONERS.
13.—SUCCESSION.
14.—WIDOW.
15.—WILL.
16.—WOMAN'S ESTATE.

———1.—Adoption.

(1) *By widow —Assent of a majority of sapindas—Presumption of* bona fides*—Degree of relationship of sapindas to husband of adopting widow* —A widow having survived her son, (who died unmarried and issueless), succeeded to his estate, and made an adoption with the assent of three out of the four of her late husband's sapindas who were living at the time and who had been divided from the deceased and from each other. The fourth sapinda, who had refused his consent (apparently without giving reasons for such refusal), now impugned the adoption on the ground that the consent of all existing sapindas was necessary to render it valid, at all events when all stood in the same degree of relationship to the husband of the adopting widow, as was the case here: *Held*, that the assent of every existing sapinda in such a case was not necessary: and that that of a majority would suffice. Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on *bona fide* grounds. If, however, it be shown that the majority gave or withheld their assent from improper considerations such assent or dissent will be of no avail to the party relying on it. Any distinction based upon the degree of relationship as to whose assent is or is not essential becomes immaterial. VENKATAKRISHNAMMA v. ANNAPURNAMMA, 23 M. 486=10 M.L.J. 73 ... 741

(2) *Preference of the adoptive mother, in the inheriting of the family estate through the adopted son, over a senior co-wife.* —A Hindu, having two wives, adopted a son in conjunction with the co wife who was the junior in marriage of the two, having chosen her to be present at the adoption with himself. The husband next died; and after him the adopted child, having inherited the impartible family estate, also died. The two widows survived them both: *Held*, affirming the decisions of the Courts below, that the junior co-wife, having taken part in the adoption by her husband at his selection, inherited the impartible family estate upon the death of the adopted son, in preference to the co wife who was senior in marriage, but who had not been conjoined in the adoption. ANNAPURNI NACHIAR v. FORBES, 23 M. 1 (P. C.)=1 Bom. L.R. 611=3 C.W.N. 730=26 I.A. 246=9 M.L.J. 209=7 Sar P.C.J. 591 ... 395

(3) *Validity of the adoption of the only son of his natural father.*—On the general question as to the validity by Hindu Law of the adoption of an only son of his natural father, decided in one judgment upon those two appeals: *Held*, that such an adoption is not contrary to Hindu Law, but valid. The autho-

Hindu Law—1.—Adoption—(*Concluded*). PAGE

rity of a widow, in reference to adoption, not being identical in different schools of Hindu Law, it was *held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widowed mother that unless there has been some express prohibition by the husband, the wife's power, with the concurrence of sapindas, where that is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband. SRI BALUSU GURULINGASWAMI v. SRI BALUSU RAMALAKSHMAMMA (MAD.) RADHAMOHUN v. HARDAI BIBI (ALL.). 22 M. 398 (P.C.)=21 A. 460=1 Bom.L.R. 226=3 C.W.N. 427=9 M.L.J. 67=26 I.A. 113=7 Sar. P.C.J. 330 ... 386

(4) See HINDU LAW (IMPARTIBLE ESTATES), 22 M. 383.

——— **2.—Alienation.**

(1) *Division by co-widows of their late husband's estate—Alienation by one after the division—Validity of alienation as against surviving widow on decease of alienor.*—A Hindu died, leaving two widows who divided his property by a formal registered partition deed, under which each took possession of her share, with powers of alienation over the property comprised in it. Certain alienations were made by one widow, who subsequently died. On the surviving widow claiming the whole of her late husband's property, including the portions so alienated: *Held*, that there is no legal obstacle to prevent one of two co-widows from so far releasing her right of survivorship as to preclude her from recovering from an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. A widow may alienate for her life any estate which comes to her by virtue of her widowhood, and may therefore enter into such a deed as will preclude her from recovering during her life property which she has alienated, to the full extent of such alienation provided that it does not extend beyond her life interest. RAMAKKAL v. RAMASAMI NAICKAN, 22 M. 522=9 M.L.J. 101 ... 373

(2) *Of family property—Right of son whose share is unaffected—Purchaser's equity for refund of purchase money.*—There is no equity in favour of the purchaser of property belonging to a Hindu family entitling him to a refund of purchase money paid in respect of a share afterwards held to have belonged to a son and to be unaffected by the sale. The words "on payment" occurring in the last sentence of the judgment in 16 M. 76 do not appear in the original judgment, and are due to a printer's error. VIRABHADRA GOWDU v. GURUVENKATA CHARLU, 22 M. 312 ... 222

(3) See HINDU LAW (IMPARTIBLE ESTATES), 22 M. 383.

(4) See HINDU LAW (WILL), 23 M. 256.

(5) See HINDU LAW (WOMAN'S ESTATE), 22 M. 113.

——— **3.—Custom.**

(1) See HINDU LAW (IMPARTIBLE ESTATES), 22 M. 515.

(2) See HINDU LAW (PARTITION), 22 M. 297.

——— **4.—Debts.**

(1) *Decree against father—How far binding against sons—Question of fact—Acquiescence by son in father's defence.*—In a suit against a Hindu father a decree had been obtained, the execution of which interfered with land belonging to the undivided family of which the father was the manager and his two sons members. The sons had not been joined as defendants in that suit, though they were of age at the time; but they had known of it and had not objected to family funds being spent in its defence. On their suing for an injunction to restrain the decree-holder from executing the decree, on the ground that it was not binding on them: *Held*, that the question how far the sons are bound by a decree against the father must be decided with reference to the particular facts of each case. If the father is manager and the question in issue is one which equally affects him

Hindu Law—4,—Debts—(*Continued*). PAGE

and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested with the father, since in that case it will be presumed that the father represents their interests. The sons will still more clearly be bound if, being of full age, and knowing of the litigation, they acquiesce in the conduct of it by the father. KUNJAN CHETTI v. SIDDA PILLAI, 22 M. 461 ... 330

(2) *Incurred by managing members of a joint family—Personal liability of other members.*—Three brothers, being the managing members of their joint Hindu family, borrowed money from the plaintiff for a family purpose. The plaintiff now sued the survivor of the brothers and the sons of all three to recover the amount of the debt, and he obtained a decree that the debt was recoverable from the family estate and also personally from the survivor of the three borrowers:—*Held*, on appeal, that the plaintiff was not entitled to a personal decree against the other defendants. CHALAMAYYA v. VARADAYYA, 22 M. 166=9 M.L.J. 3 ... 118

(3) *Liability of a divided son where debt was incurred by the father before partition—Decree against father and execution proceedings against son's property in father's life time.*—In 1890 a person subject to the Hindu Law incurred a debt for purposes that were neither illegal nor immoral. In 1891 he divided the family property with his son, and a house fell to the son's share under the division. In 1893 the creditors sued the father in respect of the debt, and, having obtained a decree, sought, in the father's life-time, to make the son's house liable in execution thereof. *Held*, that property taken by a son in partition cannot be seized in execution in respect of an unsecured personal debt of his father, even though the debt has been incurred before the partition, provided that the partition is not shown to have been made with a view to defraud or delay creditors. KRISHNASAMI KONAN v. RAMASAMI AYYAR, 21 M. 519=9 M.L.J. 127... 371

(4) Promissory note by member of an undivided Hindu family—Liability of other member—Negotiable Instruments Act—Act XXVI of 1881, ss. 4, 26, 27: See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 23 M. 597.

(5) *Rights of Hindu debtor's son after attachment and sale—Transfer of Property Act—Act IV of 1882, s. 99—Civ. Pro. Code—Act XIV of 1882, s. 244—Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share.*—In 1848 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878 plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought, in 1889, in respect of them, and a decree obtained, which contained a provision that the right to the annuity should be liable to be proceeded against for the amount so due. Plaintiff was born in 1891. In 1893 an application was made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity: *Held*, (1) that if there was in fact a decree for sale, plaintiff, as son of the judgment-debtor, born after the date of the decree, though before the sale, could not question the sale; nor would any right of redemption be left to the plaintiff: (2) that inasmuch as the decree was, on its true construction, not a decree for sale, the case was one of attached property being sold at the instance of the mortgagee in execution of a money decree, and so within the prohibition of s. 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale; and in the absence of such decree the sale is prohibited; (3) that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained; (4) that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of s. 99; (5) that the suit was not barred by S. 244 of the Code of Civil Procedure, and that plaintiff was entitled to a decree for the redemption of

Hindu Law—4.—Debts—(*Concluded*). PAGE

his share. MUTHURAMAN CHETTI v. ETTAPASAMI, 22 M. 372=9 M.L.J. 113 ... 265

(6) *Son's liability for father's debts in life-time of father—Suit against father and sons—Decree against sons*:—A creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons: *Held*, that the plaintiff could have prosecuted his claim against the sons in that suit, and have obtained a decree making their shares in the family property liable for the father's debt. RAMASAMI NADAN v. ULAGANATHA GOUNDAN, 22 M. 49, F.B.=8 M.L.J. 312, ... 37

(7) See LIMITATION, 23 M. 292.

———5.—Impartible Estate.

(1) *Customary law of inheritance of certain zamindaris in and about Madura.*—The principal issue on this appeal was whether the defendant was entitled—,by a custom prevailing in the Saptur zamindari, and in other zamindaris held by zamindars of the same caste connection in Madura, and neighbouring districts, to inherit the impartible raj estate of that, the Saptur, zamindari in preference to the plaintiff. Both the parties were sons of the late zamindar, being half-brothers, sons of their father by different mothers. The plaintiff was the elder of the two, but the mother of the younger had been married by the zamindar before his marriage with the mother of the elder. In virtue of his seniority the elder brother claimed. The younger defended the suit on the title that his mother's marriage with the Raja had preceded the marriage of the plaintiff's mother, alleging the custom to prevail in the zamindari as above stated. The Courts below, having considered the evidence, found that the custom was proved, in concurrent judgments: *Held*, that no error having been shown, and the Courts having decided with reference to what was laid down in 14 M.I.A., 570 as to the requisites for the proof of such a custom, the findings below were conclusive as to its existence. SUNDARALINGASAMI KAMAYA NAIK v. RAMASAMI KAMAYA NAIK, 22 M. 515 (P.C.)=1 Bom. L.R. 550=26 I.A. 55=7 Sar. P.C.J. 531 ... 369

(2) *Zamindari—Alienation by the owner by his will—Adopted son's claim—False description of the legatee—Designated person.*—A zamindari in Madras, by custom descending to a single heir by primogeniture, and impartible, is not inalienable, in virtue only of its impartibility, in the absence of proof of a custom having the force of law, or of some tenure attaching to the zamindari, rendering it inalienable, (15 I.A. 51=10 A. 272), a case which is applicable in Madras, decides that where there is an impartible estate descending by primogeniture, and in other respects the Mitakshara governs the rights of the parties, the eldest son does not become a co sharer with his father; and decides that the inalienability of the estate would depend upon custom which must be proved, or in some cases upon the nature of the tenure attaching to the zamindari: *Held*, that there was no proof in this case of a custom which the Courts could recognize, as having the force of law, not resting on the Mitakshara, but argued to have been established by a long course of decision in the Madras Courts, against the validity of absolute alienation of an impartible zamindari: *Held*, also, that this was not a case to which should be applied the doctrine that where there is a long course of decision that course should be supported, and the law not altered: And *held*, that, inasmuch as here there was no coparcenary subsisting between the zamindar and any member of his family, in the estate, the zamindar had power to alienate it; and that he might exercise that power by will. A Hindu adopting a son does not thereby deprive himself of any power that he may have to dispose of his property by will. There is no implied contract, on the part of the adopter, in consideration of the gift of his son by the natural father, not to make a will. A bequest was made to a person whom the testator falsely described as his "aurasa," or "naturally-born" son. This false description, not involving any condition that the legatee should be the testator's son, did not invalidate the bequest to the designated person. SRI RAJA RAO VENKATA SURYA

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MAHIPATI RAMA KRISHNA RAO BAHADUR v. THE COURT OF WARDS, 22 M. 383 (P.C.) = 1 Bom. L.R. 277 = 3 C.W.N. 415 = 26 I.A. 83 = 7 Sar. P.C.J. 481 = 9 M.L.J. Sup. 1 ... 277

(3) See CIV. PRO. CODE (ACT XIV OF 1882). 22 M. 538.

(4) See EXECUTION SALE, 22 M. 110.

———6.—**Inheritance.**

(1) Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit—Caste Disabilities Removal Act—Act XXI of 1850. s. 1.—See ACT XXI OF 1850 (CASTE DISABILITIES REMOVAL. 23 M. 171

(2) *Of property left by ascetic—Rules relating to ascetic persons of the Sudra caste.*—It being clearly implied by all the authorities that a Sudra cannot enter the order of yathi or sanyasi, the devolution of property left by a deceased person of the caste referred to, who has become an ascetic and renounced the world, is regulated by the ordinary law of inheritance, in the absence of proof of any general or special usage to the contrary. DHARMAPURAM PANDARA SANNADHI v. VIRAPANDIYAM PILLAI, 22 M. 302 ... 215

(3) *Sapindas tracing relationship to common ancestor through two females.*—The widow of a Hindu having acquired property from her husband, and having died issueless, without disposing of it, the plaintiffs claimed, as the heirs of the husband, to recover it from the defendants, who were the brother and sister of the widow. The plaintiffs were found to be the sons of the daughter's daughter of the husband's paternal grandfather:—*Held*, that inasmuch as plaintiffs were sapindas of the deceased husband, it was immaterial that their relationship to the common ancestor should have to be traced through two females. They must therefore be held to be his bandhus and as such entitled to succeed to the property left by the widow. VENKATAGIRI v. CHANDRU, 23 M. 123 ... 481

(4) *Sudras—Sons born of a kept woman entitled to equal shares with legitimate sons in partition the father so desiring.*—Sons born of a woman continuously kept by their father as a concubine (and whose connection with their father is neither adulterous nor incestuous), are, in the case of a Sudra's estate, entitled to equal shares with legitimate sons in a suit for partition, if it is the wish of the father that they should so participate. Clause 2 of Section XII, Chapter I, Part II, of the Mitakshara, does not refer alone to the self-acquired property of the father. KARUPPANNAN CHETTI v. BULOKAM CHETTI, 23 M. 16 ... 405

(5) See ACT XXI OF 1850 (CASTE DISABILITIES REMOVAL), 23 M. 171.

(6) See HINDU LAW (ADOPTION), 23 M. 1.

(7) See HINDU LAW (IMPARTIBLE ESTATE), 22 M. 515.

———7.—**Joint Family.**

(1) *Agreement between members of a Hindu family—Construction—Their estate managed by one in the relation of ordinary agent to principal—Liability to account.*—Three brothers of a joint Hindu family agreed that their estate should remain joint, excepting the share of a separated fourth brother, which was excluded. It was in the agreement that the eldest of the three should manage the family estate, and that after twelve years, and after an account rendered by him of the profit and loss, a division among them should be made: any one of them to obtain his share on giving up his portion of the profits. In a suit for partition commenced by one of the brothers and carried on by his representatives, the term having expired: *Held*, that the true construction was that the above was not a mere agreement to postpone partition, leaving the family status of the brothers uninterrupted, but was an agreement which put them on a new footing. Upon reference to several terms of the agreement it appeared that the elder had become liable on the footing of an ordinary agent, accountable for receipts and expenditure, and that he was not in the position of the managing member of a joint family liable only to account as to the then existing state of the property. RAJA SETRUCHERLA RAMABHADRA v. RAJA SETRUCHERLA VIRABHADRA SURYANARAYANA, 22 M. 470 (P.C.) = 1 Bom. L.R. 388 = 3 C.W.N. 533 = 26 I.A. 167 = 7 Sar. P.C.J. 510 ... 337

Hindu Law—7.—Joint Family—(*Concluded*). PAGE

(2) *Parties—Bond in favour of one undivided brother for the benefit of himself and others—Suit by promisee alone—Payment to younger undivided brother—Discharge—Onus of proof.*—In a suit on a bond executed by the deceased father of defendants in favour of the plaintiff, the defendants, while admitting the bond and the consideration for which it had been given, contended that inasmuch as plaintiff had four undivided brothers and the deed had been executed in his name for the benefit of himself and his brothers, the latter should have been joined as plaintiffs, and that plaintiff could not maintain the suit alone. They also pleaded payment to plaintiff's undivided younger brother, which payment they contended was binding on the plaintiff: *Held*, that plaintiff was entitled to sue for the family debt without joining his undivided brothers, the contract on which the suit was based being in plaintiff's sole name and not purporting to have been obtained on behalf of any others but himself. And that as to the payment pleaded, if true, plaintiff was, as regards the promisor, the only person *prima facie* entitled to payment; it therefore lay on the promisor to show that a payment to a third party was binding on the plaintiff, which has not been done. The contention that payment to any member of the family was by itself necessarily binding on the member who took the contract could not be supported. ADAIKKALAM CHETTI v. MARIMUTHU, 22 M. 326 = 9 M.L J. 31 ... 232

(3) *Suit by managing member on behalf of his undivided family, other members not being joined—Maintainability of suit.*—The managing member of an undivided Hindu family sued in his own name for the recovery of certain land and asked for a declaration that it belonged to the plaintiff's family. Plaintiff had an undivided brother, and there was no evidence that he assented to or acquiesced in the institution of the suit.—*Held*, that the plaintiff was not entitled to sue without making his brother, the other member of the undivided family, a party to the suit. ANGAMUTHU PILLAI v. KOLANDAVELU PILLAI, 23 M. 190 ... 532

(4) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 23 M. 458.

(5) See HINDU LAW (ALIENATION), 22 M. 312.

(6) See HINDU LAW (DEBTS), 22 M. 166.

(7) See HINDU LAW (MARRIAGE), 23 M. 512.

(8) See LIMITATION, 23 M. 292.

(9) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 22 M. 380.

(10) See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 207.

———8.—Maintenance.

(1) *Of son's widow—Self-acquired property—Property inherited from maternal grandfather*:—A Hindu died leaving property with his widow, of which a portion was self-acquired and the remainder had been inherited by him from his maternal grandfather. He had also, by will, devised certain items to his wife. His son, who had pre-deceased him, had also left a widow, who now claimed maintenance from her mother in-law: *Held*, that inasmuch as property inherited from a maternal grandfather is not self-acquired, the rule of non-liability for maintenance relating to self-acquired property ought not to be extended to property of this description, which was therefore liable to the maintenance claimed. *Semble*, that the moral obligation to support a son's widow, to which her father in law is subject, acquires, on his death, the force of a legal obligation as against his self-acquired assets in the hands of his heir; and that a testamentary disposition of such self-acquired assets, made in favour of volunteers by a person morally bound to provide maintenance, cannot affect the position of a party whose moral claim has become a legal right. RANGAMMAL v. ECHAMMAL, 22 M. 305 = 9 M.L.J. 14 ... 217

(2) *Right of discarded concubine to claim.*—A woman who has been kept by a man as his concubine for a number of years continuously and then discarded is not entitled under the Hindu Law to claim maintenance from him. RAMANARASU v. BUCHAMMA, 23 M. 282 = 10 M.L.J. 62 ... 599

(3) *Widow's second suit for maintenance—Enhancement of rate of maintenance—Res judicata.*—A Hindu widow in 1867 obtained a decree for maintenance

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against her husband's coparceners, but the decree created no charge on the land. The family estate having passed to a collateral relative the widow now sued him for maintenance at an increased rate with arrears, and asked for a charge on the estate alleging that prices had risen and that in other respects also circumstances had changed:—*Held*, that the decree in the suit of 1867, was not a bar to the present suit. BANGARU AMMAL v. VIJAYAMACHI REDDIAR, 22 M. 175 ... 124

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 361.

——9.—**Marriage.**

Liability of undivided brother of deceased Hindu to defray expenses of his niece's marriage—Improper refusal—Performance by widow Maintainability of suit brought by widow—Contract Act—Act IX of 1872, s. 69—"Person who is interested in the payment of money."—The defendant having improperly refused to perform the marriage ceremony of his niece, the daughter of his undivided brother (deceased), the widow of the latter herself performed the ceremony, borrowing money for the purpose, and sued her late husband's said brother (the defendant) to recover the amount expended on the marriage. On its being contended that defendant was under no obligation to provide for the expenses of his brother's daughter's marriage: *Held*, that defendant was liable, the marriage having been properly performed:—*Held, further*, that the suit was maintainable though it had been brought by the mother of the bride and not by the bride herself. *Semble*, that the mother was, within the meaning of s. 69 of the Indian Contract Act, interested in making the payment which had given rise to the action. It was not necessary for her to prove that she had been compelled to make it, or that she had made it at the defendant's request. VAIKUNTAM AMMANGAR v. KALLAPIRAN AYYANGAR, 23 M. 512=10 M.L.J. 111 ... 760

——10.—**Partition.**

(1) Civ. Pro. Code—Act XIV of 1882, S. 462—Authority of Counsel, vakils or other agents—Abandonment of issue—Scope of authority in conduct of litigation—Compromise — Impartible zamindari—Son's legal incompetence to intervene in the suit on the footing of the impartibility of the estate—Partial partition—Omission to include some joint properties in plaint in suit for partition where they can be ascertained and decree given. See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 22 M. 538.

(2) *Iluvans of Palghat—Custom relating to partibility of property—Tiyans.*—In a suit for partition amongst parties belonging to the caste of Iluvans of Palghat it having been contended that the ordinary Hindu Law relating to partibility of property had no application:—*Held*, that 17 M. 184 relating to the Tiyans could not be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that the Iluvans and the Tiyans had at one time been of one class. Upon the evidence adduced to the effect that the former class had for long been treating themselves as separate from the latter and that partition was enforced as a matter of right amongst the Iluvans, the Courts were entitled to find the custom relating to partibility among the Iluvans proved. VELU v. CHAMU, 22 M. 297 ... 212

(3) *Purchase by stranger from one of two daughters jointly entitled to their father's property—Decree for partition.*—A purchaser, having purchased certain property from one of two sisters jointly entitled to their deceased father's property, under the Hindu Law, re-sold it, whereupon the other daughter sued for a declaration that such sales were invalid as against her, and that the property might be restored to her and her sister, or that there might be a partition of it:—*Held*, that while one of two daughters cannot by any alienation alter the character of the daughter's estate so far as the right of survivorship or that of the reversioners is concerned, she may alienate her interest in the property, or have that interest taken and sold in execution of a decree against her. Also that, subject to the same condition, she may demand a partition of the property. KANNI AMMAL v. AMMAKANNU AMMAL, 23 M. 504=10 M.L.J. 253 ... 754

Hindu Law—10.—Partition—(*Concluded*). PAGE

(4) *Suit for partial partition—Family property available for partition at the time—Property mortgaged with possession to third party not included—Maintainability of suit.*—One of two undivided brothers composing a Hindu family sold the whole of a house, which was in fact joint family property, alleging family necessity in justification of the sale. The other brother subsequently sold his undivided half share to two persons who now sued as plaintiffs for partition and possession of one-half of the house. The family owned another house which had, however, for some time been mortgaged with possession to a third party and was not available for partition at the time. On the plea being raised that the suit was one for partial partition and could not be sustained:—*Held*, that the suit was maintainable. Inasmuch as the other house was mortgaged with possession to a third party and therefore no longer available for immediate partition, the suit was one for partition of the whole of the family property liable to partition at the time. KRISTAYYA v. NARASIMHAM, 23 M. 608 = 10 M.L.J. 141 ... 827

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 538.

(6) See HINDU LAW (DEBTS), 22 M. 519.

(7) See HINDU LAW (INHERITANCE), 23 M. 16.

———**11.—Religious Endowments.**

(1) *Devastanam Committee—Dismissal of dharmakarta by three out of five members of committee without meeting—Legality of such dismissal.*—The dharmakarta of a temple was suspended and dismissed from office in the following manner: one member of the devastanam committee consisting of five initiated an enquiry, received petitions and took evidence, submitting the results of his enquiry to two other members successively, the three signing an order calling upon the dharmakarta to present himself at the office for the purpose of an enquiry into certain charges laid against him. No date was fixed for the enquiry, and the two remaining members of the committee took no part in the proceedings. The dharmakarta took no notice of the order, whereupon the same three committee men signed and issued another resolution dismissing him from his post. This resolution was sent to the other two members of the committee, but was not signed by them: *Held*, that the dismissal was illegal. The dharmakarta, being the holder of an office, could only be removed from it by the corporate act of the committee generally. The acts of a corporation (to which the committee might be likened) must be performed at a meeting convened after due notice to all the members of the body; and though there might be exceptions to that rule, a case in which the matter to be decided involved the rights of third parties and a decision to their prejudice was one in which the rule should be enforced. THANDAVARAYA PILLAI v. SUBBAYYAR, 23 M. 483 = 10 M.L.J. 117 ... 789

(2) *Devastanam Committee—Grounds for removal from office—Errors of judgment on part of committee man.*—Mere error in judgment on the part of a member of a devastanam committee is not sufficient to disqualify him from continuing to hold such office. To justify the removal of such an office-holder, it must be shown that the further holding by him of the office is incompatible with the interests of the temple under the charge of the committee of which he is a member. The duty of a devastanam committee consists, primarily, in seeing that its endowments are appropriated to their legitimate purposes and are not wasted. It is not a part of the duty of such a committee to interfere with the trustees in matters relating to rituals. TIRUVENGADATH AYYANGAR v. SRINIVASA THATHACHARIAR, 22 M. 361 (F.B.) = 10 M.L.J. 126 ... 653

(3) Endowed property—Hereditary managers—Void alienation—Adverse possession—Limitation Act—Act XV of 1877, s. 28, sch. II, arts. 124, 144. See LIMITATION ACT, XV OF 1877, 23 M. 271.

(4) *Suit for ejectment of a jeer as being illegally appointed—Prayer for appointment of a new jeer—Elective office.*—The jeer of a mutt died in 1888 and the defendant assumed office as his successor. The plaintiffs, who were disciples of the mutt, asserting in the plaint that the office of the jeer was elective, but without having held an election, brought a suit to eject the

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defendant and to have a new jeer elected or appointed by the Court and placed in possession of the properties of the institution. It was alleged both that the defendant had not been duly appointed to be jeer and also that he was disqualified for that office by immorality and otherwise: *Held*, that the suit was not maintainable. SRINIVASA SWAMI v. RAMANUJA CHARIAR, 22 M. 117=8 M.L J. 190 ... 82

(5) Suit relating to—Civ. Pro. Code—Act XIV of 1882, s. 30—Suit by worshippers—No leave to sue—Non-joinder of Advocate-General Maintainability of suit. See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 28.

(6) *Trustee's title barred by adverse possession as against his predecessor—Limitation.*—The holder of the office of trustee in a temple succeeded to that office in 1893. His predecessor had remained in office for over twelve years, but had never sued for the recovery of certain lands. A suit being now brought to recover the said lands on the ground that they provided the emoluments of the office of meikaval in the temple: *Held*, that the suit was barred by limitation, the adverse possession held during the previous office-holder's time barring his successors. CHIDAMBARA CHETTI v. MINAMMAL, 23 M. 439=9 M.L J. 8 ... 708

———12.—Reversioners.

See HINDU LAW (WIDOW), 22 M. 126.

———13.—Succession.

Succession Certificate Act—Act VII of 1889, s. 4—Suit by person claiming property of undivided family by right of survivorship—Succession certificate. See SUCCESSION CERTIFICATE ACT (VII OF 1889), 22 M. 380.

———14.—Widow.

(1) *Decree for mesne profits of her late husband's land in favour of his widow—Assignment of decree—Execution proceedings by assignee—Validity of assignment.*—The widow of a deceased Hindu, having been kept out of possession of land forming portion of her late husband's estate, obtained a decree for possession thereof, and for mesne profits. She assigned the decree for mesne profits and subsequently died. Upon the assignee attempting to execute the decree in respect of mesne profits, the reversionary heirs contended that he had no right to do so on the ground that his assignor, the widow, could not alienate the mesne profits so as to enure beyond her lifetime: *Held*, that the right to mesne profits under a decree is not immoveable property and that the decree was validly assigned. SAMINATHA PILLAI v. MANIKKASAMI PILLAI, 21 M. 356 ... 254

(2) *Duration of a grant held by a Hindu widow made to her by her husband in his lifetime.*—On the distribution of compensation under the Land Acquisition Act, 1870, the title of a widow to a village, she alleging it to be her property by absolute right, as a jaghir granted to her by her husband, came into contest. Her late husband's adopted son, being now possessed of the zemindari within which the village was disputed her right, alleging that the grant had been only for her maintenance, and claiming the whole compensation. The terms of the grant, if any, had been expressed, were unknown. No written grant was produced. The Judicial Committee pointed out that an inquiry, directed by the Appellate Court below, as to whether a local custom existed for zemindars to grant to their wives for life only, and if such custom was valid, was inappropriate; inasmuch as no custom at all, in its legal sense of something exceptional to the general law, was in question. The power of the husband as zemindar to have made such a grant for life, or for more, was not in dispute. All that was known was that the widow had received rents for about twenty-six years. There was no sufficient evidence for holding that the village had been alienated in perpetuity. The judgement of the District Judge, dividing the compensation equally between the parties, was maintained the widow being treated as holding for life. SRI BRAJA KISORA DEVU GARU v. SRI KUNDANA DEVI PATTA MAHADEVI GARU, 22 M. 431 (P.C.)=1 Bom. L.R. 287=26 I.A. 66=9 M.L.J. 157=7 Sar P.C.J. 528 ... 303

Hindu Law—14.—Widow—(*Concluded*). PAGE

(3) *Lessee from widow—Quarries worked for purposes of State Railway—Compensation money.*—Land inherited by a widow from her husband was leased by her. The authorities of a State Railway worked quarries on part of it and Government paid Rs. 5 000 as compensation to the lessee. The reversionary heirs sued to establish their right to the money: *Held*, that the money paid by Government whether regarded as the price of stone bought or compensation for wrong done should be regarded as part of the produce of the estate, and should not be treated as part of the estate itself or as proceeds of the conversion of part of it into money. The right of a widow to work quarries on land inherited from her husband considered. SUBBA REDDI v. CHENGALAMMA, 22 M. 126=9 M.L J. 19 ... 89

(4) See ACT XXI OF 1850 (CASTE DISABILITIES REMOVAL), 23 M. 171.

(5) See HINDU LAW (ADOPTION), 23 M. 486.

(6) See HINDU LAW (ALIENATION), 22 M. 512.

(7) See HINDU LAW (MAINTENANCE), 22 M 305.

(8) See HINDU LAW (MARRIAGE), 23 M. 512.

(9) See HINDU LAW (WILL), 23 M. 256.

(10) See INAM, 23 M. 47.

———15.—Will.

(1) *Bequest for immoral consideration—Condition of future cohabitation—Invalidity of bequest—Succession Act—Act X of 1865, s 114.*—A bequest by a Hindu testator, made conditional on the continuance of immoral relations between himself and the legatee, is void. TAYARAMMA v. SITHARAMASAMI NAIDU, 23 M. 613=10 M.L.J. 214 ... 831

(2) *Construction—Devise of lands to brother to be enjoyed jointly with the testator's widow—Power of alienation during widow's life time.*—A testator, by his will, directed that his lands should be enjoyed by his brother from generation to generation and for ever, with power to alienate the same by sale, gift or otherwise, but that he should enjoy them jointly with the testator's wife. Upon its being contended that the provision in favour of the wife merely conferred upon her, or recognised,as right to maintenance and that the power of the brother to alienate was a extensive during the life of the widow as after her death: *Held*, that on the true construction of the will, the testator did not intend the brother to have any power of alienation during the widow's lifetime. PERIYA AYAL v. NARAYANA PADAYACHI, 23 M. 256 ... 581

(3) *Disposition in favour of a widow and an adopted son—Nature and extent of widow's interest thereunder.*—By his will, a Hindu testator, after providing for various bequests, dealt with the residue of his estate as follows:—"My daughter-in-law and grand-daughters shall receive half "of my whole estate, and my wife and my adopted son shall receive the "other half." On the question as to what was the nature and extent of the interest to which the testator's widow was entitled thereunder: *Held*, that having regard to the rule of construction which has been repeatedly applied to gifts by Hindus in favour of their wives, the intention of the testator was not that his wife should take an absolute estate. The supposition is that a Hindu donor intends to act in accordance with the ordinary notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of his family. Though it was competent for the testator to provide for his wife in such a way that she should have absolute control over the property given her, that is not the provision which the Hindu Law makes for a widow. The language of the will was not inconsistent with an intention on the part of the testator that the son, with his adoptive mother, should take a moiety with the incidents attaching to property held by an undivided family. Upon the true construction of the will, therefore, the widow was not intended to take any other estate than she would have taken if there had been an intestacy. SESHAYYA v. NARASAMMA, 22 M. 357 ... 255

(4) See EVIDENCE ACT (I OF 1872), 23 M. 499.

(5) See HINDU LAW (IMPARTIBLE ESTATES), 22 M. 383.

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Power of alienation—Gift of land on daughter's marriage.—A Hindu, in whom the whole of the family property had vested, died without issue and his mother took the estate. She subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with her daughter. The gift was not found to be otherwise than reasonable in extent: *Held*, that the gift was binding on the reversioner. RAMASAMI AYYAR v. VENGIDUSAMI AYYAR, 22 M. 113=8 M.L.J. 170 ... 79

Iluvans.

See HINDU LAW (PARTITION), 22 M. 297.

Inam.

(1) *Commissioner's grant—Hereditary office-holder—Enfranchisement.*—A grant of a portion of inam lands by Government, on enfranchisement, is not illegal because the grantee, though a member of the family of hereditary office holders, was not himself actually in office at the time of enfranchisement. TARIYA GOWDU v. VONAMO GOWDU, 22 M. 204 ... 146

(2) *Service Inams—Enfranchisement in favour of widow—Right of widow.*—Lands which had been held by a deceased as moslem service inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life-estate: *Held*, that the right of the widow under the grant was not limited to that of a widow's estate. SUBBARAYA MUDALI v. KAMU CHETTI, 23 M. 47=9 M.L.J. 160 ... 427

(3) See ACT III OF 1895 (HEREDITARY VILLAGE OFFICES, MADRAS), 23 M. 492.

Indian Councils Act, 24 and 25 Vict., Cap. 67.

S. 25—Letters Patent, s. 15—Ganjam and Vizagapatam Agency Courts Act—Act XXIV of 1839—Validity of Agency Rule No. XXII passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court. See ACT XXIV OF 1839 (GANJAM AND VIZAGAPATAM AGENCY COURTS), 23 M. 329.

Injunction.

See SPECIFIC RELIEF ACT (I OF 1877), 22 M. 199, 251.

Insolvent Act 11 and 12 Vict., Cap. XXI.

S. 30—*Bankruptcy Rules of* 1848, *Rule* XXV—"*Person interested*"—*Liability for costs of unsuccessful motion—Deponent of an affidavit.*—A sale of property forming portion of the estate of certain insolvent debtors having been authorised by the Court, the Official Assignee moved to set it aside, relying in support of his application on affidavits which had been filed in Court and in which the deponents alleged that the property was worth a great deal more than the price at which the sale had been authorised. The Court having dismissed the motion, and ordered the deponents to pay the costs of the Official Assignee and the purchasers: *Held*, that the deponents could not be made liable for costs, and that Rule XXV of the Bankruptcy Rules of December 1848 did not apply to such a case. The deponents were not "persons interested in the insolvent's estate," nor could they be said to have "applied" or appeared on an application. The Official Assignee should be made liable for the costs of such an unsuccessful application, he being left to take such steps as might be necessary to indemnify himself. RAMANNA NAIDU v. BRAHMAYYA CHETTI, 23 M. 26 ... 412

Interest.

(1) *Post-diem Interest—Amount secured by mortgage bond with interest repayable by three instalments—Whole amount to become due on failure to pay any instalment—No provision for post diem interest.*—By a registered mortgage bond it was stipulated that the mortgage debt secured thereby and interest thereon at one per cent. per annum should be repaid by three annual instalments, the first of which was to become due on a certain date; and it was provided that if default should be made in payment of

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any instalment, the whole amount secured by the bond should at once become payable. The bond contained no provision for the payment of *post-diem* interest. Default having been made, the mortgagee sued for the principal and for *post diem* interest. *Held*, that the covenant must be construed to be one for the payment of interest as long as the principal sum was improperly withheld. GHANTAYYA v. PAPAYYA, 23 M. 534 ... 775

(2) *Post-diem—Provision in bond for annual payments of interest and repayment of principal sum on day fixed.*—A bond, which had been executed in December 1881, contained a stipulation that interest should be paid on 11th April every year, and that the principal sum borrowed should be repaid in December 1884. Repayment not having been so made, a suit was brought in December 1896 to recover the principal sum together with interest up to the date of plaint: *Held*, that inasmuch as the bond contained a stipulation for the payment of interest annually, and there was nothing in it to suggest that the liability should cease on the day upon which the principal was repayable, interest could be recovered. JIVANNA PANDITHAR v. APPALU, 22 M. 339 ... 241

(3) See ACT XXXII OF 1839 (INTEREST), 23 M. 41.

(4) See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 23 M. 18.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 637.

Jeer.

See HINDU LAW (RELIGIOUS ENDOWMENTS), 22 M. 117.

Jurisdiction.

(1) See ACT XXIV OF 1839 (GANJAM AND VIZAGAPATAM AGENCY COURTS), 23 M. 239.

(2) See ACT XII OF 1851 (LAND REVENUE, MADRAS), 22 M. 100.

(3) See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 22 M. 440.

(4) See ACT III OF 1873 (CIVIL COURTS, MADRAS), 23 M 314.

(5) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 22 M. 457.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 196.

(7) See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 205, 225.

(8) See LIMITATION ACT (XV OF 1877), 23 M. 621.

(9) See REGULATION XXIX OF 1802 (KARNAMS, MADRAS), 22 M. 340.

Jury.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 22 M. 15.

(2) See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 632.

Karnams.

See REGULATION XXIX OF 1802 (KARNAMS MADRAS), 22 M. 340.

Kasavargam Tenancy.

Right to buildings—Compensation on eviction.—A kasavargam tenant has a proprietary right to his house on the land, and when evicted he is entitled to compensation for his buildings. BLAKE v. SAVUNDARATHAMMAL, 22 M. 116=8 M.L.J. 163 ... 81

Kattubadi.

Rent—Charge.—Kattubadi is rent and does not constitute a charge on the land. GAJAPATHI RAJAH v. SURYANARAYANA, 22 M. 11 ... 8

Land Acquisition Act (X of 1870).

See HINDU LAW (WIDOW), 22 M. 431.

Landlord and Tenant.

(1) *Agricultural land—Change in the nature of cultivation—Waste.*—The defendant held from the plaintiff irrigable land which was cultivated with paddy,

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raggi, &c. ; he had an occupancy right in his holding and paid a fixed money rent. The defendant having planted cocoanut trees on the land, the plaintiff sued to eject him and to have the trees removed: *Held*, that the acts of the defendant did not constitute waste or a breach of the terms of his tenancy, and that the suit should be dismissed. VENKAYYA v. RAMASAMI, 22 M. 39=8 M.L.J. 278 ... 29

(2) See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 23 M. 268.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 629.

(4) See COURT FEES ACT (VII OF 1870), 23 M. 84.

Leave to bid.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 227.

Leave to sue.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 378, 23 M. 28, 537.

(2) See PARTIES, 23 M. 82.

Letters of Administration.

See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 22 M. 345.

Letters Patent.

(1) *S. 15—Appeal from judgment of a single Judge made under Civ. Pro. Code, s. 622.*—An appeal lies against an order made by a single Judge of the High Court under Civ. Pro. Code, s. 622, when such order amounts to a judgment. CHAPPAN v. MOIDIN KUTTI, 22 M. 68 (F.B.)=8 M.L.J. 231. 49

(2) *S. 15—Appeal from order of refusal to send for records—Dismissal on ground that no appeal lies.*—An order refusing to send for the record on a petition filed under S. 25 of the Provincial Small Cause Courts Act, 1887, is not a judgment, and no appeal lies therefrom. VENKATARAMA AYYAR v. MADALAI AMMAL, 23 M. 169 ... 517

(3) *S. 15—Civ. Pro. Code—Act XIV of 1882, s. 622—Rejection of petition by a single Judge—Appeal.*—No appeal lies under Letters Patent, s. 15, against an order made by a single Judge dismissing an application under s. 622. SRIRAMULU v. RAMASAM, 22 M. 109 ... 77

(4) S. 15—Ganjam and Vizagapatam Agency Courts Act—Act XXIV of 1839—Validity of Agency Rule No. XXII passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court. Indian Councils Act—24 and 25 Vict., cap. 67, s. 25. See ACT XXIV OF 1839 (GANJAM AND VIZAGAPATAM AGENCY COURTS), 23 M. 329.

License.

See ACT I OF 1886 (ABKARI, MADRAS), 23 M. 220.

Lien.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 301, 332.

Limitation.

(1) *Decree against father for money due, the sons not being joined as defendants—Death of father after original debt barred by limitation, the decree subsisting—Suit against the sons on the decree—Period of limitation how calculated—One cause of action.*—Certain creditors having, in 1884, obtained a decree, kept alive that decree until 1893, when the judgment-debtor died. They then sought to make liable the property of the deceased in the hands of the defendants, his sons and representatives, stating the cause of action against the said defendants as having arisen in 1893, the date of their father's death. The sons pleaded limitation, and the question was whether the period of limitation against the sons began to run from the date of their father's death or from the date at which the debt originally became due. On a reference being made to a Full Bench as to "whether

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a creditor in the position of the plaintiff has a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life time for such debt: *Held*, that in such a case there are not two causes of action, and such a creditor has not a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's lifetime for such debt, and that in consequence, the suit was barred by limitation. MALLESAM NAIDU *v.* JUGALA PANDA, 23 M. 292, (F.B). ... 606

(2) See ACT XII OF 1851 (LAND REVENUE, MADRAS), 22 M. 100.

(3) See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 23 M. 571.

(4) See ACT II OF 1886 (HARBOUR TRUST, MADRAS), 23 M. 389.

(5) See ACT IV OF 1889 (MERCHANDISE MARK), 22 M. 488.

(6) See CIV. PRO CODE (ACT XIV OF 1882), 22 M. 320.

(7) See HINDU LAW (RELIGIOUS ENDOWMENTS), 23 M. 439.

(8) See SPECIFIC RELIEF ACT (I OF 1877), 23 M. 385.

Limitation Act (XV of 1877).

(1) Ss. 4, 14—Exclusion of time of proceeding *bona fide* in Court without jurisdiction—Joinder of causes of action—Court Fees Act—VII of 1870, s 28—"Plaint"—Suit filed before period of limitation expired, but stamp duty not paid till afterwards — Muhammadan Law—Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law. See MUHAMMADAN LAW (PARTITION), 22 M. 494.

(2) S. 5—See ACT II of 1886 (HARBOUR TRUST, MADRAS), 23 M. 389.

(3) S. 14, *arts.* 29, 49 - *Time occupied in prosecuting suit in another Court—Dismissal of suit through defect of jurisdiction or other cause of like nature—Court unable to entertain suit because misconceived* —Defendants having attached certain goods on 12th June 1895, in execution of a decree obtained by them against M. a claim was preferred by plaintiff, on 19th June 1895, and disallowed. Plaintiff thereupon brought a declaratory suit on 2nd August 1895 in the City Civil Court, Madras, and obtained an injunction to stop the sale of the goods, which however, was dissolved on 27th August 1895, the goods being sold on 5th October 1895, while the suit in the City Civil Court was pending. On 4th December 1896 the City Civil Court declared plaintiff to be the sole owner of the property, which decree was upheld by the High Court on 7th February 1898. On 4th December 1897, plaintiff brought a suit in the Court of Small Causes, Madras, to recover from the defendants the goods or their value, which was dismissed on 2nd May 1898. The dismissal was upheld by a Full Bench of the Court of Small Causes on 22nd October 1898 and by the High Court, on 13th April 1899. In these decisions it was held that plaintiff's suit was not maintainable. Plaintiff filed the present suit on 28th April 1899, in the Court of Small Causes, Madras, and claimed that the cause of action had arisen on 7th February 1898, the date on which plaintiff's right to the specific moveable property had been finally declared. He also claimed that the time occupied in the proceedings in the Court of Small Causes should be deducted under s. 14 of the Limitation Act: *Held*, that the suit was barred; and that plaintiff was not entitled to have the time spent in prosecuting the previous small cause suit deducted from the period of limitation. That suit had been dismissed, not because the Court, through defect of jurisdiction or other cause of a like nature, was unable to entertain it, but because it was misconceived. MURUGESA MUDALIAR *v.* JATTARAM DAVY, 23 M. 621 ... 336

(4) S. 14, *arts*, 120, 127—*Dismissal of former suit on substantive ground of failure to establish cause of action—Claim by contributors to a common fund.* - An agreement was entered into between an uncle and his nephews, in 1879, that their earnings should be put into a common fund, which fund should be utilized for family requirements. No provision was, however, made for the division of any surplus that might arise. The agreement was acted upon until 1894, by which time a sum of Rs. 37,723-8-0 had

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accumulated. Upon a claim being made by the nephews in 1894, for a distribution of this fund, the uncle denied their right to participate in it. The uncle, who was working in partnership with others, in the same year, 1894, instituted a suit against his partners for an account and for his share of profits. He claimed the said accumulated fund of Rs 37,723-8-0 as his share. While his suit was pending, namely, in December 1895, he assigned its subject-matter to the present ninth defendant (a banking corporation). The partners, in defence, alleged that the present plaintiffs were entitled to share equally in the Rs. 37,723-8-0 and that they held the fund as stake-holders. In December 1894, present plaintiffs filed a suit against their uncle, the said first defendant, and his partners, in which they claimed shares in the said sum of Rs. 37,723-8-0. The two suits were tried together. First defendant's suit against his partners was dismissed on the ground that he had claimed for himself alone and had not brought the proper parties before the Court. In plaintiffs' suit, the latter were declared to be entitled to shares in the said sum, as prayed. First defendant appealed in both suits, judgment being given by the Appellate Court on 19th October 1897. In the suit in which first defendant was plaintiff, the plaint was allowed to be amended and a decree was passed for the amount found due to him alone in the settlement of accounts. In the plaintiffs' suit, the Appellate Court found that plaintiffs had no cause of action as against first defendant's firm; and that as between plaintiffs and first defendant there were accounts to be settled, in addition to those which appeared in the books of the firm. The Appellate Court further declined to treat the suit as one for partition only, and dismissed it, intimating that plaintiffs could obtain relief by way of partition in a suit so framed as to embrace all the parties interested and all the property in which they were interested. On 30th January 1899, plaintiffs filed the present suit in which they claimed that their shares in the said fund of Rs. 37,723-8-0 should be determined and paid: *Held* (affirming BODDAM, J.), that plaintiffs were entitled to recover. *Held also*, that the time occupied in prosecuting the former suit could not be excluded when computing the period of limitation. Though the plaintiffs had acted with due diligence in instituting their former suit, it was dismissed—not on any technical ground of misjoinder of parties or of causes of action—but on the substantive ground that having regard to the frame of the suit, no cause of action had been established against any of the defendants; and the suit was not one which the Court from defect of jurisdiction or other cause of a like nature, was unable to entertain. *Held further*, that the claim was not barred by limitation. The title of the nephews was not based on contract, express or implied, but arose out of the fact that they were contributors to a common fund, which the Court was now asked to distribute. The claim was one which the Court must deal with on equitable principles and apart from any question of partnership or of contract, and was consequently one to which art. 120 of the Limitation Act applied. *Also*, that the question was not one relating to joint family property, within the meaning of art. 127. COMMERCIAL BANK OF INDIA v. ALLAVOODEEN SAHEB, 23 M. 583 ... 809

(5) S. 19—*Acknowledgment—Muchalka under the Rent Recovery Act (Madras)*, 1865.—A muchalka given by a tenant at the end of a fasli, containing an undertaking to pay instalments of rent at dates then passed, amounts to an acknowledgement of liability for the purposes of the Limitation Act, 1877, s. 19. VENKATAGIRI RAJAH v. SHEIKH BADE SAHEB, 22 M. 32 ... 24

(6) S. 19, sch. II, art. 110—Contract Act—Act IX of 1872, s. 25, cl. (3)—Promise to pay a barred debt—See CONTRACT (ACT IX OF 1872), 23 M. 94.

(7) S. 28, sch. II, *arts.* 124, 144—*Religious foundation—Endowed property—Hereditary managers—Void alienation—Adverse possession.* The hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution, the first defendant's predecessor: *Held*, that there not being any custom of the foundation allowing such an assignment, it was beyond their legal competence, conveying no title. The possession delivered to the purchaser

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was adverse to the vendors. After the twelve years' period of limitation, which expired in the lifetime of the vendor, whose son now sued to recover the hereditary managership and possession of the lands of the endowment, the suit was barred under Limitation Act XV of 1877: *Held*, that there was no distinction between the claim to the office and the claim for the property, in regard to the application of art. 124 of sch II of the Act, and of s. 28. If there were, art. 144 would apply to the claim for the property. In order to fix the starting point for limitation at a date later than that of the transfer, it was contended that the office and title were held in successive life estates. If that contention had been right, the period of limitation would have commenced at the death of the plaintiff's father. The Judicial Committee were of opinion that it must be assumed that the origin of the endowment was by gift from the founder and that, in accordance with the ruling in I.A. Sup. Vol. 47=9 B L.R., 377, heritable estates could not be created to take effect as successive life estates, and inconsistently with the general law. This applied to both the office and the property: *Held*, that the law of inheritance did not permit the creation of successive life estates in this endowment; the above ruling being also contrary to the judgment in 7 B. 188; and that the plaintiff could not claim to have been entitled otherwise than as heir to, and from, and through his father, in whose lifetime the title had been extinguished by lapse of time and adverse possession of the defendant. GNANASAMBANDA PANDARA SANNADHI v. VELU PANDARAM. 23 M. 271 (P C.)=2 Bom. L.R. 597=4 C.W.N. 329=27 I.A. 69=10 M.L.J. 29=7 Sar. P.C.J. 671. ... 591

(8) *Sch*. II. *arts*. 2, 36, 89, 90—*Chairman of Municipal Council—Principal and Agent—Liability for embezzlement by manager.*—During the tenure of his office by the Chairman of a Municipal Council, the manager embezzled sums of money. On the Council, within three years, but more than two years thereafter, suing its late chairman to recover the amount lost by reason of the embezzlement on the ground that he was liable as its agent: *Held*, that the relation of principal and agent did not exist, and that therefore arts. 89 and 90 of sch. II to the Limitation Act did not apply; that the case was governed by art. 36, and that the suit was therefore barred by limitation. SRINIVASA AYYANGAR v. MUNICIPAL COUNCIL OF KARUR, 22 M. 342 ... 243

(9) *Sch* II. *art*. 23—*Malicious prosecution—Termination of prosecution—Presentation of revision petition against acquittal—Commencement of period of limitation.*—A suit for damages for malicious prosecution was brought more than one year from the date of the plaintiff's acquittal, but within a year from the dismissal of a revision petition which had been filed against the acquittal. On its being contended that the period of limitation should be calculated from the date of the dismissal of the revision petition, as the prosecution was only then terminated within the meaning of art. 23 of sch. II of the Limitation Act: *Held*, that time began to run from the date of the acquittal. Whether it would be so in a case in which an appeal is preferred by Government against an acquittal, *Quære*. NARAYYA v. SESHAYYA, 23 M. 24 ... 411

(10) Sch. II, art. 49—Claim to recover goods in hands of third parties—Alternative claim for value as compensation—Specific Relief Act—Act I of 1877, ss. 10, 11—Civ Pro. Code—Act XIV of 1882, s. 208—See SPECIFIC RELIEF ACT (I OF 1877), 22 M. 478.

(11) *Sch*. II, *arts*. 106, 116—*Suit for an account of a dissolved partnership—Registered partnership deed.*—A suit for an account of a partnership dissolved more than three years before the filing of the plaint is barred by limitation even if the instrument of partnership was registered. VAIRAVAN ASARI v. PONNAYYA, 22 M. 14=8 M.L J. 151 ... 10

(12) Sch. II, art. 110—Rent Recovery Act (Madras)—Act VIII of 1865, s. 10—Suit to recover arrears of rent Suit to enforce acceptance of patta pending—Time from which period of limitation is computed.—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 243.

(13) *Arts* 113, 144—*Suit on an award—Meaning of "contract" in art.* 113—*Specific Relief Act—Act* I *of* 1877, s. 30.—By an award bearing date 7th

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July 1893 plaintiffs were held to be entitled to certain immoveable property. On 15th November 1897, they filed a suit to enforce the award. On its being contended that the suit was barred by limitation, under art. 113 of the Limitation Act, it being in fact for the specific performance of a contract: *Held*, that the suit was not barred, the article applicable being art. 144. A suit to enforce an award cannot be treated as a suit to enforce a contract, within the meaning of art. 113, the word "contract" in that article being used in its ordinary sense. SORNAVALLI AMMAL v. MUTHAYYA SASTRIGAL, 23 M. 593=10 M.L.J. 208 ... 816

(14) *Sch.* II, *arts.* 120, 144—*Emoluments of hereditary office—Interest in immoveable property.*—A suit to recover a sum of money due by custom as an emolument of an hereditary office is not one for the possession of an interest in immoveable property. In 1883 a sum of money became payable, as marriage dues, to the holder of certain offices connected with a temple. Upon a suit being brought more than six years thereafter, namely in 1895, to recover the amount, it was objected that the claim was barred by limitation: *Held*, that such a claim is governed by art. 120 of sch. II to the Limitation Act, and must, in consequence, be enforced within six years of the accrual of the right. RATHNA MUDALIYAR v. TIRUVENKATA CHARIYAR, 22 M. 351 ... 250

(15) *Sch.* II, *art.* 132—*On demand—Accrual of cause of action.*—In a suit brought in 1895 on a hypothecation bond, dated 9th October 1880, it appeared that the loan secured thereby was repayable on 9th October 1883, but it was stipulated that if interest was not paid at 10 per cent. per annum as therein provided, then that the loan should be repaid with interest at 15 per cent. when the obligee should require it. Default had been made in the payment of interest in 1881, but the obligee had not called for the money: *Held*, that the suit was not barred by limitation. NETTAKARUPPA GOUNDAN v. KUMARASAMI GOUNDAN, 22 M. 20=8 M.L.J. 167 ... 15

(16) *Sch.* II, *art.* 142—A suit for the proprietary possession of land was defended on the ground of limitation, resting on the defendant's possession, displacing the plaintiff's case that her predecessor in title had possessed the land within twelve years before the suit. The defendant had a possession which was admitted to have extended back for seven years before the suit. The documentary evidence showing that he had been in possession for more than five years immediately preceding those seven years was exactly similar to the evidence which accompanied his possession during that period. This evidence consisted of a series of documents such as were usually given to and received by the possessor of lands, and they extended throughout the period in dispute, going back far behind the twelve years which would bar. It was not necessary to consider whether the burthen of proof was shifted merely by the seven years' admitted possession, as the additional evidence raised the inference that the same possession had continued for more than twelve years: *Held*, that the burthen of rebutting this inference had not been discharged by evidence given by the plaintiff, while the evidence for the defendant, had amply sustained the burthen originally laid upon him to show his twelve years' possession. INNASIMUTTU UDAYAN v. UPAKARATH UDAYAN, 23 M. 10 (P.C.)=26 I.A. 210=7 Sar. P.C.J. 620 ... 401

(17) Sch. II, art. 173-A—Civ. Pro. Code—Act XIV of 1882, ss. 244, 258—Execution of decree—Money decree.—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 22 M. 182. ...

(18) *Sch.* II, *art.* 179—*Execution of decree—Payment out of Court to plaintiffs of money collected by receiver, but not under decree—Step-in-aid-of execution.*—The question whether an application to enforce execution of a decree was barred by limitation depended upon whether a payment out of Court to plaintiffs of money collected by receiver constituted (with the application alleged to have preceded it) a step-in-aid of execution within the meaning of art. 179 of sch. II to the Limitation Act. The receiver had been appointed during the pendency of suit, which was by mortgagees for possession of the mortgaged land and for mesne profits accrued prior to the date of plaint. The receiver remained in possession of the land for a period of

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six months after decree, when he handed it over to the plaintiffs; and the payment out of Court above referred to was of money which had apparently been collected by the receiver during the said six months, and formed no part of the mesne profits dealt with by the decree: *Held*, that such money was not collected or paid in execution of the decree though the plaintiffs had become entitled to it as a consequence of the decree. It consisted of current profits of the estate, demanding which plaintiffs had done nothing towards the execution of the decree, which did not deal with such profits and which could be fully executed without reference to them. And *held*, therefore, that the payment referred to did not constitute a step-in-aid of execution, and that the present application was barred by art. 179 of sch. II to the Limitation Act. APPASAMI NAICKAN v. JOTHA NAICKAN, 22 M. 448 ... 321

(19) *Sch.* II, *art.* 179, *cl.* (2)—*Final decree of appellate Court—Decree against joint defendants—Appeal by one of two defendants against part of the decree—Decree against non-appealing defendant "imperilled".*—Plaintiff having, on 31st March 1891, obtained in a District Munsif's Court a decree rendering liable the property of two defendants, the second defendant appealed, making the plaintiff alone respondent, with the result that the District Court set aside the decree against the second defendant, and remanded the suit for trial as to his liability. Plaintiff appealed unsuccessfully to the High Court against this order of remand, the first defendant again not being made a party. On 23rd July 1894 the District Munsif delivered a revised judgment, in which he again held the second defendant's share liable, but gave both defendants two months' time for payment, which provision was not contained in the original decree. This revised judgment was upheld by the District Court on appeal, on 25th March 1895; and by the High Court on second appeal on 22nd February 1897, with the modification that the decree as against second defendant should be treated as a money decree. First defendant was again not a party to either appeal. On 7th August 1897, plaintiff applied for execution, whereupon first defendant pleaded limitation: *Held*, that the decree as against the first defendant was not barred by limitation inasmuch as it had been imperilled by the appeal of the second defendant. *Per* MOORE, J.—Under art. 179, cl. (2) of sch. II of the Limitation Act, it is immaterial whether some only or all of several judgment-debtors prefer an appeal. There is only one decree that can be executed and that is the final decree of the appellate Court. *Per* O'FARRELL, J.—On the general question as to the construction of art. 179, sch. II of the Limitation Act, the plain words of the Act have been unduly narrowed by the decision in 12 M. 479; the consideration of such subtle points as whether a decree was or was not "imperilled" by an appeal was foreign to the intention of the legislature. VIRARAGHAVA AYYANGAR v. PONNAMMAL, 23 M. 60=9 M.L.J. 284 ... 436

Liquidated Damages.

Breach of a contract to pay various sums—Agreement to pay enhanced rent in event of breach—Penalty.—By the terms of a deed a tenant was liable to pay rent to the plaintiff at an enhanced rate if he failed to pay, at a time specified, Government revenue, interest on a mortgage, and the rent agreed upon. The interest and the rent having fallen into arrears, and a suit having been brought to recover rent at the enhanced rate: *Held*, that plaintiff was entitled to recover the additional amount as liquidated damages. BALKURAYA v. SANKAMMA, 22 M. 453=9 M.L.J. 201 ... 323

Malabar Law.

1.—JOINT FAMILY.
2.—MAINTENANCE.
3.—MORTGAGE.
4.—RELIGIOUS ENDOWMENTS.
5.—WILL.

————**1.—Joint Family.**

See MUHAMMADAN LAW (PARTITION), 22 M. 494.

Malabar Law—2.—Maintenance. PAGE

See CRIM. PRO. CODE (ACT V OF 1898), 22 M. 246.

———3.—**Mortgage.**

(1) *Kanom—Suit for sale of mortgaged property—Rights of kanomdar.*—A kanomdar having sued to recover the amount of his kanom and for sale of the mortgaged property in default of payment: *Held*, that such a suit is unsustainable; that a kanom, in the mortgage aspect of it, is a usufructuary mortgage; and there is no authority to support the contention that it is a simple mortgage apart from an observation in 15 M. 366 at p. 379. SRIDEVI v. VIRARAYAN, 22 M. 350 ... 249

(2) *Tenant's right to compensation—Mortgage by tenant without notice to landlord—Acceptance of surrender by landlord—Rights of landlord and mortgagee.*—The right of a tenant in Malabar to compensation is analogous to the right to a chose-in-action; and a transfer of such a right by a tenant to a third party cannot affect the landlord unless the latter has notice of the transfer when he accepts the surrender of the property demised and settles the account with his tenant in reference to arrears of rent and the amount due as compensation. Whether notice to a landlord of such a transfer would affect his right to set off arrears of rent due to him against the amount payable as compensation—*Quære.* VASUDEVA SHENOI v. DAMODARAN, 23 M. 86 ... 454

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 478.

(4) See STAMP ACT (I OF 1879), 22 M. 164.

———4.—**Religious Endowments.**

See PARTIES, 23 M. 82.

———5.—**Will.**

Marumakkatayam Law—Self-acquired property—Power of dispossession by will—Succession certificate—Probate.—A member of a Marumakkatayam tarwad died leaving self-acquired property. The karnavan of the tarwad applied for a succession certificate, but the application was opposed by legatees under a will of the deceased which had not been admitted to probate, but was undisputed. *Held*, that the will was valid and that the succession certificate should not be granted to the karnavan, but to one of the legatees. ACHUTAN NAYAR v. CHERIOTI NAYAR, 22 M. 9 ... 7

Malicious Prosecution.

See LIMITATION ACT (XV OF 1877), 23 M. 24.

Mesne Profits.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 196.

(2) See HINDU LAW (WIDOW), 22 M. 356.

Minors.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 187, 309.

(2) See CONTRACT ACT (IX OF 1872), 22 M. 314.

Misfeasance.

See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 23 M. 298.

Mortgage.

1.—GENERAL.
2.—EXTINCTION.
3.—FORECLOSURE.
4.—REDEMPTION.

Mortgage—1.—General. PAGE

(1) *Construction of documents—Sale-deed with counter-deed undertaking to transfer land in event of payments being made.*—In a document described as a sale-deed, plaintiff's father professed to give "in absolute sale" certain lands to the defendant, inasmuch as he was unable to pay a debt owing by him to the defendant. On the same day defendant executed a counter-deed in which he referred to the said sale-deed and undertook to get the said lands transferred to plaintiff's father in the event of the latter paying the said debt within a certain time together with interest till date of payment; and in that event to cancel the said sale-deed and deliver the same to plaintiff's father. The counter-deed further provided that plaintiff's father should pay the principal and interest of the said debt by instalments, and that, in default of payment of any instalment, plaintiff's father should pay the whole amount due: and in default of payment in that manner, defendant should credit the land to himself according to the sale-deed, after getting the counter-deed cancelled: *Held*, that on their true construction the documents showed nothing more than an intention to secure repayment of the debt; that though the provisions for payment by instalments and of the whole amount in default of instalments were contained in the counter-deed signed only by the transferee of the land they were equivalent to a covenant by the transferor so to repay, because, the two documents being parts of one transaction, both parties were bound by or could take advantage of every stipulation, whether contained in one or other of the deeds, as would have been the case if the transaction had been embodied in a single document:—*Held*, therefore, that the transferee had a right to recover the debt (with interest) from the transferor personally; and that the provision entitling the transferee to credit the land to himself in default of payment could not be construed as negativing that right. Two documents relating to the transfer and retransfer of land which were so connected as to constitute one transaction having been executed in the year 1882, prior to the passing of the Transfer of Property Act: *Held*, that the transaction should be regarded as having been entered into with reference to the law as propounded in the course of Madras decisions commencing in 1858 and referred to in 2 I.A. 241=1 M. 1, and that the documents must be construed accordingly. RAMAYYA v. KRISHNAMMA, 23 M. 114=9 M.L.J. 36 ... 474

(2) See ACT VIII OF 1890 (GUARDIANS AND WARDS), 22 M. 289.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 121.

(4) See DOCUMENT, 23 M. 137.

(5) See INTEREST, 23 M. 534.

(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 332.

———2.—Extinction.

See EVIDENCE, 22 M. 92.

———3.—Foreclosure.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 133, 23 M. 33.

———4.—Redemption.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 259.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 M. 209; 23 M. 33, 377, 510, 521.

Muhammadan Law.

1.—DOWER.
2.—GIFT.
3.—PARTITION.

———1.—Dower.

(1) *Suit for dower—Dower prompt or deferred—Presumption.*—According to Muhammadan law, dower, being consideration for marriage, is, unless payment of the whole or part of it is expressly postponed, presumed to be prompt and exigible on demand. MASTHAN SAHIB v. ASSAN BIBI AMMAL, 23 M. 371 (F.B.)=10 M.L.J. 123 ... 661

(2) See MUHAMMADAN LAW (GIFT), 23 M. 70.

Muhammadan Law—2.—Gift. PAGE

'Hiba-bil-Iwuz'—Settlement in lieu of dower—Possession not transferred—Validity on passing of consideration.—A Muhammadan executed a deed of settlement of certain land in lieu of dower on his wife, who left him shortly thereafter without ever acquiring possession. On his contending that the settlment was invalid :—*Held*, that a *bona fide* transaction by way of 'Hiba-bil-Iwuz' (as this was found to be) is supported by proof of the actual passing of the consideration agreed to be given ; that the consideration in this case was the release by the wife of her right to dower from her husband, and that such release was completed by her acceptance of the transfer under the settlement. MUHAMMAD ESUPH RAVUTAN v. PATTAMSA AMMAL) 23 M. 70=9 M.L.J. 185 ... 443

———3.—**Partition.**

Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law—Limitation Act—Act XV of 1877, *Ss.* 4, 14—*Exclusion of time of proceeding* bona fide *in Court without jurisdiction—Joinder of causes of action—Court Fees Act—Act VII of* 1870, *s.* 28—*"Plaint"—Suit filed before period of limitation expired, but stamp duty not paid till afterwards.*—Two suits were brought for partition of the property of a deceased by his heirs under the Muhammadan Law :—the first, by his widow and six children in the Court of the Subordinate Judge ; the second, by two other children by his first wife, in the Court of the District Munsif, from which Court it was transferred to the Court of the said Subordinate Judge. The Subordinate Judge having ruled that the plaintiffs in each suit were not entitled to sue jointly, the plaints were permitted to be amended. The first plaint was accordingly represented in the Subordinate Court as that of the widow ; the second, also in the Subordinate Court, as that of the first child of the first wife : and seven further plaints were filed in the Subordinate Court on behalf of the remaining children respectively. These seven further plaints were unstamped. Six of them, presented by the widow's children, stated explicitly that the duty payable thereon was included in that already paid on the widow's plaint, which sum correctly represented the duty payable on the footing that the share of each formed a distinct subject-matter. All the plaints were by order placed on the file of the District Munsif's Court. The plaints were at first treated at the Munsif's Court as being duly stamped : though payment of fresh Court-fees was subsequently ordered after the expiration of the period of limitation. The deceased had died in 1882 ; the two original suits had been filed in 1893 and 1894, respectively—within twelve years of his death ; and the two amended suits and the seven fresh plaints had been filed in December 1894, more than twelve years from his death :—*Held*, (on the question of joinder), that there was no misjoinder of causes of action. If the suits were viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were competent to sue together in respect of what was thus a common injury to them. If, on the other hand, the suits were suits for partition, the plaintiffs were *a fortiori* entitled to join. (On the question of limitation), that the suits by the two children of the first wife were not barred as they should be treated as a continuation of their original joint claim, which had been instituted in the same Court before the period of limitation had expired. That where there has been a misjoinder which has precluded a Court from entertaining a suit, the period during which such suit has been prosecuted diligently and in good faith may be deducted in computing the period of limitation : the inability of the Court to entertain a suit combining causes of action which could not be combined, being covered by the words "from other cause of a like nature,"—in s. 14 of the Limitation Act. That with reference to the widow's amended suit, inasmuch as her original suit (on behalf of herself and her six children) had been filed before the period of limitation had expired and had been prosecuted diligently and in good faith, the time during which that original suit had been pending must be deducted and her amended suit held to be not barred. That for similar reasons, a like deduction should be made in favour of the six fresh suits of her children (unless a contrary decision were necessitated by the fact that their plaints had

Muhammadan Law—3.—Partition—(*Concluded*). PAGE

remained unstamped until after the expiration of the extended period of limitation). *Per* SUBRAMANIA AYYAR, J.—That although an amount equal to the fees properly payable in respect of the widow's amended suit and of the six fresh suits filed by her children had in fact been paid on the joint suit originally filed, credit could not be claimed out of that original payment for the Court-fees due on the six fresh suits subsequently instituted. These plaints must, therefore, be considered to have been not duly stamped, if not entirely unstamped, at the time when the period of limitation expired. That, the said plaints having been filed in time, the fact that they were not duly stamped or were entirely unstamped when the period of limitation had expired, did not render them time-barred; since the plaints must be regarded as having been presented on the day upon which they were filed. It cannot be inferred from the Limitation Act, 1877, that the word "plaint" as used in Section 4, explanation, means "plaint duly stamped." A "plaint" in law means merely "a private memorial tendered to a Court, in which the person sets forth his cause of action: the exhibition of an action in writing." Whether any Court-fee is payable in an action commenced by the plaint, and if so, when and how it should be paid, are matters that are foreign to the question whether the document is a plaint or not. The Court Fees Act and the Limitation Act are entirely different in their purpose and scope, and neither can be taken to control or qualify the other. *Per* DAVIES, J.—That inasmuch as the order of the Subordinate Judge requiring separate plaints was erroneous it could not operate to enhance the Court-fees truly payable. The true plaints in the case, in so far as stamp duty was concerned, were the two joint plaints originally presented. These were filed in time, and were sufficiently stamped. The fees having been paid at the beginning, no question arose as to the insufficiency of stamp duty, and the objection on the ground of limitation was thereby disposed of. A deceased as well as his paternal ancestors had followed the Muhammadan Law; but his mother had been a member of a tarwad which held property subject to Marumakkatayam Law. On its being contended that in such a case the property of the deceased, whether derived from his father or mother, passed according to the rule of Marumakkatayam Law to his mother's tarwad, and not to his heirs according to the Muhammadan Law:—*Held*, that the law governing the devolution of the property of the deceased, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law. ASSAN v. PATHUMMA, 22 M. 494=9 M.L.J. 37 ... 353

Native Christian.

See SUCCESSION ACT (X OF 1865), 23 M. 216.

Negligence.

See ACT II OF 1886 (HARBOUR TRUST, MADRAS), 22 M. 524.

Negotiable Instruments Act (XXVI of 1881.)

(1) *Ss.* 4, 26, 27—*Hindu Law—Promissory note by member of an undivided Hindu family—Liability of other member.*—The maker of a promissory note (executed in plaintiff's favour), being a member of an undivided Hindu family, had borrowed from plaintiff the money represented by the note and purchased therewith land for the benefit of the family, which consisted of himself (the maker of the note), an uncle and the sons of the uncle. The uncle had always recognised the debt as a family debt, and the land purchased with the money borrowed had, in a subsequent division of property, been allotted to the uncle and his sons, who had also agreed with the maker of the note that they would discharge the debt. On a suit being brought against the maker of the note, as well as the uncle and his sons: *Held*, (DAVIES, J., dissenting), that all the members of the undivided family were liable. *Per* SUBRAHMANIA AYYAR, J.—Even assuming that the maker of the note was not the manager of the family, he was the agent of his coparceners when buying the land and raising the loan, and his acts as such agent bound the uncle who expressly assented to them; also, that inasmuch as the uncle was liable, his sons must be also, held liable for the debt to the extent to which they were interested in

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the family property, and that even if they were minors when the money was borrowed. Whether, having regard to ss. 233 and 234 of the Indian Contract Act, a principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name.—*Quære. Per* DAVIES, J., (1) Had the suit been brought on a bond, or on the debt of which the promissory note afforded evidence, other members of the family might have been held liable as well as the maker of the note, on the ground that the latter represented them. But in the case of a suit on a promissory note (as this suit was) on such representation could be alleged unless the persons said to be represented appeared by name on the face of the document; (2) Where the name of only one person appears on a promissory note and he does not purport to make it on behalf of any one but himself, none but the maker can be held liable to discharge it. KRISHNA AYYAR v. KRISHNASAMI AYYAR, 23 M. 597 ... 819

(2) *Ss.* 79, 80—*Interest on promissory note—No mention of interest or rate of interest in instrument—Indent of goods—Failure to take delivery and re-sale in consequence—Liability for loss.*—Certain promissory notes, on which a suit was brought, were in the following terms:—"On demand we promise to pay———or order the sum of Rupees——for value received." Plaintiffs claimed interest. On its being contended that where an instrument is completely silent about interest, s. 80 of the Negotiable Instruments Act, 1881, has no application, and no interest can be allowed: *Held*, that the mercantile usage which would have enabled the Court to award interest on such an instrument prior to the passing of the Negotiable Instruments Act, 1881, has not been abrogated by that Act, though the interest that can now be awarded is limited by s. 80 to six per cent. S. 80 governs, alike, the case in which interest, but no rate of interest, is mentioned in the instrument, and that in which interest is not mentioned. In the case of a note payable on demand, the date of the demand, and not that of making the note, is the date from which interest must be taken to run. Plaintiffs had procured certain goods in pursuance of indents signed by defendants which provided that, in the event of defendants failing to take due delivery of the goods, plaintiffs should be at liberty to re-sell them on defendants' account and that defendants should pay to plaintiffs any deficiency arising from such re-sale. Goods were resold at a loss and in a suit to recover such loss it was contended, in defence, that the property in the goods had not passed to the defendants and that plaintiffs' only remedy was by way of damages: *Held*, that a clause such as that contained in the indent came into operation notwithstanding that the property had not passed to the buyers; and that plaintiffs were entitled to recover the deficiency arising from the re-sale. BEST v. HAJI MUHAMMAD SAIT, 23 M. 18 ... 407

Non-joinder.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 119; 23 M. 28.

Notary Public.

See ACT I OF 1884 (CITY OF MADRAS, MUNICIPAL, MADRAS), 23 M. 529.

Notice.

(1) See ACT XXXII OF 1839 (INTEREST), 23 M. 41.
(2) See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 23 M. 523.
(3) See ACT II OF 1886 (HARBOUR TRUST, MADRAS), 23 M. 389.
(4) See ACT IX OF 1890 (RAILWAY), 22 M. 137.
(5) See COMPANIES ACT (VI OF 1882), 22 M. 291.
(6) See EJECTMENT, 23 M. 262.
(7) See MALABAR LAW (MORTGAGE), 23 M. 86.

Parties.

(1) *Devasom—Property vested in three sabhas—Suit by members representing two—Maintainability of suit.*—A temple was managed by three sabhas, and members representing two only of such sabhas brought a suit to recover

Parties—(*Concluded*). PAGE

land belonging to it, without alleging that the members of the third sabha had been consulted with reference to the suit, or that they had repudiated the right of the plaintiff to sue in conjunction with that sabha. Permission to sue as representing the whole of the members of the three sabhas had been refused : *Held*, that the suit was not maintainable. PURAMATHAN SOMAYAJIPAD v. SANKARA MENON, 23 M. 82 ... 451

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 28, 73, 121, 195, 361.

(3) See HINDU LAW (JOINT FAMILY), 22 M. 326.

Partner.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 22 M. 139.

Partnership.

See LIMITATION ACT (XV OF 1877), 22 M. 14.

Patta.

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 248, 318, 353 ; 23 M. 221, 474, 616.

Payment.

Under protest—Land Revenue, Madras Town—Act XII of 1851, ss. 1, 17—Act VI of 1867, ss. 4, 31—Penal assessment—Jurisdiction of Civil Court—Limitation—See ACT XII OF 1851 (LAND REVENUE, MADRAS), 22 M. 100.

Penal Code (Act XLV of 1860).

(1) S. 19—See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 540.

(2) *S. 40—Stamp Act—Act I of 1879, ss. 61, 67—Defrauding Government of Stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under s. 61 of Stamp Act, 1879.*—Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under s. 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty : *Held*, that the execution of a document which on its face required to be and was not stamped, could not be said to be "an act, contrivance or device not specially provided for by this Act or any other law for the time being in force;" and that punishment for the act of the executant of such a document, if it were punishable at all, was provided for under s. 61 of the Stamp Act, 1879, and it could not therefore be dealt with under s. 67. Also that the act of a person receiving an unstamped document might amount to abetment of an offence, having regard to s. 61 of the Stamp Act, 1879, and to the definition of an "offence" in s. 40 of the Indian Penal Code, and, if so, would be an act provided for by "any other law for the time being in force," and so not within the terms of s. 67 of the Stamp Act, 1879. QUEEN-EMPRESS v. SOMASUNDARAM CHETTI, 23 M. 155=1 Weir 907 ... 507

(3) *Ss. 65, 67—Imprisonment in default of fine—Towns Nuisance Act (Madras)—Act III of 1889, s. 3, cl. 10.*—An accused having been convicted of an offence under s. 3, cl. 10, of the Towns Nuisances Act (Madras), 1889, and sentenced to pay a fine of Rs. 8 and in default of payment to undergo simple imprisonment for a week : *Held*, (1), that s. 67 of the Indian Penal Code, refers solely to cases in which the offence is punishable with fine only, and has no application to offences punishable either with imprisonment or with fine, but not with both ; such sentences are governed by s. 65 of the Indian Penal Code ; and (2) that the sentence of imprisonment in default should not exceed one-fourth of the maximum term of

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imprisonment provided for the offence. QUEEN-EMPRESS v. YAKOOB SAHIB, 22 M. 238=1 Weir 32 ... 170

(4) Ss. 147, 304, 325—See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 225.

(5) Ss. 147 and 324—Charges under Criminal Procedure Code—Act V of 1898, s. 260—Summary procedure under Penal Code, s. 323—See CRIM. PRO. CODE (ACT V OF 1898), 22 M. 459.

(6) Ss. 176, 179, 187—See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 544.

(7) S. 193—*Crim. Pro. Code—Act* V *of* 1898, *ss.* 195, 476—*Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate.*—At a preliminary enquiry held by a Sub-Divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution, under s. 193 of the Indian Penal Code: *Held*, that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of s. 193 of the Indian Penal Code, and the witness could not be convicted under that section. QUEEN-EMPRESS v. VENKATARAMANNA, 23 M. 223=1 Weir 152 ... 558

(8) Ss. 206, 397, 424— *Harvesting crops under attachment.*—A judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force and was convicted of theft:—*Held*, that the accused was not guilty of theft, but of the offence of dishonestly removing the property under Penal Code, s. 424. *Per* BENSON, J.—The offence was also criminal misappropriation within the meaning of Indian Penal Code, s. 403. QUEEN-EMPRESS v. OBAYYA, 22 M. 151=8 M.L.J. 259=1 Weir 424 and 486 ... 107

(9) S. 294-A—Companies Act—Act VI of 1882, s. 4—Illegal contract—Bond to secure payments under a kuri—See COMPANIES ACT (VI OF 1882), 22 M. 212.

(10) S. 373—*Obtaining a girl under the age of* 16 *for purposes of prostitution—Evidence of intent.*—In a charge against a dancing girl under s. 373 of the Indian Penal Code, for having purchased a young girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under s. 373 of the Indian Penal Code: *Held*, that there was evidence before the Court to support the conviction. QUEEN-EMPRESS v. PAPA SANI, 23 M. 159=1 Weir 381 ... 509

(11) Ss. 395, 396, 412—Crim. Pro. Code—Act X of 1882, ss. 269, 307, 533—Verdict of jury and their opinion as assessors—Confessional statement—See CRIM. PRO. CODE (ACT X OF 1882), 22 M. 15.

(12) Ss. 482, 486—Merchandise Marks Act—Act IV of 1889, s.15—Use of counterfeit trade-mark—Prosecution after one year from first discovery of offence—Limitation—See ACT IV OF 1889 (MERCHANDISE MARKS), 22 M. 488.

Plaint.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 214.

Plea of Guilty.

(1) See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 151.

(2) See EVIDENCE ACT (I OF 1872), 22 M. 491.

Practice. PAGE

(1) See ACT III of 1873 (CIVIL COURTS, MADRAS), 23 M. 314.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 101.
(3) See COMPANIES ACT (VI OF 1882), 22 M. 291.
(4) See CONTRACT ACT (IX OF 1872), 22 M. 314.
(5) See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 632.
(6) See LIMITATION ACT (XV OF 1877), 23 M. 621.

Principal and Agent.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 458.
(2) See HINDU LAW (JOINT FAMILY), 22 M. 470.
(3) See LIMITATION ACT (XV OF 1877), 22 M. 342.

Probate.

See MALABAR LAW (WILL), 22 M. 9.

Profession Tax.

See ACT I OF 1884 (CITY OF MADRAS MUNICIPAL, MADRAS), 22 M. 145 ; 23 M. 529.

Promissory Note.

(1) *Suit by assignee by invalid endorsement—Claim also on the original debt in respect of which note was given—Maintainability of suit.*—The purchaser of the assets of a bank in liquidation, which assets included a debt due by defendants to the late bank and a promissory note given in respect of that debt, sued defendants on the promissory note as well as on the original debt in respect of which the note had been given. The note had not been endorsed until after the bank had been wound up and had ceased to exist, and the endorsement had been held to be invalid : *Held*, that plaintiffs were entitled to sue for the original debt even though they were not entitled to sue on the promissory note. RAMACHANDRA RAO v. VENKATARAMANA AYYAR, 23 M. 527 ... 770

(2) See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 23 M. 18.
(3) See STAMP ACT (I OF 1879), 22 M. 327.

Protocol of record in Ceylon.

See EVIDENCE ACT (I OF 1872), 23 M. 499.

Rateable Distribution.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 194, 241 ; 23 M. 478.

Razinamah.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 214.

Receiver.

See LIMITATION ACT (XV OF 1877), 22 M. 448.

Registration.

(1) See EVIDENCE, 23 M. 92.
(2) See REGISTRATION ACT (III OF 1877), 22 M. 508 ; 23 M. 221.

Registration Act (III of 1877).

(1) *Registration—Unregistered agreement incorporated into a judicial proceeding.*—A prior suit between the same parties, now contesting the right to part of an ancestral estate, claimed another part of the same estate, without comprising the lands now in suit, which, at the time when the first suit was brought, were outstanding under a mortgage. A decree had been made by consent, excluding the lands now sued for. The defendant's case was that the lands now claimed, together with those decreed by consent, had been made the subject of a compromise of which the terms had been

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stated in two written agreements not registered. Also, that according to the compromise each of the parties was to take a moiety of the whole estate. Each had obtained possession; but the decree was limited to the part of the estate for which the prior suit, then disposed of, was brought; and only one of the agreements—that one which related to the lands then in suit—was presented to and accepted by the Court which made the consent decree : *Held*, that this agreement had a different effect from the other one, as it constituted a step in a judicial proceeding, and did not require registration. The order was pronounced in terms of it. But as regarded the lands now in suit, excluded as they had been from the decree in the former suit, the defendant's title to them had been left to stand or fall by the other unregistered document. The latter, by the Registration Act, 1877, conferred no title, and this defence failed. PRANAL ANNI v. LAKSHMI ANNI, 22 M. 508 (P.C.) = 1 Bom. L.R. 394 = 3 C.W.N. 485 = 26 I.A. 101 = 9 M.L.J. 147 = 7 Sar.P.C.J. 516 ... 363

(2) S. 17, cl. (b)—*Document compulsorily registrable—Valuation—Least sum payable—Sum repayable before expiry of stated term—Principal sum without interest.*—A charge on certain property to secure Rs. 50 was given by the jenmis in favour of defendant No. 1, who held a kanom on the property granted three years previously, containing the following terms :—"This amount of Rs. 50, together with the customary interest thereon, will be added to the kanom amount when, after the expiry of the period of demise of the paramba, a renewal is effected or the paramba is caused to be surrendered. The jenmam right over the said paramba has been mortgaged to you for this Rs. 50 and the interest thereon." The document was not registered. It was contended that the document was one compulsorily registrable under s. 17 of the Registration Act, 1877, inasmuch as payment under it was postponed for at least nine years (*i.e.*, the balance of the term granted by the kanom), by the end of which period the accumulations of interest would have amounted to Rs. 54 in addition to the principal sum of Rs. 50, making Rs. 104 in all: *Held*, that the document did not contain a clear expression of intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words by construing them to mean no more than that, in the event of the amount remaining unpaid when the kanom became redeemable, the Rs. 50 with interest thereon should be treated as if it were part of the kanom amount so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom. That there was nothing in the document to prevent the interest accruing under it from being paid from time to time, even if the unpaid capital were not repaid until the kanom was redeemable. And that the least sum payable being the test as to whether a document is compulsorily registrable, the document need not be registered under s. 17 of the Registration Act, 1877. Per O'FARRELL and MICHELL, JJ., that under cl. (b) of S. 17 of the Registration Act, 1877, only the principal amount secured should be taken into consideration. KUNHI AMMA v. AHMED HAJI, 23 M. 105. 468

(3) Ss. 17, 18—Rent Recovery Act (Madras)—Act VIII of 1865, s. 11—Reduction of rent—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 217.

(4) S.35—*Representative of deceased settlor—Admission of execution of document by one out of three representatives—Defect of procedure in course of registration—Validity of registration.*—The mother of three sons executed a deed of gift in favour of one of them and then died. The donee alone registered the document, the other sons not appearing before the registering officer. The document having been subsequently put in evidence, it was contended that it was inadmissible on the ground that under s. 35 of the Registration Act, the donor being dead, the execution of the document must be admitted by the representative of the deceased, and that an admission by one out of three representatives is not an admission within the meaning of the Act: *Held* that assuming that three sons of the deceased donor ought to have joined in admitting the execution of the document and that the registering officer was in error in considering one of them the due representative of the deceased, such error was a defect in

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procedure in the course of registration and the registration was not rendered invalid by reason thereof. PAKRAN v. KUNHAMMED, 23 M. 580 ... 807

(5) S. 50—*Unregistered sale of land valued under Rs. 100—Subsequent registered hypothecation—Possession of first purchaser for over twelve years—Registered hypothecation defeated by such possession.*—The owner of land having, in 1876, sold and given possession of it for Rs 95 to the plaintiff under an instrument which was not registered, hypothecated it in 1878 to a third party, under a bond that was registered. The land was wrongly represented in the hypothecation bond as being in the original owner's possession. The third party, in 1882, sued the original owner on the hypothecation bond without making plaintiff a party, and obtained a decree, which in 1893, he assigned to defendant, who purchased the land in the course of execution. On plaintiff suing for a declaration of his right to the land: *Held*, that the hypothecation had been defeated by plaintiff's possession for a period exceeding twelve years prior to the institution of the suit. A hypothecation right so created is liable to be affected not only by lapse of time as between creditor and debtor, but also by possession of the hypothecated property for the requisite period, by a third person on a claim inconsistent with the rights of both the creditor and the debtor. Nor does s. 50 of the Registration Act interfere with the operation and effect of limitation and prescription governing such a case as this. NALLAMUTTU PILLAI v. BETHA NAICKAN, 23 M. 37=9 M.L.J. 258 ... 420

Regulation XXV of 1802 (Permanent Settlement, Madras).

(1) S. 8—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 23 M. 221.

(2) S. 9—*Regulation* XXVI *of* 1802 (*Madras*), *s.* 2—*Assessment of Land Revenue Act* (*Madras*)—*Act* I *of* 1876.—An application to a Collector to grant separate registration of a portion of a permanently-settled estate which has been alienated by a Court-sale, is one under the provisions of Regulations XXV and XXVI of 1802 and not under Act I of 1876. BOMMARAZU v. SESHAMMA, 22 M. 438 ... 314

Regulation XXVI of 1802 (Land Registration, Madras).

S. 2—See REGULATION XXV OF 1802 (PERMANENT SETTLEMENT, MADRAS), 22 M. 438.

Regulation XXIX of 1802 (Karnams, Madras).

S. 7—*Jurisdiction—Suit for office of karnam—District Munsif's Court.*—A suit to establish plaintiff's right to, and to recover possession of, the office of karnam, and for the restoration of the inam lands, and for damages, was brought in the Court of the District Munsif: *Held*, that it was properly so brought. JAGANATHA PILLAI v. SUBBARAYA PILLAI, 22 M. 340 ... 242

Regulation XI of 1816 (Village-police, Madras).

See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 540

Regulation VII of 1817 (Endowments and Escheats, Madras).

See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 22 M. 223.

Rent.

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 23 M. 565.

(2) See KATTUBADI, 22 M. 11.

Res Judicata.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 197, 323.

(2) See HINDU LAW (MAINTENANCE), 22 M. 175.

Restitution.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 306.

Resumption.

See EJECTMENT, 23 M. 262.

Review. PAGE

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 496.

Revision.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 101.

Rules.

(1) See ACT XXIV OF 1839, 23 M. 329, 23 M. 367.

(2) See ATTORNEY, 23 M. 134.

Sale.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 623.
(2) See EVIDENCE, 23 M. 69.
(3) See MORTGAGE (GENERAL), 23 M. 114.

Sanction to prosecute.

See CRIM. PRO. CODE (ACT X OF 1882) 23 M. 205, 23 M. 210.

Small Cause Courts.

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 22 M. 457.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 547.

Specific Performance.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 24.

Specific Relief Act (I of 1877).

(1) S. 9—*Suit for possession by person evicted brought more than six months from date of dispossession against one having better title than himself.*—Certain land belonging to two brothers was mortgaged by one of them and leased to plaintiffs by the mortgagee. The heirs of the other brother, declining to accept the mortgage or the lease which had been granted under it as binding on them, evicted plaintiffs from the land. Plaintiffs now brought this suit against the defendants to recover the possession of which the defendants had deprived them by such eviction. The defendants' title was found to be good:—*Held*, that plaintiffs could not succeed. Per SUBRAHMANIA AYYAR, J.—That it is an undoubted rule of law that a person who has been ousted by another who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title. Also that s. 9 of the Specific Relief Act cannot be held to take away any remedy available with reference to the well-recognised doctrine that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. But that the above propositions were inapplicable to the facts of the present case, where the defendants were found to have good title. Per O'FARRELL, J.—The rule is that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of s. 9 of the Specific Relief Act, and not otherwise. Here the defendants held under a lease granted by person who was found to have title, and a suit to recover possession would only lie under the provisions of s. 9 of the Specific Relief Act, and this was clearly not such a suit. MUSTAPHA SAHEB v. SANTHA PILLAI, 23 M. 179 ... 524

(2) Ss. 10, 11—*Civ. Pro. Code—Act* XIV *of* 1882, *s.* 208—*Limitation Act—Act* XV *of* 1877, *sch.* II, *art.* 49—*Claim to recover goods in hands of third parties—Alternative claim for value as compensation.*—In execution of a decree obtained by the defendants against one M in the Court of Small Causes, certain goods were attached, to which plaintiff preferred a claim. That claim being disallowed, plaintiff filed in the City Civil Court, Madras, a suit for and obtained a declaration of his title to the goods, but prior to the date of the decree, namely, in October 1895, the goods attached had been sold by the Court of Small Causes, and certain third parties had become purchasers thereof. On plaintiff, in December 1897, suing "for

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the recovery of the goods or their value as compensation": *Held*, (1) that the goods not being in the possession or under control of the defendants, plaintiff was not entitled to a decree for their recovery in specie: and that plaintiff's only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants; and (2) that the suit being framed for the recovery of specific moveable property was governed by art. 49 of sch. II of the Limitation Act, 1877, and was therefore not barred by limitation. The alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to s. 208 of the Code of Civil Procedure and did not alter the character of the suit or bring it within any other category of the schedule. MURUGESA MUDALI v. JOTHARAM DAVAY, 22 M. 478... 343

(3) S. 30—Limitation Act—Act XV of 1877, arts. 113, 144—Suit on an award—Meaning of "contract" in art. 133—See LIMITATION ACT (XV OF 1877), 23 M. 593.

(4) S. 42—Separate registration and assessment of village alienated from zamindari—Regulation XXV of 1802 (Madras), s. 8—Assessment of Land Revenue Act (Madras)—Act I of 1876—Invalid order of Government—Declaratory decree—Construction of agreement—See ACT I OF 1876 (ASSESSMENT OF LAND REVENUE, MADRAS), 22 M. 270.

(5) *S. 42—Suit by trustees for a declaration that an appointment to the office of pattamali was invalid—Omission to ask for consequential relief—Custody by pattamali of articles belonging to temple—Possession by trustees not divested where pattamali was acting in the capacity of mere servant—Maintainability of suit without prayer for consequential relief.*—Some of the trustees of a temple having sued others for a declaration that an appointment by the latter of a person to the office of pattamali was invalid, it was objected by the defendants that even if the allegation were true, the suit must fail as the pattamali (who was also impleaded as a defendant) had taken charge of documents and jewels belonging to the temple, and consequential relief should have been prayed for. The plaint was accordingly amended, but the District Court, whilst holding that the appointment of the pattamali was invalid, dismissed the suit on the ground that the amendment had been made after the lapse of the period of limitation: *Held*, that the suit for declaration would lie without consequential relief being prayed for, inasmuch as its object was not to establish any legal character or any right to any property in the plaintiffs but was in effect to have an act done by the other trustees in contravention of duty declared null and void. Even if s. 42 of the Specific Relief Act applied to such a decree, which was doubtful, no further relief than the declaration was necessary, as the custody of the documents and jewels by the pattamali was merely that of a servant under the trustees, with whom the possession in fact and in law remained. There was therefore nothing of which delivery could be sought from the possession of the pattamali and no question of limitation arose. JANARDANA SHETTI GOVINDARAJAN v. BADAVA SHETTI GIRI, 23 M. 385=10 M.L.J. 54 ... 671

(6) *Ss. 42, 54—Injunction—Property in word—Use of word to which special meaning has become attached—Dharmakarta.*—The vicharanakarta of a number of temples held a sanad from Government in which two of such temples were named and the others included in the word "vagaira,"—(meaning literally "et cetera," or "and others"). The dharmakarta of the said two temples and of three minor ones only, having limited rights and duties, and being in many respects subordinate to the vicharanakarta, had, in pursuance of immemorial custom, used a seal in connection with his office, which had never borne more than a single figure, without legend. He had now made and used in the conduct of temple affairs a new seal, bearing the same figure, but with the legend "Tirumalai, Tirupati vagaira devestanam dharmakarta" added to it. On the vicharanakarta suing for a declaration and for a perpetual injunction to restrain the use of a seal containing such words: *Held*, that although the legend might in a sense be accurate in representing what the defendant actually was and the vicharanakarta had no property in the word "vagaira," yet the defendant

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should be restrained from using it upon the seal, since from the manner in which that word had been used in the sanad of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, a special meaning had become attached thereto when used in connection with the two principal temples; and since the object of the dharmakarta in using it was to assert an extension of his rights and to claim a position co-extensive with that of the vicharanakarta, which, in fact, he did not possess. SRI SADAGOPA RAMANUJA PEDDA JIYANGARLU v. SRI MAHANT RAMA KISORE DOSSJEE, 22 M. 189 ... 134

(7) *S.* 54—*Injunction—Remedy in damages.*—Under the Specific Relief Act, 1877, s. 54, the Court may grant a perpetual injunction against a defendant who invades or threatens to invade a plaintiff's right, in cases there specified, and, *inter alia*, when the invasion is such that pecuniary compensation would not afford adequate relief: The rule so laid down differs from the rule upon which the decisions are based in English law. In the latter the right to an injunction is a *prima facie* right to which a plaintiff is entitled on proof that material injury has been sustained, provided that no circumstances are disclosed to deprive him of that *prima facie* right. Under the Specific Relief Act an injunction is not to be given when the remedy in damages is considered adequate. BOYSON v. DEANE, 22 M. 251. 179

Stamp Act (I of 1879).

(1) *Ss.* 3, 46, *sch.* 1, *arts.* 13, 44 (*a*)—"*Mortgage deed.*"—By a clause in a document referred to the High Court for an opinion as to the stamp duty payable thereon, the A company agreed that, on execution of the document, they would issue and hand to the B company £ 8,000, part of the £25,000 second debentures, and that such second debentures, together with the £20,000 first debentures already issued to the B company, and the remaining £5,000 first debentures, subject to the prior charges thereon, should be held by the B company as security for a sum of £32,009-15-10 previously mentioned in the deed: *Held*, that the clause constituted the document a "mortgage deed" within the meaning of the Indian Stamp Act, 1879. The whole debt of £32,009-15-10 being, by the said document, secured not only upon the old security of £20,000 first debentures, but also upon the £8,000 second debentures, and the remaining £5,000 of the first debenture, stamp duty was payable on the new security, though a portion of the debt secured was included in the previous document on which duty had been paid; that the document was not a mere agreement to make a transfer, but an agreement to hand over the debentures on the execution of the document and was therefore in effect an actual transfer; that the "mortgage deed" was one with possession within art. 44 (*a*) of sch. I of the Stamp Act, 1879, by which this document was governed; and that in respect of the undertaking to make further advances, the document was liable to further duty as an agreement "not otherwise provided for." REFERENCE UNDER STAMP ACT, S. 46, 23 M 207... 544

(2) *Ss.* 5, 11, 18, 34—"*Chargeable with duty*"—*Promissory note executed out of British India—Insufficient stamp.*—A suit upon a promissory note which had been executed out of British India was dismissed on the ground that the note was insufficiently stamped, and that it could not be admitted in evidence on payment of the duty chargeable under s. 34 of the Indian Stamp Act. On a petition being preferred for the revision of the order of dismissal:—*Held*, that s. 34 of the Stamp Act did not render the document inadmissible in evidence, that section being applicable only to an instrument which is "chargeable with duty." There is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court, where the holder of the note has not done any of the acts referred to in ss. 5 and 18 of the Act, and, in consequence, the obligation to stamp has not arisen. MAHOMED ROWTHAN v. MAHOMED HUSIN ROWTHAN, 22 M. 337=9 M.L.J. 135 ... 240

(3) *S.* 34—*Penalty chargeable only on the original, unstamped, or insufficiently stamped, instrument—Document tendered as secondary evidence not within the section and not admissible.*—By the terms of the Indian Stamp Act,

Stamp Act (I of 1879)—(*Concluded*). PAGE

1879, the provisions of s. 34, which apply to documents either unstamped or insufficiently stamped, have no application when the original instrument, which ought to have been properly stamped but was not, has not been produced. The clauses of that section deal with, and exclusively refer to, the admission in evidence of original documents which have been either not stamped at all, or have been insufficiently stamped. RAJA OF BOBBILI v. INUGANTI CHINA SITARAMASAMI GARU, 23 M. 49 P.C.=4 C.W.N. 117=26 I.A. 262=7 Sar P.C.J. 597 ... 428

(4) Ss. 61, 67—Defrauding Government of stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under s. 61 of Stamp Act, 1879—Penal Code—Act XLV of 1860, s. 40—See PENAL CODE (ACT XLV OF 1860), 23 M. 153.

(5) *Sch.* I, *art.* 44 *(a)—Mortgage—Consideration.*—A kanom deed is liable to stamp duty as a mortgage only, and in calculating the consideration, the ascertained amount of compensation for improvements paid at the landlord's request by the incoming to the outgoing tenant must be included. REFERENCE UNDER STAMP ACT, s. 46, 22 M. 164 (F.B.) ... 116

Stamp Duty.

See MAHOMEDAN LAW (PARTITION), 22 M. 494.

Statute 13 Eliz., Cap. V.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 184.

Stay of Proceedings.

See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 568.

Step in aid of Execution.

See LIMITATION ACT (XV OF 1877), 22 M. 448.

Succession Act (X of 1865).

(1) S. 114—Hindu Law—Bequest for immoral consideration—Condition of future co-habitation—Invalidity of bequest.—See HINDU LAW (WILL), 23 M. 613.

(2) S. 202—*Estate of intestate Native Christian—Suit for partition of estate by purchaser of widow's share before completion of administration—Dismissal of suit—Only remedy by way of administration suit.*—A person to whom the Indian Succession Act, 1865, applied having died intestate in April 1884, his widow and son were in September of the same year granted letters of administration, which were cancelled for want of stamp duty, a fresh grant being made on 19th January 1885. Plaintiff, alleging that the said widow had executed a promissory note in her favour in September 1884, filed a suit against her on 6th January 1885, and, there being no appearance of the defendant, obtained an *ex parte* decree. In execution of the decree so obtained plaintiff attached portions of the estate of the deceased and brought them to sale, becoming herself the purchaser of the one-third share of the widow in each lot sold. In March 1885 the son was appointed sole administrator; in January 1888 he died and the letters of administration were revoked in consequence, and the amin of the District Court was appointed administrator of the estate until October 1894, when the son's widow was so appointed in his stead. Plaintiff now sued for partition of the property comprised in the estate of the deceased in order that she might obtain delivery of the portions of it which she had purchased in execution of the decree against the widow previously obtained as aforesaid. The estate of the deceased had never been administered or distributed. The defence was that the said previous decree had been obtained by fraud: *Held*, that under s. 44 of the Indian Evidence Act, the defendants were entitled to set up this defence; and that the property of the deceased having become vested in his administrator under the Indian Succession Act, it remained so vested until the administrator had distributed the estate, and that, in consequence, the widow had no saleable interest in any part of the estate until in the course of the

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administration thereof her share had been determined and allotted to her. Until such allotment (which had not yet taken place) the only process by which plaintiff could legally claim the widow's interest in the estate was by a suit for the administration of the estate, to which suit the widow, if alive, would be a necessary party. If not alive, letters of administration to her estate would be necessary, the administrator being made a party—*Held, also*, that the suit could not be treated as an administration suit. SRIRANGAMMAL v. SANDAMMAL, 23 M. 216=9 M.L.J. 338 ... 550

(3) *S.* 271—*Trusts Act—Act* II *of* 1882, *s.* 56—*Suit by two out of eleven beneficiaries for possession of trust property—Maintainability of suit.*—Two daughters of a testator sued defendants Nos. 1 and 2, the testator's sons and his administrators with the will annexed, and other defendants, for a declaration that certain properties devised by the testator to be held in trust and the rents divided among his eleven children were trust properties, and to recover possession thereof. A decree had been obtained against plaintiff No. 2 and her right, title and interest in the trust property brought to sale. Defendants Nos. 1 and 2 had filed a suit to set aside the sale but afterwards compromised it on the terms that the sale should be cancelled on payment of a certain sum by defendant No. 1, but that in default of such payment the decree should take effect. Default having been made the property was sold:—*Held*, (by the whole Court), that the decree of the Court below awarding the plaintiffs possession of the whole property on behalf of themselves and the other beneficiaries must be reversed. *Per* BODDAM, J.—That the alienations made in pursuance of the compromise entered into by the administrators were binding upon the plaintiffs and that therefore neither of them had any cause of action. *Per* O'FARRELL, J.—That under all the circumstances the suit could not be treated as a suit to recover the plaintiffs' shares of the trust property. *Per* SUBRAHMANIA AYYAR, J. (*dissentiente*).—The fact that the plaintiffs had asked for a larger relief than they were entitled to did not warrant the dismissal of the suit altogether; and that the suit fell within the class of cases in which the relief against a third party is such as a Court of Equity will administer, and a *cestui que trust* may be entitled to sue the trustees and the third party jointly, but in which he will be bound to confine his suit to that specific matter in respect of which alone the third party is liable, and not to make it part of a suit for the general administration of the trust; and that plaintiff No. 1 was not precluded from recovering her eleventh share. PADMANABHA CHETTIAR v. WILLIAMS, 23 M. 239=10 M.L.J. 10 ... 570

Succession Certificate.

(1) See MALABAR LAW (WILL), 22 M. 9.

(2) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 22 M. 139, 380.

Succession Certificate Act (VII of 1889).

(1) *S.* 4—*Hindu Law—Suit by person claiming property of undivided family by right of survivorship—Succession certificate.*—Where a plaintiff claimed by right of survivorship to recover money due on a mortgage bond which had been executed by the defendants in favour of the former managing member of the plaintiff's undivided family:—*Held*, that the Succession Certificate Act did not apply and that plaintiff need not produce a Succession Certificate under that Act. PALLAMRAJU v. BAPANNA, 22 M. 380 ... 274

(2) *S.* 4 (1), (*a*)—*Debt—Suit for account of share of deceased partner.*—A Muhammadan, being the son of a deceased member of a firm, brought a suit as his legal representative against the surviving partners praying for an account of the partnership assets and for payment to him of the amount which might be found due to the share of the deceased. The plaintiffs had neither letters of administration nor a Succession Certificate. *Held*, that the plaintiff's claim, being unliquidated, was not a debt within the meaning of Succession Certificate Act, 1889, s. 4 (1), (*a*). SABJU SAHIB v. NOORDIN SAHIB, 22 M. 139 ... 99

Summary Procedure.

See CRIM. PRO. CODE (ACT V OF 1898), 22 M. 459.

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See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 179.

Surety.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 268.

Tax.

See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 23 M. 268.

Title.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 629.

(2) See HINDU LAW (RELIGIOUS ENDOWMENT), 23 M. 439.

Tujans.

See HINDU LAW (PARTITION), 22 M. 297.

Toddy Shop.

See ACT I OF 1886 (ABKARI, MADRAS), 23 M. 220.

Trade Mark.

See ACT IV OF 1889 (MERCHANDISE MARK), 22 M. 438.

Transfer of Property Act (IV of 1882).

(1) S. 35—Guardians and Wards Act—Act VIII of 1890, ss. 29, 30—Mortgage by guardians on estate of minor—"Previous permission of the Court"—Contract Act—Act IX of 1872, s. 64—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 22 M. 289

(2) S. 53—*Debtor and creditor—Intent to delay and defeat creditors—Statute* 13, *Eliz., cap. V.*—A mere preference by a debtor of one creditor to another, and *a fortiori* a mere *bona fide* security given to a creditor to the extent of his debt, is not within s. 53 of the Transfer of Property Act, 1882,—as it is not within the English Statute of 13 Eliz., cap. V. But where a document given by way of security goes further and secures debts that are not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors. Where a party intends to rely upon a document as not within s. 53 of the Transfer of Property Act because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more. NARAYANA PATTAR v. VIRARAGHAVAN PATTAR, 23 M. 184 ... 528

(3) S. 60—*Suit to redeem entire mortgage by purchaser of equity of redemption of a portion—Indivisibility of mortgage.*—The mortgagors of four items of property originally mortgaged for an entire sum sold the equity of redemption of one item to the plaintiff who now sued the mortgagees to redeem the whole of the four items :—*Held*, that he was entitled so to do. A mortgage for an entire sum is from its very purpose indivisible; and that character of indivisibility exists with reference not only to the mortgagee, but also to the mortgagor ; save by special arrangement between all the parties interested, neither mortgagor nor mortgagee, nor persons acquiring a partial interest through either, can obtain relief under the mortgage except in consonance with that principle of indivisibility. HUTHASANAN NAMBUDRI v. PARAMESWARAN NAMBUDRI, 22 M. 209 ... 149

(4) Ss. 60, 62—*Mortgage containing covenant to repay "within" a given time—Right to redeem before the expiration of that time—Mortgagee's right to foreclose.*—Certain premises were mortgaged with possession in 1896, the mortgagor, in the instrument of mortgage, covenanting to repay the mortgage money " within 20th of April 1904 " In 1898 the mortgagor sold the mortgaged premises and called upon the mortgagee to receive the principal and interest due and to deliver up possession. On the mortgagee refusing on the ground that the mortgage was not redeemable till 1904 :—*Held*, that the mortgagor was entitled to redeem. A stipulation for the postponement of payment of mortgage money is *prima facie* intended for the benefit of the mortgagor; the parties to an instrument of mortgage may, however, by the language of their contract, show their

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intention that redemption may take place only at the end of a given term. The covenant, as worded, so far from showing an intention to preclude the mortgagor from redeeming, reserved the liberty to redeem at pleasure. ROSE AMMAL v. RAJARATHNAM AMMAL, 23 M. 33 ... 418

(5) *Ss.* 60, 68, 72, 74, 75, 95—*Advance by mortgagee to pay off prior lien on mortgaged property—Suit against purchaser of property to recover amount so advanced—Charge on the mortgaged property.*—Plaintiff's undivided brother had advanced money on a usufructuary mortgage bond to enable the owners of certain property to obtain possession of it from one in whose favour a lien had been decreed to subsist. The money not having been so applied, the holder of the lien attached the property and applied to the Court for its sale. To save the property from being sold, plaintiff's said brother further paid the amount of the lien into Court; and at about the same time the mortgagors sold the property to defendant. Plaintiff's brother had never obtained possession of the property, and had since died. Upon plaintiff suing to recover (in addition to the mortgage amount, liability for which was not disputed), the amount of the lien so paid into Court to save the property from sale:—*Held*, that inasmuch as plaintiff could only succeed by showing that by such payment a charge was created upon the land (the money not having been paid at the request or for the benefit of the defendant) the suit must fail. There is no provision in the Transfer of Property Act to support the proposition (involved by the plaintiff's suit) that a second mortgagee may, by a transaction between himself and the first mortgagee, without knowledge or concurrence on the part of the mortgagor, acquire a new right over the mortgaged property. *Per* SUBRAMANIA AYYAR, J.—That as against the mortgagors, plaintiff would have been entitled to add the sums paid by him to the prior incumbrancer to the mortgage amount. But as the mortgage was usufructuary and plaintiff had never obtained possession, he had acquired no charge on the mortgaged property for the money recoverable by him under s. 68 of the Transfer of Property Act. The amount sought to be added thereto consequently stood on a similar footing, and the plaintiff's contention that a charge in respect of it existed in his favour was unsustainable. PERIANNA SERVAIGARAN v. MARUDAINAYAGAM PILLAI, 22 M. 332=9 M.L.J. 166 236

(6) *Ss.* 60, 88, 99—*Purchase by mortgagee holding decree for sale of portion of mortgaged property, subject to mortgage—Impossibility of mortgagee freeing himself by such purchase from liability to be redeemed—Civ. Pro. Code—Act* XIV *of* 1882, *ss.* 244, 258—"*Court executing a decree*" *includes proceedings initiated by decree-holder and by judgment-debtor.*—A mortgagee having obtained a decree against his mortgagor for the sale of the mortgaged property, a portion of the latter was subsequently sold, subject to the said decree, in execution of a money decree obtained by a third party against the mortgagor. The mortgagee purchased the portion so sold, whereupon the mortgagor presented a petition under s. 258 of the Code of Civil Procedure claiming that the mortgagee was bound to discharge his mortgage debt and should be called upon to certify satisfaction of his decree:—*Held*, that petitioner was not entitled to the relief prayed for, but only to proceed upon the footing that the portion of the mortgaged property which had been purchased by the mortgagee remained, notwithstanding such purchase, redeemable by petitioner together with the remainder of the property. On the question whether the purchase by a mortgagee of a portion of the mortgaged property at a Court-sale in execution of the money decree of a third party, involves a taking advantage by the mortgagee of his fiduciary position as mortgagee:—*Held*, that the principle of the impossibility of a mortgagee freeing himself from his liability to be redeemed as affirmed in *Marland* v. *Dhondo* (I.L.R., 22 Bom. 624) and *Mayan Pathuti* v. *Pakuran* (I.L.R., 22 Mad. 347 (was applicable, even in the absence of fraud or collusion between the mortgagee and the third party in execution of whose decree the purchase of the equity of redemption had been made, and that such a purchase contravened the principle underlying s. 99 of the Transfer of Property Act and expressed in s. 88 of the Indian Trusts Act. The provision in s. 244 of the Code of Civil Procedure that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of a

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decree shall be determined by order of the Court executing the decree, relates not only to proceedings initiated by the decree-holder but also to applications made by the judgment-debtor. Whether the subject-matter of the petition was an "adjustment" of the decree, within the meaning of s. 258 of the Code of Civil Procedure—*Quære*. ERUSAPPA MUDALIAR v. COMMERCIAL AND LAND MORTGAGE BANK LIMITED, 23 M. 377 = 10 M.L.J. 91 ... 665

(7) Ss. 83, 84—*Deposit in Court to the account of the mortgagee of amount remaining due on mortgage—Deposit to credit of persons not entitled in addition to persons entitled.*—A mortgagor before bringing a suit for redemption deposited the mortgage money in Court to the credit of persons who were not entitled to it in addition to that of persons who were entitled to it:—*Held*, that he was not entitled to claim the benefit of ss. 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it. MADHAVI AMMA v. KUNHI PATHUMMA, 23 M. 510 ... 758

(8) Ss. 85, 88—*Decree for sale on mortgage in suit against Hindu father—Suit by son for declaration that decree not binding on his share.*—A decree having been obtained against a Hindu father in a suit on a bond hypothecating family property, the sons sued for a declaration that the decree was not binding on their share on the grounds that they had not been made parties to the suit, and that the debt had been contracted by the father for immoral purposes :—*Held* (not following the decision of the majority of the full bench in *Bhawani Prasad* v. *Kallu* (I.L.R., 17 All., 537), that the true rule as to the effect of s. 85 of the Transfer of Property Act, in cases in which a decree is obtained against a Hindu father without making his sons parties to such a suit, is laid down in *Ramasamayyan* v. *Virasami Ayyar* (I.L.R. 2 Mad. 222). PALANI GOUNDAN v. RANGAYYA GOUNDAN, 22 M. 207 ...

(9) Ss. 86, 88—*Decree for sale—Provision for interest at contract rate until six months from date of decree.*—Defendants promised to pay plaintiffs a sum of money for value received, with interest thereon from the date of the promise until demand at the rate of 8 per cent. per annum, and, after demand, at the rate of 15 per cent. per annum until payment in full; and as further security for such re-payment deposited with plaintiffs the title-deeds of certain immoveable property. Demand was made, but was not complied with; whereupon plaintiffs informed defendants by letter that their account carried interest at the higher rate provided for in the promissory note. Plaintiffs now sued for the amount due in respect of principal and interest at the rate of 15 per cent. per annum from the date of their letter till payment: and asked that in default of payment on a day to be fixed by the Court the property might be sold. A decree having been passed in plaintiffs' favour provision was made therein ordering defendants to pay the amount of principal and interest due at the date of the decree, with interest thereon at the rate of 15 per cent. per annum from that date to a date six months thereafter. Objection having been taken to the form of this decree on the ground that payment of interest at the contract rate was only provided for up to the termination of six months from the date of decree, instead of till payment :—*Held*, that the decree was correctly drawn. In principle there is no difference between a mortgage decree which has become absolute and an ordinary decree for money. After the day fixed for payment, or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and afterwards there is no more reason for giving interest at the contract rate in the one case than in the other. COMMERCIAL BANK OF INDIA v. ATTEENDRULAYYA, 23 M. 637 ... 284

(10) S. 87—*Decree for foreclosure—Mortgagor's application for extension of time.*—In a suit on a mortgage a decree for foreclosure was passed, a period of three months being fixed for the discharge of the mortgage-debt. The mortgagor having made default, the decree-holder applied for and was placed in possession of the property. The mortgagor, to whom no notice had been given of the decree-holder's application, then applied for and obtained an extension of time for payment, and he made the payment and

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recovered possession:—*Held*, (1) that the mortgagee was entitled to appeal against the order; (2) that the order was right since no order absolute of foreclosure had been made after notice to the mortgagor. NARAYANA REDDI v. PAPAYYA, 22 M. 133=8 M.L.J. 205 ... 94

(11) S. 88—Civ. Pro. Code—Act XIV of 1882, s. 310-A—Extension of decrees—Application to set aside sale of mortgaged property—See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 286.

(12) *S. 93—Application for sale of mortgaged property on default of mortgagor to redeem - Court in which application should be made.*—In a suit for the redemption of mortgaged property, the District Munsif passed a decree which was, on appeal, modified by the District Court. The mortgagor not having paid the decree amount, the mortgagee applied to the District Court under s. 93 of the Transfer of Property Act for an order that the mortgaged property might be sold:—*Held*, that the application should have been made to the Court of the District Munsif. VENKATA KRISHNA AYYAR v. THIAGARAYA CHETTI, 23 M. 521=10 M.L.J. 145. 760

(13) S. 99—Civ. Pro. Code—Act XIV of 1882, s. 244—Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share—Hindu Law—Rights of Hindu edbtor's son after attachment and sale—See HINDU LAW (DEBTS), 22 M. 372.

(14) *S. 99—Civ. Pro. Code—Act* XIV *of* 1882, *s.* 244—*Sale by mortgagee in execution of decree.*—Property subject to a mortgage having been sold by the mortgagee as holder of a decree against the mortgagors, a separate suit was brought by the mortgagors to set aside the sale as being in contravention of s. 99 of the Transfer of Property Act. On objection being taken that the suit was not maintainable, the matter being one for determination in execution proceedings under s. 244 of the Code of Civil Procedure:—*Held*, (1) that although the sale was contrary to the provisions of s. 99 of the Transfer of Property Act, that section being for the benefit only of a particular class of persons, namely, those concerned with a right to redeem mortgaged property, such a sale was not void but voidable; (2) that the question being one arising between the parties to the suit wherein the sale was made, and relating to execution, could not be raised and decided in a suit, but should be raised and tried only in execution proceedings taken under s. 244 of the Code of Civil Procedure, and the sale set aside if such relief were not, for any reason, barred; (3) that the sale having been confirmed, such confirmation was final, and precluded the mortgagors from seeking the relief to which they would otherwise have been entitled; and (4) that, notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale. MAYAN PATHUTI v. PAKURAM, 22 M. 347=9 M.L.J. 98 ... 247

(15) *Ss. 106, 107—Duration of tenancy—Presumption of yearly tenancy — Evidence—Burden of proof in action of ejectment by zamindar against tenant as to nature of tenancy.*—Suit for ejectment by a Zamindar against two tenants holding under him subject to the payment of an annual cist or assessment. The zamindar was the owner of the kudivaram as well as of the melvaram right, and it was admitted that the tenants' possession was derived from him:—*Held*, that these facts alone were not enough to raise the presumption of a tenancy from year to year. *Per* SHEPHARD, J.—It is not the general rule that the tenants in an ordinary zemindari hold their lands as yearly tenants or as tenants from year to year. Many of the occupants of zamindari lands are not tenants in the proper sense of the word and the fair presumption is that when new occupants are admitted to the enjoyment of waste or abandoned lands the intention is that they should enjoy on the same terms as those under which the prior occupants of zamindari lands held, it being open to the zamindar to rebut that presumption, either by proving that the usual condition of things does not prevail in his estate or that a particular contract was made between him and his tenant. *Per* SUBRAMANIA AYYAR, J.—The presumption of tenancies from year to year which is well-known to English law, because of the

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general prevalence in England of tenancies in the strict legal sense of the term, would also arise in this country if the tenancies here were proved to be similar. But inasmuch as practically, the whole of the agricultural land on zamindaris is cultivated by raiyats who are generally entitled to hold them so long as they desire to do so, subject to the performance of obligations incident to the tenure, there is insufficient foundation from which such a presumption may be raised. Nor is the fact that the zamindar is the owner of the kudivaram right as well as the melvaram right sufficient to shift on to the raiyat the burden of proving that the tenancy not one from year to year. In order to discharge the cnus which is on him in a case of ejectment the zamindar must do more than merely show that the land when it passed into the hands of the raiyat was at his disposal as relinquished or as immemorial waste land. He must show that the defendants' possession is inconsistent with the *prima facie* view that it is held under the usual and ordinary form of holding prevalent in the zamindaris. CHEEKATI ZAMINDAR v. RANASOORU DHORA, 23 M. 318. 624

(16) S. 135—*Sale of actionable claim—Mortgagee by assignment—Assignee of prior lien.*—The assignee of a mortgagee obtained a decree for the principal and interest due under the mortgage, subject to a prior lien of the appellant. The appellant's prior lien had also been acquired by assignment, the consideration for which was proved to have been Rs. 575, though it purported to have been a much larger sum. On the appellant contending that s. 135 of the Transfer of Property Act did not apply so as to prevent his claiming a lien for the larger sum :—*Held*, that the appellant was only entitled to a lien for the price paid by him for the assignment. RAMA SASTRI v. NARASIMHA AYYAR, 22 M. 301 ... 214

(17) S. 135 (*d*)—"*Judgment of a competent Court*"—"*Actionable claim*"—*Suit by assignee of a foreign judgment—Consideration smaller than amount of judgment-debt—Decree for whole amount.*—The assignee of a judgment for Rs. 12,297 passed against the defendant by the Supreme Court of Mauritius sued in a Court in Britsh India to recover the amount of the judgment with interest. Defendant, amongst other defences, contended that the transfer was not supported by consideration ; and the Subordinate Judge, finding as a fact that only Rs. 5,500 had been paid therefor, held that the foreign judgment was an actionable claim within the meaning of s. 135 of the Transfer of Property Act, and decreed in plaintiff's favour for that amount only, with interest. On appeals being preferred to the High Court :—*Held*, that the plaintiff was entitled to recover the whole amount of the judgment. *Semble*, the word "judgment" in cl. (*d*) of s. 135 of the Transfer of Property Act includes a foreign judgment. VYTHILINGA PADAYACHI v. SITHARAM AYYAR, 23 M. 449=10 M.L.J. 77 715

Trespass.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 M. 197.

Trial de novo.

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Trust

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Trustee.

(1) See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 22 M. 223, 481; 23 M. 293.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 99, 195, 537.
(3) See SPECIFIC RELIEF ACT (I OF 1877), 23 M. 385.

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(1) "Actionable claim"—See TRANSFER OF PROPERY ACT (IV OF 1882), 23 M. 449.

(2) "Adjustment"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 377.

(3) "Carrying on business"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 456.

(4) "Chargeable with duty"—See STAMP ACT (I OF 1879), 22 M. 337.

(5) "Class of offences"—See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 632.

(6) "Complainant"—See CRIM. PRO. CODE (ACT V OF 1898), 23 M. 626.

(7) "Contract"—See LIMITATION ACT (XV OF 1877), 23 M. 593.

(8) "Court executing a decree"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 377.

(9) "Judgment"—See ACT XXIV OF 1839 (GANJAM AND VIZAGAPATAM AGENCY COURTS), 23 M. 329.

(10) "Judgment"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 23 M. 449.

(11) "Legal Representatives"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 M 125.

(12) "Material irregularity"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 628.

(13) "Mortgage-deed"—See STAMP ACT (I OF 1879), 23 M. 207.

(14) "Offence"—See PENAL CODE (ACT XLV OF 1860), 23 M. 155.

(15) "Oral"—See EVIDENCE ACT (I OF 1872), 22 M. 261.

(16) "Oral agreement"—See EVIDENCE ACT (I OF 1872), 22 M. 261.

(17) "Person"—See ACT I OF 1884 (CITY OF MADRAS MUNICIPAL, MADRAS), 23 M. 529.

(18) "Person interested"—See INSOLVENT ACT, 11 and 12 Vict., Cap. XXI, 23 M. 26.

(19) "Person interested in the payment of money"—See HINDU LAW (MARRIAGE), 23 M. 512.

(20) "Plaint"—See MUHAMMADAN LAW, (PARTITION), 22 M. 494.

(21) "Promise"—See CONTRACT ACT (IX OF 1872), 23 M. 94.

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(23) "Shall record with his own hand his reason for such opinion"—See CIV. PRO. CODE (ACT XIV OF 1882), 23 M. 496.

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(25) "The minor only"—See DOCUMENT, 23 M. 137.

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(27) "Within thirty days"—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 22 M. 179.

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